THE RIGHT HONOURABLE

SIR LAWRENCE HUGH JENKINS, K.C.I.E.

LATE CHIEF JUSTICE

OF

THE HIGH COURT OF JUDICATURE AT BOMBAY

THIS WORK

IS

BY PERMISSION

MOST RESPECTFULLY DEDICATED

For the revision of the proofs the writer is indebted to Mr B K Desai, M A, LL B, Advocate of the High Court of Bombay Mr K S Shavaksha, B A, of the Middle Temple Barrister at Law and Mr Oscar H Brown, B A LL B, of Gray s Inn Barrister at Law

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Chambers No 17,
High Court, Bombay,
July 1926

D F M

PREFACE TO THE THIRD EDITION

There have been numerous alterations and additions introduced into the new Code, of which the following require the immediate attention of practitioners —

1 S 2, cl 2,—definition of decree
2 S 2, cl 11,—definition of legal representative
3 S 7, O 50,—Provincial Small Cause Courts
4 S 8, O 51,—Presidency Small Cause Courts
5 S 20, cl (c),—arising of *part* of cause of action within jurisdiction
6 S 21,—objections to jurisdiction
7 S 24,—general power of transfer and withdrawal of suits
8 S 25,—power of Governor General in Council to transfer suits
9 S 35,—costs
10 S 37,—definition of Court which passed a decree
11 S 40 —transfer of decree to Court in another province
12 S 46,—precepts
13 S 47,—questions to be determined by the Court executing decree
14 S 48,—execution barred in certain cases
15 S 53,—liability of ancestral property in execution
16 S 55, sub s (1), second proviso and sub s (4),—arrest and detention
17 S 60, sub s (1) cls (a), (b), (h) and (k),—property liable to attachment and sale in execution of decree
18 S 61, O 21, rr 44 45, rr 74 75 O 38, r 12 —agricultural produce
19 S 62 sub s (2) —seizure of property in dwelling house
20 S 64, *Explanation*,—private alienation pending attachment
21 S 65,—execution purchaser s title
22 S 73, sub s (2),—rateable distribution
23 S 88,—interpleader
24 S 91,—public nuisances
25 S 92, sub s (2),—public charities
26 S 96, sub s (3) —appeal from original decree
27 S 97,—appeal from preliminary decree
28 S 99 —material irregularity
29 S 103 —power of High Court to determine issues of fact in second appeal
30 S 104, O 43,—appeal from orders
31 S 105, sub s (2) —appeal from order of remand
32 Ss 121 131,—Rules See also Index, under the head ' Rules '
33 S 141,—application of procedure provided in Code to miscellaneous proceedings
34 S 144,—application for restitution
35 S 145,—enforcement of liability of surety
36 Ss 146 to 153 —these sections are new
37 O 1, rr 1 to 5, r 7,—joinder of parties
38 O 2, r 2 *Explanation* r 4, r 7,—frame of suit
39 O 5, r 17,— procedure where defendant refuses to accept service or cannot be found.
40 O 6,—pleadings The whole of this order is new
41 O 7, rr 7 8,—plaint
42 O 8, rr 2 5, rr 7 8 —written statement
43 O 9, r 13,—setting aside decree *ex parte*
44 O 11 r 12, r 15, r 19,—discovery and inspection
45 O 12,—admissions and judgment on admissions

46. O. 16, r. 1—witness summons.
47. O. 20, r. 11, r. 12, r. 17, r. 19—decrees.
48. O. 21, r. [illegible], r. 11, r. 2[illegible], sub-r. (2), r. 32, sub-r. [illegible], rr. 47, 48, rr. [illegible], r. [illegible], r. [illegible], r. [illegible], r. 90—execution.
49. O. 22, rr. 3, 4, r. 6—abatement.
50. O. 23, r. 3—compromise of suit.
51. O. 30—suits by or against firms.
52. O. 33, r. 4—next friend and guardian.
53. O. 33, r. 5, cl. (1)—rejection of petition for leave to sue as a pauper.
54. O. 34—suits relating to mortgages of immoveable property.
55. O. 37, r. 3—leave to appear in summary suit.
56. O. 40, r. 1—appointment of receiver.
57. O. 41, r. 2, r. 5, sub-r. 1, r. 6, r. 11, r. 22, sub-r. 4, r. 33—appeal from original decrees.
58. O. 43, r. 1, cl. (m)—appeal from orders.
59. O. 4[illegible], rr. 4, [illegible]—appeal to the Privy Council.
60. Schedule II, para. 1, para. 17, cl. (c), para. 18, para. 21—arbitration.

The High Courts Act and the Charters of the High Courts have been set out respectively in Appendix I and Appendix II.

D. F. M.

26th October, 1908.

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WOODROFFE & AMEER ALI'S

CIVIL PROCEDURE

IN

BRITISH INDIA

A Commentary on Act V. of 1908

SECOND EDITION

By

Sir JOHN GEORGE WOODROFFE, Kt, M.A, BCL

BARRISTER AT LAW A JUDGE OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

AND

FRANK JAMES MATHEW,

BARRISTER-AT-LAW

CALCUTTA & SIMLA

THACKER, SPINK

1916

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COMPARATIVE TABLE OF THE SECTIONS OF THE OLD AND THE NEW CODE.

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1	S 1	33	O 1, r 10 (4)
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3	Ss 154, 156 157, 158	35	O 1, r 12
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4	S 4	37	O 3, r 2
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6, last para	S 6	42	O 2, r 1
7	*Cf* S 4	43	O 2, r 2
8	S 8	44	O 2, rr 4, 5
9	Omitted	45	O 2, rr 3, 6
10	Omitted	46	*Cf* O 2, rr 6 7
11	S 9	47	*Cf* O 2, rr 6, 7
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14	S 13	50	O 7, rr 1, 2, 4, 5,
15	S 15		6
16	S 16	51	O 6, rr 14, 15 (1)
16A	S 18	52	O 6 r 15 (2), (3)
17	S 20	53	O 6, r 17 *cf* O 7,
18	S 19		r 11
19	S 17	54	O 7, r 11, *cf* O 6,
20	Omitted.		r 18
21	Omitted	55	O 7, r 12
22	Ss 22, 23 (1)	56	O 7, r 13
23	Ss 22, 23 (2)	57	O 7, r 10
24, paras 1 and 3	Ss 22, 23, (3)	58	O 7, r 9
24, para 2	Omitted	58, last para	O 4, r 2
25	S 24	59	O 7 r 14
26	O 1, rr 1, 4 (*a*)	60	O 7, r 15
27	O 1, r 10 (1)	61	O 7, r 16
28	O 1 rr 3, 4 (*b*)	62	O 7 r 17
29	O 1, r 6	63	O 7, r 18
30	O 1, r 8 (1)	64	S 27, O 5, r 1
31	O 1, r 9	65	O 5, r 2
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72	O 5, r 9	114	*Cf* O 6 r 2
73	O 5, r 10	115	*Cf* O 6 rr 14 15
74	O 5, r 11	116	rr 16 17
75	O 5, r 12	117	O 10 r 1
76	O 5, r 13	118	O 10 r 2
77	O 5, r 14	119	O 10 r 3
78	O 5 r 15	120	O 10 r 4
79	O 5, r 16	121	O 11 r 1
80	O 5 r 17	122	*Cf* O 48, r 2
81	O 5, r 18	123	O 11 r 3
82	O 5, rr 19, 20 (1)	124	O 11, r 5
		125	O 11 r 6
83	O 5, r 20 (2)	126	O 11 r 8
84	O 5, r 20 (3)	127	O 11, r 11
85	S 28, O 5, rr 21, 23	128	O 12, r 2
		129	O 11, rr 12 13
86	O 5, r 22	130	O 11, r 14
87 }	O 5, rr 24, 29	131	O 11 r 15
88 }		132	O 11, r 17
89	O 5, r 25	133	O 11, r 18 (1)
90	O 5, r 26	134	O 11, r 18 (2)
91	O 5, r 30 (1), (2)	135	O 11, r 20
92	O 5, r 30 (3)	136	O 11, r 21
93	O 48, r 1	137	O 13, r 10
94	S 142, O 48, r 2	138	O 13, r 1 (1)
95	S 143	139	O 13, r 2
96	O 9, r 1	140	O 13, rr 1(2), 3
97	O 9, r 2	141	O 13, r 4
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99	O 9, r 4	142	O 13 r 6
99A	O 9, r 5	142A	O 13, r 7
100	O 9, r 6	143	O 13 r 8
101	O 9 r 7	144	O 13, r 9
102	O 9, r 8	145	O 13, r 11
103	O 9, r 9	146	O 14, rr 1 2
104	Omitted	147 .	O 14, r 3
105	O 9, r 10	148	O 14, r 4
106	O 9, r 11	149	O 14, r 5
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154	O 15, r 3	195	O 19, r 2
155	O 15, r 4	196	O 19, r 3
156	O 17, r 1	197	S 139
157	O 17, r 2	198	S 33, O 20 r 1
158	O 17, r 3	199	O 20, r 2
159	O 16, r 1	200 }	Cf S 137
160	O 16, r 2	201 }	
161	O 16 r 3	202	O 20 r 3
162	O 16, r 4	203	O 20, r 4
163	O 16, r 5	204	O 20, r 5
164	O 16, r 6	205	O 20, r 7
165	O 16 r 7	206, first and second paras	O 20, r 6
166	O 16, r 8		
167	O 16, r 9	206, third para	S 152
168	O 16, r 10	207	O 20, r 9
169	O 16, r 11	208	O 20 r 10
170	O 16, r 12	209	S 34
171	O 16, r 14	210	O 20, r 11
172	O 16, r 15	211 }	S 2 (12), O 20, r 12
173	O 16, r 16	212 }	
174 }	O 16, rr 10 to 13 17, 18		
175 }		213	O 20, r 13
		214	O 20, r 14
176	O 16, r 19	215	O 20, r 15
177	O 16 r 20	215A	O 20 r 16
178	O 16 r 21	216	O 20 r 19
179	O 18 rr 1 2 (1)	217	O 20, r 20
180	O 18 rr 2 (2) (3), 3	218 }	
181	O 18 r 4	219 }	Cf S 35 (1), (2)
182	O 18, r 5	220 }	
183	O 18 r 6	221	O 20 r 6 (3)
184	O 18 r 8	222	Cf S 35 (3)
185	O 18 r 9	223 first para	S 38
185A, first and second paras	S 138	223, second and third paras	S 39
185A, third para	O 18, r 7	223 fourth para	S 41
186	O 18, r 10	223, fifth para	O 21, r 4
187	O 18 r 11	223, sixth para	O 21, r 5
188	O 18, r 12	224	O 21, r 6
189	O 18, r 13	225	O 21, r 7
190	O 18, r 14	226	O 21, r 8
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C P Code, 1882	C P Code, 1908	C P Code, 1882	C P Code, 1908
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582	S 107 (2), O 22, r 11	621	O 46 r 5
582A	Cf S 146	622	S 115
583	Cf S 144 (1)	623	S 114, O 47, r 1
584	Cf S 100	624	O 47 r 1
585	Cf S 101	625	O 47 r 3
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588	S 104, O 43, r 1	628	O 47 r 6
589	S 106	629	O 47 rr 7, 9
590	S 108, O 43 r 2	630	O 47 r 8
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592	O 44 r 1	632	S 117
593	O 44 r 2	633	S 122
594	O 45 r 1	634	S 118
595	S 109	635	S 119
596	S 110	636	O 49, r 1
597	S. 111	637	S 128 (2) (i)
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600	O 45, r 3	639	S 120 (2)
601	O 45, r 6	640	S 132
602	O 45 r 7	641	S 133
603	O 45, r 8	642	S 135
604	O 45, r 9	643	Omitted
605	O 45, r 10	644	O 48 r 4
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608	O 45, r 13	646	Omitted.
609	O 45, r 14	646A	O 46, r 6
610	O, 45, r 15	646B	O 46, r 7
611	O 45, r 16	647	S 141
612	Omitted	648	S 136
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615		650	Omitted.
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618	O 46 r 2	653	S 59
619	O 46, r 3		

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C P Code, 1882	C P Code, 1908	C P Code, 1882	C P Code, 1908
153	O 15, r 2	194	O 19, r 1
154	O 15, r 3	195	O 19, r 2
155	O 15, r 4	196	O 19, r 3
156	O 17, r 1	197	S 139
157	O 17, r 2	198	S 33, O 20, r 1
158	O 17, r 3	199	O 20, r 2
159	O 16, r 1	200 } 201 }	Cf S 137
160	O 16, r 2		
161	O 16, r 3	202	O 20, r 3
162	O 16, r 4	203	O 20, r 4
163	O 16, r 5	204	O 20, r 5
164	O 16, r 6	205	O 20, r 7
165	O 16, r 7	206, first and second paras	O 20, r 6
166	O 16, r 8		
167	O 16, r 9	206 third para	S 152
168	O 16, r 10	207	O 20, r 9
169	O 16, r 11	208	O 20, r 10
170	O 16, r 12	209	S 11
171	O 16, r 14	210	O 20, r 11
172	O 16, r 15	211 } 212 }	S 2 (12), O 20, r 12
173	O 16, r 16		
174 } 175 }	O 16, rr 10 to 13, 17, 18	213	O 20, r 13
		214	O 20, r 14
176	O 16, r 19	215	O 20, r 15
177	O 16, r 20	215A	O 20, r 16
178	O 16, r 21	216	O 20, r 19
179	O 18, rr 1, 2 (1)	217	O 20, r 20
180	O 18, rr 2 (2), (3), 3	218 }	
181	O 18, r 4	219 }	Cf S 35 (1), (2)
182	O 18, r 5	220 }	
183	O 18, r 6	221	O 20, r 6 (3)
184	O 18, r 8	222	Cf S 35 (3)
185	O 18, r 9	223 first para	S 38
185A first and second paras	S 138	223 second and third paras	S 39
185A third para	O 18, r 7	223, fourth para	S 41
186	O 18, r 10	223 fifth para	O 21, r 4
187	O 18, r 11	223 sixth para	O 21, r 5
188	O 18, r 12	224	O 21, r 6
189	O 18, r 13	225	O 21, r 7
190	O 18, r 14	226	O 21, r 8
191	O 18, r 15	227	O 21, r 9
192	O 18, r 16	228	S 42
193	O 18, r 17	229	S 43

Comparative Table of the Sections of the Old and the New Code—contd

C P Code, 1882	C P Code, 1908	C P Code, 1882	C P Code, 1908
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229B	S 44	267	O 21, r 41
230, first para	O 21, r 10	268	O 21, r 46
230, second para	O 21, r 21	269	O 21 r 43
230, third and	S 48	270	O 21, r 51
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234	S 50	275	O 21 r 55
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237	O 21, r 13	278	O 21, r 58
238	O 21, r 14	279	O 21, r 59
239	O 21, r 26 (1) (2)	280	O 21 r 60
240	O 21, r 26 (3)	281	O 21, r 61
241	O 21 r 27	282	O 21 r 62
242	O 21, r 28	283	O 21 r 63
243	O 21, r 29	284	O 21, r 64
244	S 47	285	S 63
245	O 21 r 17	286	O 21, r 65
245A	S 56	287	O 21, rr 66, 70
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246	O 21, r 18	289	O 21, r 67
247	O 21, r 19	290	O 21, r 68
248	O 21, r 22	291	O 21, r 69
249	O 21 r 23	292	O 21, r 73
250	O 21, r 24 (1)	293	O 21, r 71
251	O 21, rr 24 (2), (3),	294	O 21, r 72
	25 (1)	295	S 73
252	S 52	296	O 21, r 76
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254	O 21, r 30	298	O 21, r 78
255	O 21, r 42	299	O 21, r 79 (1)
256	O 21, r 11 (1)	300	O 21 r 79 (2)
257	O 21, r 1	301	O 21, r 79 (3)
257A	Omitted	302	O 21, r 80
258	O 21, r 2	303	O 21 r 81
259	O 21, r 31	304	O 21 r 82
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262	O 21, r 34 (5)	307	O 21 r 85
263	O 21, r 35	308	O 21 r 86
264	O 21, r 36	309	O 21, r 87
265	S 54	310	O 21, r 88

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310A	O. 21, r 89	344—360A	Repealed by the Pro
311	O 21, r 90		vincial Insolvency
312	O 21, r 92		Act, 1907
313	O 21, r 91	361	O 22, r 1
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315	O 21, r 93	363	O 22, r 3 (1)
316	S 65, O 21, r 94	365	O 22, r 3 (1)
317	S 66	366	O 22, r 3 (2)
318	O 21, r 95	367	O 22 r 5
319	O 21, r 96	368	O 22, r 4
320	Ss 68, 70 and 71	369	O 22, r 7
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322C		373	O 23, r 1
322D		374	O 23, r 2
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324		375A	O 23 r 4
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325		377	O 24, r 2
325A		378	O 24 r 3
325B		379	O 24 r 4
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327	S 67	382	O 25 r 1 (2)
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329	O 21 r 98	384	O 26 r 2
330	O 21, r 98	385	O 26, r 3
331	O 21, r 99	386	S 76, O 26 r 4
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333	O 21 r 102	389	O 26, r 7
334	O 21, rr 97, 98	390	O 26, r 8
335	O 21, rr 97, 99, 103	391	S 78
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340	O 21, r 39 (5)	398	O 26 r 16
341	S 58	399	O 26 r 17
342		400	O 26, r 18
343	O 21, r 25	401	O 33 r 1

Comparative Table of the Sections of the Old and the New Code—contd

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402	Omitted
403	O 33 r 2
404	O 33 r 3
405	O 33 r 5
406	O 33 r 4
407	O 33 r 5
408	O 33 r 6
409	O 33 r 7
410	O 33 r 8
411	O 33 r 10
412	O 33 r 11
413	O 33 r 15
414	O 33 r 9
415	O 33 r 16
416	S 79 O 27 r 1
417	O 27 r 2
418	O 27 r 3
419	O 27 r 4
420	O 27 r 5
421	O 27 r 6
422	O 5 r 27
423	O 27 r 7
424	S 80
425	Omitted [See s 55 sub sec (2)]
426	O 27 r 8 (1)
427	O 27 r 8 (2)
428	S 81
429	S 82
430	S 83
431	S 84
432	S 85
433	S 86
434	S 87
435	O 29 r 1
436	O 29 rr 2 3
437	O 31 r 1
438	O 31 r 2
439	O 31 r 3
440	O 32 rr 1 4 (2)
441	O 32 r 5 (1)
442	O 32 r 2
443	O 32 rr 3 (1) 4 (2)
444	O 32 r 5 (2)

C P Code 1882	C P Code 1908
445	O 32 r 4 (1)
446	O 32 r 9
447	O 32 r 8
448	O 32 r 10 (1)
449	O 32 r 10 (2)
450	O 32 r 12 (1)
451	O 32 r 12 (2) (3)
452	O 32 r 12 (4)
453	O 32 r 12 (5)
454	O 32 r 13
455	O 32 r 14
456	O 32 rr 3 (2) (3) 4 (4)
457	O 32 r 4 (1)
458	O 32 r 11 (1)
459	O 32 r 11 (2)
460	Omitted
461	O 32 r 6
462	O 32 r 7
463	O 32 r 15
464	O 32 r 16
465	O 28 r 1
466	O 28 r 2
467	O 28 r 3
468	O 5 rr 28 29
470	S 88
471	O 35 r 1
472	O 35 r 2
473	O 35 r 4
474	O 35 r 5
475	O 35 r 6
476	O 3[illegible] r 3
477, 478	O 38 r 1
479	O 38 r 2
480	O 38 r 3
481	O 38 r 4
482	Omitted
483, 484	O 38 r 5
485	O 38 r 6
486	O 38 r 7
487	O 38 r 8
488	O 38 r 9
489	O 38 r 10

Comparative Table of the Sections of the Old and the New Code—contd.

C. P Code, 1882.	C P Code, 1908	C P Code, 1882	C P Code, 1908
490	O 38, r 11	535	O 37, r 5
491	S 95	536	O 37, r 6
492	O 39, r 1	537	O 37, r 7
493	O 39, r 2	538	O 37, r 1
494	O 39, r 3	539	Ss 92 and 93
495	O 39 r 5	540	S 96
496	O 39, r 4	541	O 41 r 1
497	S 95	542	O 41 r 2
498	O 39, r 6	543	O 41 r 3
499	O 39, r 7	544	O 41, r 4
500	O 39, r 8	545	O 41, r 5
501	O 39, r 9	546	O 41, r 6
502	O 39, r 10	547	O 41, r 7
503	O 40, rr 1 to 3	548	O 41, r 9
504	O 40, r 5	549	O 41, r 10
505	Omitted	550	O 41, r 13
506		551	O 41, r 11
507		552	O 41, r 12
508		553	O 41, r 14
509		554	O 41, r 15
510		555	O 41, r 16
511		556	O 41 r 17
512		557	O 41 r 18
513		558	O 41 r 19
514		559	O 41 r 20
515		560	O 41, r 21
516	The Second Schedule	561	O 41 r 22
517		562	O 41, r 23
518		564	Omitted
519		565	O 41, r 24
520		566	O 41 r 25
521		567	O 41 r 26
522		568	O 41, r 27
523		569	O 41, r 28
524		570	O 41, r 29
525		571	O 41, r 30
526		572, 573	*Cf* S 135
527	O 36, r 1	574	O 41, r 31
528	O 36, r 2	575	S 98
529	O 36, r 3	576	O 41, r 34
530	O 36, r 4	577	O 41, r 32
531	O 36, r 5	578	S 99
532	O 37, r 2	579	O 41, r 35
533	O 37, r 3	580	O 41 r 36.
534	O 37, r 4		

Comparative Table of the Sections of the Old and the New Code—concld

C P. Code, 1882	C P Code, 1908	C P Code, 1882	C P Code, 1908
581	O 41, r 37	620	O 46 r 4
582	S 107 (2), O 22, r 11	621	O 46, r 5
582A	Cf S 146	622	S 115
583	Cf S 144 (1)	623	S 114 O 47, r 1
584	Cf S. 100	624	O 47, r 1
585	Cf S 101	625	O 47, r 3
586	S 102	626	O 47, r 4
587	S 103, O 42 r 1	627	O 47, r 5
588	S. 104, O 43 r 1	628	O 47, r 6
589	S 106	629	O 47, rr 7, 9
590	S 108 O 43 r 2	630	O 47, r 8
591	S 105	631	S 116
592	O 44 r 1	632	S 117
593	O 44 r 2	633	S 122
594	O 45 r 1	634	S 118
595	S 109	635	S 119
596	S 110	636	O 49, r 1
597	S 111	637	S 123 (2) (i)
598	O 45 r 2	638	S 120 (1), O 49, r 3
600	O 45 r 3	639	S 120 (2)
601	O 45, r 6	640	S 132
602	O 45, r 7	641	S 133
603	O 45, r 8	642	S. 135
604	O 45 r 9	643	Omitted.
605	O 45, r 10	644	O 48, r 4
606	O 45, r 11	645	S 137
607	O 45, r 12	645A	S 140
608	O 45, r 13	646	Omitted.
609	O 45, r 14	646A	O 46, r 6
610	O, 45, r 15	646B	O 46, r 7
611	O 45, r 16	647	S 141
612	Omitted.	648	S 136
613	Omitted.	649	Ss 36, 37
615	Omitted.	650	Omitted
616	S 112	650A	S 29
617	S. 113, O 46, r 1	652	Ss 122, 129, 130 and 131
618	O 46, r 2		
619	O 46, r 3	653	S 59

CHRONOLOGICAL TABLE

OF

PREVIOUS AND AMENDING ACTS.

Year	No of Act	Short Title	How affected
1841	VIII	Interpleader	Rep, Act X of 1877
1847	XVII	Defects in Civil Procedure	,, Act XII of 1873
1859	VIII	Code of Civil Procedure	,, Act X of 1877
1860	IV	Civil Procedure	,, Act XXIII of 1861
1861	X	Repealing Enactments relating to Civil Procedure	,, Act XIV of 1870
1861	XXIII	Code of Civil Procedure	,, Act X of 1877
1863	IX	Amending the Code of Civil Procedure	,, Act X of 1877
1864	V	Extension of Civil Procedure Code to Sindh	,, Act VIII of 1868
1877	X	Code of Civil Procedure	,, Act XIV of 1882
1878	XVIII	Amending the Code of Civil Procedure	,, Act XII of 1879
1879	XII	Do do	,, Act XIV of 1882
1882	XIV	Code of Civil Procedure	,, Act V of 1908
1908	**V**	**The Code of Civil Procedure**	Amndg Act I of 1914
			,, Act IV of 1914
			Amndg and Replng Act X of 1914
			Amndg and Replng Act XVII of 1914
			Amndg Act *XIII of 1916*
			,, XXIV of 1917
			,, XVIII of 1919
			,, XXIV of 1920
			XXVI of 1920
			,, XXXVIII of 1920
			,, III of 1921
			,, IX of 1922
			,, XI of 1923
			,, XXVI of 1923
			,, XXIX of 1923
			,, XX of 1925
			,, I of 1926
			,, VI of 1926

ADDENDA.

S 2, p. 11, f n (i)—add *Kyone Hoe Tsee* v *Kyon Soon Sun* (1925) 3 Rang 201

S 9, p 23, l 32—add the following after the words "suits relating to caste property" —

Where the question at issue is not a matter relating to the internal administration and affairs of a caste, but to the property of the caste, the civil Court has jurisdiction to interfere, although there has been a division of opinion in the caste *Fulchand* v *Harilal* (1925) 72 Bom L R 1503

S 10, p 28—add as a separate para —

Provincial Insolvency Act 5 of 1920—A Court exercising insolvency jurisdiction under the Provincial Insolvency Act 5 of 1920 has no power to stay, under this section a suit brought by the mortgagee against his mortgagor prior to the insolvency of the mortgagor *The Official Receiver* v *Palanisami* (1925) 48 Mad 750 See Provincial Insolvency Act 5 of 1920 s 29 and Presidency Towns Insolvency Act 3 of 1909, s 18

S 11, p 49, f n (q)—add *Ma Tok* v *Ma Yin* (1925) 3 Rang 77

S 11, p 59—add as a separate para at the end of the page —

(7) The decision of the Talukdari Settlement Officer, given in proceedings under s 11 of the Gujarat Talukdar's Act [Bombay Act 6 of 1888] does not bar as *res judicata* the trial of the same questions in a subsequent suit between the same parties, as the Officer is not a Court of jurisdiction competent to try such suit within the meaning of this section *Amarsangji* v *Deep Sangji* (1925) 49 Bom 442 [F B]

S 11, p 52, l 26—add the following after the word 'lands' —

A holder of inam certificate *Subban Ali* v *Imami Begum* (1925) 52 Cal 971, 980 982 [P C]

S 11, p 49, f n (q)—add *Mahit Narain* v *Mannu Singh* (1925) 47 All 778

S 11, p 36, f n (j)—transfer the following from the end of foot note (j) to the end of foot note (i) —

See also *Maina Bibi* v *Chaudhari* (1925) 52 I A 145, 47 All 250 86 I C. 579, ('25) A PC 63

S 20 p 91, l 23—add after the words " Bombay (yy) the following —

In a suit for accounts against an agent the cause of action arises at the place where the contract of agency was made or where it was to be performed and where the refusal to account took place (1925) 6 Lah 153

S. 34, p 105 l 33—add after the word 'damages the following foot note —

(*hh*) *Coorla Mills* v *Vallabhdas* (1925) 27 Bombay L R 1168, 1187

S 35, p 113, l 18—add the following as a separate para —

Review of Taxation—On a review of taxation the decision of the Taxing Master is not absolutely final even on a question of quantum The Court has [illegible]

S 37, p 117—add the following at the end of the page —

It has been held that where a Court *e g*, the Court of the Additional Subordinate Judge, is abolished but subsequently re established the Court does not cease

to exist within the meaning of cl (b) of the section *Mussammat Bibi v Harihar* (1925) 4 Pat 688

S 38, p 120—add in f n (z) *Sukhram Das v Nazar* (1925) 6 Lah 316

S 47, p 142, f n (k)—add *Khem Singh v Raghubir* (1925) 47 All. 365

S 47, p 132—add the following as case No (8) —

In India it is settled law that no action lies on an executable judgment the only remedy being execution, and this principle is embodied in s 47 but where a judgment creates a new obligation without providing for its execution but indicating a suit as the only method of enforcing it then the judgment to enforce the obligation is maintained *Ramasami v Muthayya* (1925) 48 Mad 482

S 47 p 129 f n (u)—add *Hamnar ul Haq v Nazar Abbas* (1925) 6 Lah 313

S 47, p 135—add in f n (n) *Ishar Das v Parma Nand* (1925) 6 Lah 544

S 48, p 148—omit the paragraph headed Where a payment is directed to be made on the happening of a contingency and substitute the following —

Where payment is directed to be made on the happening of a specified event —It has been held by the High Court of Bombay that where a decree directs payment to be made on the happening of a specified event the period of limitation provided by this section is to be computed *from the date on which the event happens* and not from the date of the decree the reason given being that the 12 years period runs only from the date when the decree becomes in all its parts ripe for execution *Narhar v Krishnaji* (1912) 36 Bom 368 15 I C 822 Following this decision it was held by a majority of a Full Bench of the Madras High Court that the 12 years for enforcing the personal remedy against the mortgagor runs from the date of the sale of the mortgaged property *Aiyasamier v Venkatachela* (1917) 40 Mad 989 37 I C 741 The same point was considered by the Calcutta High Court in an earlier case and it was held that the 12 years ran *from the date of the decree* the reason given being that a decree can only bear one date and that therefore under this section 12 years must be calculated from that date *Jnanendranath v Khulna Loan Co Ltd* (1913) 18 C W N 492 The Calcutta case went up to the Privy Council on appeal and the decision of the High Court was affirmed *Khulna Loan Co v Jnanendranath* (1917) 22 C W N 145 (P C) In a recent Madras case it was held following the Privy Council decision, that where a decree directs that money be recovered from a party only on failure to recover from another party execution of the decree becomes barred against the former after 12 years from the date of the decree *Nawab Shiya ul Mulk v Umir ul Umra* (1925) 48 Mad 846

S 48, p 148, f n (t)—delete the foot note

S 51, p 156 l 23—add the following after the words the decree holder (u) —

Where immoveable properties are attached in execution of a decree the Court may in a proper case appoint a receiver to collect the rents of the properties *Maung Thin Zan v S A S Firm* (1925) 3 Rang 235

S 55, p 163—add the following as a separate para after the para headed Sub section (2)' —

Sub-section (4): Insolvency after order for arrest —Where a judgment debtor is adjudicated an insolvent after an order for his arrest has been made but no protection order has been made, it is the duty of the executing Court to require him under the latter part of sub sec (4) to give security that he will appear, when called upon, in any proceeding in insolvency or upon the decree in execution of which he was arrested M V L A Viswanathan v Abdul Majid (1925) 3 Rang 187

S 65, p 189, l 36—add the following after the words "the purchaser" —

(viic) *Vishnu* v *Yusuff* (1925) 27 Bom L R 963

S 70, p 202, l 3—add the following as a separate para —

Suit to set aside a sale held by the Collector—A suit will lie at the instance of one who is interested in the property to set aside the sale of that property held by the Collector on the ground of fraud alleged to have been committed jointly by the judgment debtors, the decree holders, the auction purchaser, and pre emptors *Bhagwan Das* v *Suraj Prasad* (1925) 47 All 217

S 71, p 202—add the following at the end of the notes on s 71 —

Shall be deemed to be acting judicially—Though as provided by this section, a Collector executing a decree shall be deemed to be acting judicially, he is not a Court *Bhagwan Das* v *Suraj Prasad* (1925) 47 All 217

S 92, p 250, f n (u)—add *Ramrup* v *Ramdhari* (1925) 47 All 770

S 92 p 251—add the following in the middle of the page as a separate para —

Where some of the reliefs are outside the scope of the section—Where some of the reliefs claimed in a suit under this section are within and some outside the scope of the section, the Court may either require the plaintiff to amend the plaint by striking out reliefs that are outside the scope of this section or it may bar the suit and at the time of pronouncing judgment dismiss the claims relating to such reliefs *Ramrup* v *Ramdhari* (1925) 47 All 770

S 92, p 250—add at the end of the 1st para —See notes on p 251, "Where some of the reliefs are outside the scope of the section"

S 92, p 249—add after case No (6) —

But a suit for the appointment of trustees is within this section though the defendant be merely a trespasser and ejectment is claimed In such a case the Court may appoint trustees, though a decree for ejectment cannot be passed *Leachman* v *Munia* (1925) 47 All 867

S 96, p 261 —add the following after "District Court (x)" —

The Allahabad High Court has in a recent case adopted the same view as the Madras High Court *Muhammad Abdul* v *Ala Bakhsh* (1925) 47 All 534

S 97, p 266 l 35—add the following —

The High Court of Bombay has held that when a decree absolute is passed pending an appeal from the preliminary decree the appellant should file an appeal from the final decree also or in any event should inform the Court when the appeal from the preliminary decree comes on for hearing that a final decree is passed *Chandulal* v *Motilal* (1925) 27 Bom L R 1492

S 115, p 312 l 15—add the following after ' 1864 (z) —

But the correctness of this decision was doubted in a later case *Moses* v *Meyer* (1925) 27 Bom L R 1460

O 2, r 2, p 405—add the following as ill (4) —

(4) *A* agrees to sell his property to *B* He then enters into a contract to sell it to *C* *B* sues *A* for a permanent injunction restraining *A* from selling the property to *C* The suit is dismissed on the ground that *such a suit did not lie* A subsequent suit by *B* against *A* for specific performance of the agreement is not barred *Sardari Mal* v *Hirde Nath* (1925) 6 Lah 384

O 3 r 1, p 421, l 6—add the following after the words "this rule (c) —

The words in this rule ' by a pleader duly appointed to act on his behalf " do not simply mean a person duly appointed by the party in the suit but a pleader duly appointed according to law requiring pleaders in force in the particular

Court *In re the Pleaders of the High Court* (1884) 8 Bom 105, *Veerappa* v *Sundaresa* (1925) 48 Mad 676 [revision]

O 3, r 4, p 422, f n (j)—add *Budhu Ram* v *Kalu Ram* (1925) 6 Lah 461

O 6 r 17, p 465, l 19—add the following after the words "Privy Council" —

In a later case where the suit was brought upon a mortgage of property of a joint Hindu family, and the suit was dismissed on appeal to the High Court on the ground that necessity was not proved, the Privy Council refused to entertain the new contention raised before them for the first time that in any event the plaintiff was entitled to a decree against the manager (mortgagor) upon his personal consent on the ground that it involved a radical amendment of the plaint *Gajadhar* v *Ambika Prasad* (1925) 47 All 459 [P C]

O 6, r 17, p 463—add the following at the end of the page as ill (4) —

(4) A suit founded on Kittima adoption cannot be allowed to be converted into one based on appathitta adoption *Maung Ba Thein* v *Ma Than Myint* (1925) 3 Rang 483

O 9, r 9, p 503 l 9—add the following after "Allahabad (a)" —

and Rangoon *Menon* v *Lafan* (1925) 3 Rang 534

O 9, r 9, p 503 l 9—Delete the word and after "Calcutta

O 14, r 5, p 549 l 5—add —

As a general rule the Court should not frame even additional issues from materials other than those specified in r 3 above *Dodbasappa* v *Pradhanappa* (1925) 27 Bom L R 1318 But the Court may under special circumstances allow issues to be raised upon a matter which does not strictly come within the proper scope of the proceedings, provided no injustice would be done to either party (q)*

O 14, r 5, p 549—Delete lines 5 8

O 16, r 12 l 36—add the following as a new para —

Imposition of fine—Neither the issue of a proclamation nor an order for attachment under r 10 above is a condition precedent to the imposition of a fine under this rule *Magayya In re* (1925) 48 Mad. 941

O 21, r 21 p 624, l 21—add the following after the words "and property" —

Though the Court has discretion to refuse execution against the person and property simultaneously, it has no power to refuse execution against the person of the judgment debtor on the ground that the decree holder must in the first instance proceed against the property of the judgment debtor — *Hargobind* v *Hakim Singh* (1925) 6 Lah 548

O 21, r 46, p 650 f n (e)—add *Nagabhushanam* v *Ramachandra* before (1922)

O 34, r 14, p 874, l 4—add the following after the word "charge" —

The High Court of Patna has held that the creditor is in such a case entitled to sell the property in execution *Raja Braja Sunder* v *Surat* (1917) 2 Pat L J 55, *Hari* v *Musammat Tapai* (1925) 4 Pat 693

O 41, r 23, p 942, l 12—Add after "[cl u]"—(*ww*) *Ma Me Mya* v *Ma Miu Zan* (1925) 3 Rang 490

O 47, r 4, p 986, l 35—add the words "The High Courts of Calcutta and Patna have held that cl (w) is" before the word "however"

O 47, r 4, p 986, l 36—add the following after "below" —

On the other hand it has been held by the Bombay High Court that an appeal is against an order granting a review quite irrespective of the qualification contained in r 7 below: *Daso* v *Karbasappa* (1925) 27 Bom. L. R. 1446

Sch II, para 16, p. 1094, l 26 —Add the following —

Suit upon award —*Where a decree is passed in terms of an award, the only* mode of enforcing the award is by way of executing the decree, and no separate suit will lie to enforce the award *Sasi Sekhareshwar* v *Lalit Mohan* (1925) 52 I A 79, 52 Cal 314

Sch. II, para 21, p 1105, *f* n (*i*2) —Add *Shaikh Muhammad* v *Shaik Abdul* (1925) 4 Pat. 670 *Jagat* v *Sarwan* (1925) 47 All 743

Letters Patent, cl 15, l. 4 —add —

O 12, r 6 [judgment on admission]—See notes to "Appeal, on p 539

Letters Patent, cl. 15, p 1163 f n (*o*) —add *Prajamal Chendi* v *Mulchand* (1925) 6 Lah. 251

THE

CODE OF CIVIL PROCEDURE

ACT V OF 1908

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 21ST MARCH 1908.

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature

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WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, It is hereby enacted as follows —

Preliminary.

Short title commencement and extent

1 [S 1.] (1) This Act may be cited as the Code of Civil Procedure, 1908

(2) It shall come into force on the first day of January, 1909

(3) This section and sections 155 to 158 extend to the whole of British India the rest of the Code extends to the whole of British India, except the Scheduled Districts

Interpretation of the Act —The first Code of Civil Procedure was passed in the year 1859 and it was repealed by the Code of 1877 The Code of 1877 was repealed by the Code of 1882 which in its turn has been repealed by the present Code It will be seen from the Preamble that the present Act not only defines and amends but also *consolidates* the law of civil procedure The object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it up to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidation Act is passed When a question, therefore arises as to the construction of a section in such an Act the proper course is in the first instance to *examine the language of the Act and to ask what is its natural meaning* If the meaning is plain it is not proper to have recourse to the *previous state of the law* and the language of the Act must be interpreted uninfluenced by any considerations derived from the *previous state of the law* But if the meaning be doubtful resort may be had to the previous

S. 1. state of the law for the purpose of aiding in the construction of the provisions of the Act (*a*)

The following are some of the leading rules relating to the interpretation of statutes.

1 Proceedings of the Legislature in passing an Act are to be excluded from consideration in the judicial construction of the Act (*b*) These proceedings include Reports of Select Committees, Statements of Objects and Reasons attached to Bills, and debates of the Legislature (*c*)

2 Marginal notes to the sections of an Act are not to be referred to for the purpose of construing an Act (*d*)

3 Illustrations in Acts of the Legislature, although not part of the sections, are helpful in the working and application of the Acts and it is the duty of a Court of law to accept them, if that can be done, as being both of relevance and value in the construction of the text "The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which the sections deal And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves It would be the very last resort of construction to make any such assumption (*e*)

4 The essence of a Code is to be exhaustive on the *matters in respect of which it declares the law*, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction (*f*) In cases however, *where there is no specific provision in the Code*, the Court has the power, and it would seem it is its duty, to act according to justice, equity and good conscience (*g*) See s 151

5 Every statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation But this presumption does not apply to enactments affecting *procedure or practice* such as the Code of Civil Procedure The reason is that no person has a vested right in any course of procedure The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it (*h*) The right of appeal, however, is in the nature of a vested right, and hence the provision in s 154 of the Code declaring that nothing in this Code shall affect ' any present right of appeal which shall have accrued to any party at its commencement See also s 97.

6 ' The Code consists (i) of that which is termed the body of the Code and (ii) of the rules The body of the Code is fundamental and is unalterable except by the Legislature, the rules are concerned with details and machinery and can be more readily altered Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised It follows that the body of the Code is expressed in more general terms, and it has to be read in conjunction with the more particular provisions of the rules' (*i*)

British India —The expression "British India" is not defined in the Code In the absence of any definition of a particular expression in an Act, we are to turn to the definition of it in the General Clauses Act X of 1897 There are several terms of

30 I C 401

frequent or *general* occurrence in several Acts and these are defined in the General Clauses Act British India is one of them and it is defined in that Act (s 3 cl 1) as meaning all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India Aden is within British India (*j*) but not *Singapore* (*k*) nor the Civil Station at Wadhwan (*l*) nor the Kathiawar States (*m*) See notes to O 25 2 (1) British India

Scheduled Districts—A list of Scheduled District is given in Schedule I to the Schedule Districts Act XIV of 1874 The sections of this Code except s 1 and ss 155 to 158 do not extend to any of the Scheduled Districts Section 5 however of the Scheduled Districts Act empowers the Local Government with the sanction of the Governor General in Council to extend to any of the Scheduled Districts any enactments in force in British India and the whole of the Procedure Code has accordingly been extended to several Scheduled Districts including Sindh Ajmere Merwara and the Scheduled Districts of the Punjab (*n*)

2 [S 2.] In this Act, unless there is anything repugnant in the subject or context,—

Definitions

(1) "Code" includes rules

See notes on p 2 para No (6)

(2) "*decree*" *means the formal* expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default

Explanation—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final

(3) "decree holder" means any person in whose favour a decree has been passed or an order capable of execution has been made

Definition of "decree" in the Code of Civil Procedure, 1882—The term decree was defined in the Code of 1882 as follows—

Decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court

(*j*) Aden Laws Regulation 1891 s 2
(*k*) Straits Settlement Act 1866 s 1
(*l*) *Emperor* v *Chimanlal* (1912) 14 Bom L R 876 17 I C 534
(*m*) *Hemchand* v *Azam Sakarlal* (1906) 33 I A 1 8 Bom L R 129
(*n*) See Unrepealed General Acts Vol II p 579 See also *Jagat Mohan* v *Ishnoo* (1888) 15 Cal 365 *Prabhu Narain* v *Salig am* (190) 34 Cal 576

S. 2. expressing it, decides the suit or appeal An order rejecting a plaint or directing accounts to be taken, or determining any question mentioned or referred to in section 244 [now s 47] but not specified in section 588 [now s 104 and O 43, r 1], is within this definition, an order specified in section 588 is not within this definition

Importance of the definition of decree —The adjudications of a Court of law may be divided into two classes, namely, (1) decrees, and (2) orders Orders again may be sub divided into appealable orders and non appealable orders The expression "order" is defined in cl (14) of the present section as meaning the formal expression of any decision of a Civil Court which is not a decree

Where a decision amounts to a decree, it is invariably appealable unless it is expressly provided that no appeal shall lie from it (s 96) Further, where an appeal is preferred from a decision which amounts to a decree and a decree is passed in appeal, an appeal will lie to the High Court from the decree passed in appeal if the case comes within the provisions of s 100 below This is called a second appeal In the case, therefore, of an adjudication which amounts to a decree the law permits an appeal and in some cases also a second appeal

Where an adjudication amounts to an order no appeal lies from it unless it is enumerated in the list of appealable orders given in s 104 or in the list given in O 43, r 1

We have thus seen that an appeal lies from a decree We have also seen that an appeal lies from an order specified in s 104 or in O 43 r 1 What then is the distinction between a decree and an appealable order? The distinction is this—that while in the case of an adjudication which amounts to a decree the law permits a second appeal in some cases no second appeal is allowed at all in the case of an adjudication which amounts to an appealable order That is to say, if an appeal is preferred from a decree and a decree is passed in appeal, an appeal will in certain cases lie from the decree passed in appeal But if an appeal is preferred from an appealable order and an order is passed in appeal, no appeal lies at all from the order passed in appeal [s 104, sub section (2)] To take an instance *A* appeals from a decision of a Subordinate Judge to a District Judge The appellate Court decides against *A* *A* prefers a second appeal to the High Court from the decision of the District Court If the decision of the Subordinate Judge amounts to a decree a second appeal will lie provided the case comes within s 100 But if the decision amounts to an appealable order, no second appeal will lie

The definition of decree is important not only for determining the right of second appeal but for determining whether an appeal lies at all in the first instance If an adjudication is an appealable order, there is no difficulty whatever in determining whether an appeal lies from it All that has to be done in such a case is to refer to s 104 and to O 43, r 1, and to ascertain whether the order is enumerated in the lists there given The real difficulty in determining the right of appeal arises when the adjudication from which an appeal is preferred is not an appealable order In such a case the adjudication may be either a decree or a non appealable order, and an appeal can lie only if the adjudication amounts to a decree The appellant would in this class of cases endeavour to show that the adjudication appealed from is a *decree*, while the respondent would endeavour to show that the adjudication is *merely an order* Instances of this class of cases are given in the next following paragraph

Essential elements of a decree —The term 'decree' is defined in the Code as meaning "the formal expression of an adjudication which, so far as regards the Court expressing it, *conclusively determines* the *rights of the parties* with regard to all or any of the *matters in controversy* in the *suit*" The words italicized above indicate

the distinguishing marks of a decree To constitute a decision a decree, the following conditions must be present —

I —The decision must have been expressed in a *suit*

II —The decision must have been expressed on the *rights* of the parties with regard to all or any of the *matters in controversy* in the suit.

III —The decision must be one which *conclusively determines* those rights

If all the elements set forth above concur in a decision, the decision is a decree, if not, it is an order see definition of 'order,' cl 14, below

Illustrations of Condition I

1 *A* applies for leave to sue in *formâ pauperis* The application is rejected on a finding that *A* is not a pauper This decision is not a decree, for it is not a decision in a suit (*o*) [The application is for leave *to sue*, which shows clearly that there is yet *no suit* Every suit is commenced by a *plaint* (*p*) and an application for leave to sue in *formâ pauperis* does not become a plaint until the application is granted (see O 33, r 8)] Similarly an order under s 18 of the Religious Endowments Act 20 of 1863 granting or refusing leave *to institute* a suit for accounts of a religious endowment is not a decree and is not therefore appealable (*q*)

2. There are several Acts relating to special subjects, under which proceedings *have to be commenced by a petition* and *not* by a *suit* *Decisions on petitions under* those Acts would not, therefore, be *decrees* Thus a decision on a petition under the Religious Endowments Act appointing a new member to fill a vacancy in a committee of trustees of an endowment is not a decree (*r*)

Illustrations of Condition II

1 In a suit by *A* against *B* an application is made by *X* to be added as a plaintiff to the suit on the ground that he is interested in the subject matter of the suit The application is rejected The decision is not a decree for it is not a decision on any *right* which *X* might have claimed in the suit had he been made a party plaintiff (*s*)

2 A plaintiff in a suit, finding that the suit must fail by reason of some formal defect, applies for leave to withdraw from the suit with liberty to bring a fresh suit (O. 23, r 1) The leave is granted This decision is not a decree, for it is not an adjudication determining the *rights of the parties with regard to* any matter in controversy in the suit These rights still remain open for determination in a subsequent suit (*t*)

Note —In all the cases cited above there was an appeal preferred from the decision. The decision not being an appealable order in any of them it was contended on behalf of the appellant that it amounted to a decree, and was therefore appealable But it was held in all of them that the adjudication did not amount to a decree, and that it was not therefore appealable

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(*q*) *Mozaffer Ali* v *Hedayet* (1907) 34 Cal 97 *Jogodindro* v *Saru Sundari* (1891) 18 Cal 3 2 *Abdul Hossein* v *Kasi Sahu* (1900) 27 Cal 362 See also *Palloji* v *Ganu* (1891) 15 Bom 370

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Points of distinction between the definition of "decree" in this Code and that in the Code of 1882—The definition of decree as it stood in the Code of 1882 has been modified in the following two respects —

1 Under the Code of 1882, no adjudication came within the definition of a decree unless it decided *the suit* Under this Code, an adjudication which conclusively (u) determines *the rights of the parties* with regard to all or any of the matters in controversy in the suit is a decree, *though it does not completely dispose of the suit* But the decree *in that case is called a preliminary decree as distinguished from a final decree* The present definition is wider than that in the Code of 1882 in that it includes preliminary decrees within its scope the object being to permit an appeal from preliminary decrees See notes below, Preliminary decree

2 Under the Code of 1882 there was a conflict of decisions as to whether an order of dismissal for default was a decree The present section expressly declares that an order of dismissal for default is not within the definition of decree, the object being to exclude the right of appeal from such order See notes *below*, *Order of dismissal* for default"

Two other alterations both of a minor character, may also be noted here They are as follows —

(i) An adjudication directing accounts to be taken is no longer to be *deemed* to be a decree as under the Code of 1882 it *is* a decree by the very terms of the present definition though a preliminary one Under the Code of 1882 such an adjudication was appealable, for it was to be *deemed* to be a decree Under this Code it is appealable for it *is* a decree This distinction however is of no practical importance See notes to s 97 below

(ii) The word within has been substituted for mentioned or referred to in' with a view to bring within the definition of decree orders against sureties (s 145) and orders as to court fees in pauper suits (O 33 r 13) and thus providing for appeals therefrom See notes to s 145 and O 33 r 13

It has been seen that the importance of the definition of decree rests on the fact that by reference to it the *right of appeal* is determined Hence every material change made in the definition of that term must be taken to have been made for the purpose either of permitting an appeal from adjudications which were not appealable before or excluding a right of appeal from adjudications from which an appeal was permitted under the old law It is from this standpoint that the new definition must be examined and that is what we have attempted to do above

Preliminary decree—*A decree may be preliminary or final or it may be partly* preliminary and partly final. A decree is preliminary when the adjudication though it conclusively determines the *rights* of the parties with regard to some or one of the matters in controversy in the suit, *does not completely dispose of the suit* and further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit (v) As to appeals from decrees, see ss 96 and 97

The question whether a decision amounts to a *preliminary decree is one of considerable* importance in view of the provisions of s 97, by which it is provided that if a party aggrieved by a preliminary decree does not appeal therefrom within the period of limitation allowed for appeals he shall be precluded from disputing its correctness in an appeal from the final decree It was held at one time by the High Court of Bombay that a finding on a preliminary issue that a suit is *not* bad for misjoinder, or that it is *not* barred by limitation or a decision that the Court *has* jurisdiction to entertain a

(u) The addition of the word "conclusively is in accordance with the decision in *Lekha* v *Bhauna* (1896) 18 All 101, 104

(v) *Khushi Ram* v *Tulsa Ram* (1917) P R no. 7 p 25 at pp 26-27, 39 I C 100

suit, was a preliminary decree (w) But these decisions have since been overruled by a Full Bench of the same High Court (x) In the last mentioned case it was held that a finding that the matters in dispute are *not* caste questions, and are not therefore outside the jurisdiction of Civil Courts does not amount to a preliminary decree from which an appeal can lie (x) Similarly, it has been held that a finding that a matter is *not* res judicata, and that therefore the trial can proceed, is not a preliminary decree (y) Nor is a finding that a plaintiff is competent to maintain the suit brought by him (z) Nor is a finding that a suit is *not* barred by limitation (a) A finding that the defendant is an agriculturist within the meaning of the Dekhan Agriculturists Relief Act, 1879, is not by itself an adjudication which can be embodied in a preliminary decree though it may result in the plain being returned for presentation to the proper Court (b) [see O 7, r 10] An interlocutory order that a plaint should be stamped with a higher court fee than what it is stamped with does not amount to a preliminary decree (c) None of these findings determines the rights of the parties with regard to *all or any* of the matters in controversy in the suit, it merely enables the Court to proceed to inquire into those rights (d)

Illustrations

1 *A* sues *B* for cancellation of a document and a decree is passed in the suit This is a final decree, for the suit is completely disposed of

2 A suit is brought by one partner against another for a dissolution of partnership and for the taking of partnership accounts Here the Court may pass a *preliminary* decree declaring the proportionate shares of the parties, and directing such accounts to be taken as it thinks fit and after the accounts are taken it may pass a *final* decree directing payments of debts due by the partnership and the costs of the suit and directing payment to the parties of the amount found due to them on the taking of accounts See O 20 r 15

3 *A* sues *B* for the recovery of possession of certain immovable property and for mesne profits The Court may pass a decree for possession of the property, and direct inquiry as to mesne profits Here the decree is partly final and partly preliminary It is final so far as it directs delivery of possession to *A* It is preliminary so far as it directs an inquiry as to mesne profits After the inquiry is completed the Court has to pass a final decree in respect of mesne profits in accordance with the result of the inquiry See O 20 r 12

The following is a list of suits in which a preliminary decree may be passed under this Code —

1 Suits for recovery of possession of immovable property and for rent or mesne profits (O 20 r 12)
2 Administration suits (O 20 r 13)
3 Suits for pre emption (O 20 r 14)
4 Suits for dissolution of partnership (O 20 r 15)
5 Suits for account between principal and agent (O 20 r 16)
6 Suits for partition of property or separate possession of a share therein (O 20 r 18)
7 Suits for foreclosure of a mortgage (O 34 rr 2 3)
8 Suits for sale of mortgaged property (O 34 rr 4 5)
9 Suits for redemption of a mortgage (O 34 rr 7 8)

(w) *S dhanath* v *Ganesh* (1913) 37 Bom 60 17 I C 461 *Narayan* v *Gopal* (1914) 38 Bom 39? 398 ?3 I C 889

(a) *Khushi Ram* v *Tulsa Ram* (1917) P R no 7 p ?5 39 I C 100

(b) *Dattatraya* v *Radhabai* (19?1) 45 Bom ... *Gulabchand* v *Bal ram* (1915) 8 I C 589 *Ramanachar ya* ... 5 Bom L R 8?6 834 76 B 33 ... *Ali* v *Nas b-un nissa* (1911) P ... 13 I C 800 ... Bom 6 7 at p 634 60 I C

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The above list is not exhaustive, and there is nothing to preclude the Courts from passing a preliminary decree in other cases (e)

Rejection of plaint—As to an adjudication rejecting a plaint it has been expressly provided by the present clause that it shall be deemed to be a decree Such adjudication, therefore, is appealable as a decree. *An appeal, however, is not the only* remedy open to a party whose plaint is rejected, for he may cure the defect for which the plaint was rejected and present a fresh plaint (O 7, r 13) As to the cases in which a plaint "shall' be rejected, see O 7, r 11

Order returning plaint—A plaint may be returned for amendment (O 6, r. 17) or to be presented *to the proper Court* (O 7, r 10) In either case the decision returning the plaint is an order as distinguished from a decree An order returning a plaint to be presented to the proper Court was appealable under the Code of 1882 [s 588, cl (6),] and it is also appealable under this Code [O 43, r 1, cl (a)] An order returning a plaint for amendment was appealable under the Code of 1882 [s 588, cl (6)] it is no longer appealable under this Code (f)

Rejection of memorandum of appeal.—It is provided by the present section that a decision *rejecting a plaint* is to be deemed to be a decree The provisions of this and other sections relating to suits apply to appeals so far as such provisions are applicable (s. 108) Hence a decision rejecting a memorandum of appeal on the ground that it is barred by limitation (g) or that it is insufficiently stamped (h), or that it was not duly presented (i), is appealable as a decree

Order returning memorandum of appeal—No appeal lies from an order returning a memorandum of appeal to be presented to the proper Court (j) Nor does an appeal lie from an order returning a memorandum of appeal for amendment

Adjudications appealable as orders.—An adjudication which is appealable as an order is not a decree See s 104 and O 43, r 1

Order of dismissal for default.—It is provided by O 9, r 8, that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing the Court shall make an order that the suit be dismissed. Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable Under the Code of 1882 there was a conflict of decisions as to whether the decision of a Court under the corresponding section 102 dismissing a suit for default was a decree or merely an order It was held by the High Court of Madras that the decision was an order and not a decree and that there was no first or second appeal therefrom (k) On the other hand, it was held by the other High Courts that the decision was a decree and appealable as such (l)

Again, it is provided by O 41, r 17, that where on the day fixed the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable Under the Code of 1882 it was held by the High Courts of Bombay and Calcutta that a decision under the corresponding section 556 dismissing an appeal for default was a decree and was

(e) *Dattatraya* v *Palhabai* (1921) 45 Bom 627 633 60 I C 885 *Raja Peary Mohan* v *Manohar* (1923) 27 Cal W N 989, 992-993 74 I C 373 (24) A C 160

(f) *Gurdas* v *Bhag* (1911) P R no 96 p 334 11 I C 231

(g) *Gulab Rai* v *Mangli Lal* (1885) 7 All 42 *Raghunath* v *Nilu* (1885) 9 Bom 452, *Gunga Das* v *Ramjoy* (1880) 12 Cal 30

(h) *Rup Singh* v *Mukhraj* (1885) 7 All 887

(i) *Ayyanna* v *Nagabhooshanam* (1893) 16 Mad 285

(j) *Raghunath* v *Shamo Koeri* (1904) 31 Cal [illegible] 320 [illegible] 221 [illegible] W [illegible] 23

therefore appealable (*m*) In an Allahabad case it was assumed that the decision was not a decree (*n*)

Further, it is provided by O 41, r 11 (2), that if on the day fixed for the hearing of the appeal the appellant does not appear, the Court may make an order that the appeal be dismissed Such an order, it is enacted by the present section is not within the definition of decree, and is not therefore appealable Under the Code of 1882 it was held by the Calcutta High Court that a decision under the corresponding s 551 dismissing an appeal for default was a decree and was therefore appealable (*o*)

Lastly we may refer to the provisions of O 9 r 3, by which it is provided that when neither party appears when the suit is called on for hearing the Court may make an order that the suit be dismissed Such order it is enacted by the present section, is not within the definition of decree and is not therefore appealable

Decree holder—A decree for specific performance of an agreement for the sale of immoveable property may be executed either by the plaintiff or the defendant either party being a decree holder in such a case (*p*)

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of Original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council

Foreign Court—The Privy Council is not within this definition for though it is situate beyond the limits of British India it is invested with judicial authority within it (*q*) But the High Court of Justice in England whether it be the Chancery Division (*r*) or the King s Bench Division (*s*), is a foreign Court The Ceylon Court also is a foreign Court (*t*) As to suits on judgments of the High Court of Justice in England, see notes to s 13 A British Indian Court will not give effect to a foreign judgment etc

(6) "foreign judgment" means the judgment of a foreign Court

(7) "Government Pleader" includes any officer appointed by the local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader

(8) "Judge" means the presiding officer of a Civil Court:

No judge can act in any matter in which he has any pecuniary interest nor where he has any interest though not a pecuniary one sufficient to create a real bias (*u*)

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order

(*m*) *Ramchandra* v *Madhav* (189?) 16 Bom ?3 *Radha Nath* v *Chandi Charan* (1903) 30 Cal 660

(*n*) *Polkar* v *Gopal* (189?) 14 All 361

(*o*) *Uma Sundari* v *Bindu* (1897) 24 Cal 7?9

(*p*) *Bai Jarnabbai* v *Ablerehman* (19?-) 46 Bom 990 67 I C 667 (?3) A B 26

(*q*) *Bowles* v *Bowles* (1884) 8 Bom 571

(*r*) *London Bank* v *Hormasji* (1871) 8 B H C ?00

(*s*) See *Deep Narain* v *Diefert* (1904) 31 Cal 274

(*t*) *Shaik Athan* v *Davud* (1909) 3? Mad 469 471 3 I C 190

(*u*) *Aloo* v *Gagubha* (189?) 19 Bom 608

2. (10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any *person who intermeddles with the estate of the deceased and* where a party sues or is sued in a representative character the *person on whom the estate devolves on the death of the party* so suing or sued.

Legal representative—The expression legal representative occurs in several places in the Code In the Code of 1882 it was differently interpreted by different High Courts See the undermentioned case (t) in which almost all the earlier cases are reviewed See also notes to s 50 s 52 and O 22 r 3

"Where a party sues in a representative character'—A suit by a Hindu reversioner for a declaration that an alleged adoption is not valid is a suit by him in a ' representative character that is as representing in his reversionary right the estate of the last male owner and on his death such right devolves on the next reversioner so as to entitle him to be substituted as plaintiff under O 22 r 3 (u)

A surviving coparcener is not a legal representative of a deceased coparcener within the meaning of this clause (x) See notes to O 22 r 3 Legal representative

"Intermeddles with the estate.'—One who intermeddles with the estate of a deceased person even though it may be with *part* thereof is a legal representative within the meaning of this clause and is liable to the extent of the property taken possession of by him (y)

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but *shall* not include profits due to improvements made by the person in wrongful possession.

See s 144 and notes to O 20, r 12

(13) "moveable property" includes growing crops

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree:

See notes under cl (3) of this section.

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court:

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"Pleader."—The term "pleader" is here used in a much larger sense than its ordinary signification as a convenient term to designate all persons who are entitled to *plead* for others in Court "Pleader," in its ordinary sense, is synonymous with vakil (z)

Authority to compromise—An attorney or solicitor is entitled in the exercise of his discretion to enter into a compromise on behalf of his client, if he does so in a *bona fide* manner (a) And so is counsel (b) But a pleader cannot enter into a compromise on behalf of his client without his client's *express* authority (c) The reason is that both counsel and solicitor have an *implied* authority to compromise, the former by reason of his *retainer*, and the latter by virtue of his position of *agent* in relation to his client (d)

The result is that the consent of the client is not needed for a matter which is within the ordinary authority of counsel, and if a compromise is entered into by counsel, it binds the client though his consent was not taken (e) But what if the authority of counsel has been expressly limited by the client, and counsel consents to an order or decree in spite of the dissent of the client, or on terms differing from those which the client authorized? In such a case, if the limitation of authority is communicated to the other side, consent by counsel outside the limits of his authority is of no effect (f) If the limitation is not communicated to the other side, the question arises whether, having regard to the fact that the other side entered into the compromise believing that the opponent's counsel had the ordinary unlimited authority, the Court has power to interfere It has been recently held by the House of Lords that it has, and that it is not prevented by the agreement of counsel from setting aside or refusing to enforce the compromise, that it is a matter for the discretion of the Court, and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side (g) The authority of counsel and solicitor to compromise a suit is limited to the issues in the suit A compromise will not therefore be binding on a client if it extends to matters *outside* the scope of the particular case in which the counsel or solicitor is retained (h) A compromise effected *out of Court* is also not binding upon the client (h2) And since a compromise is no more than an agreement, it can be set aside at the instance of the client if it has been made by the counsel or solicitor under a misrepresentation or mistake (i) The application to have the suit restored to the list should be made before the decree is sealed (j)

Power to refer to arbitration—The law is the same as regards reference to arbitration Counsel has an *implied* power to consent to a reference and so has a solicitor on the record (k) But the authority does not extend to referring the case to arbitration on terms *different* from those which the client has authorised (l) A pleader or vakil has no power to refer a case without the express authority of his client (m)

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(d) Counsel is not his client's agent but a solicitor is *Matthews* v *Munster* (1888) 20 Q B D 141 142, *Jang Bahadur* v *Shankar* (1891) 13 All 272

(e) *Matthews* v *Munster* (1887) 20 Q B D 141 *Jang Bahadur* v *Shankar* (1891) 13 All 272 *Carrison* v *Rodrigues* (1886) 13 Cal 115

(f) *Strauss* v *Francis* (1866) I R Q B 379, 382

Cal 657 700

(j) *Berry* v *Mullen* (1871) 5 Ir Rep 368 *Jang Bahadur* v *Shankar* (1891) 13 All 272,

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Authority to withdraw suit.—Counsel has an implied power to withdraw an action (*n*). As regards vakils or pleaders it has been held that a vakalutnama couched in general terms suffices *prima facie* to authorize him to apply on behalf of his client for leave to withdraw a suit, and in the absence of anything to show that the vakil had acted contrary to the client's instructions, or otherwise was guilty of mis conduct in making the application, the client is bound by the act of his vakil (*o*)

Power to bind client by admission—Counsel (*p*), solicitors (*q*), and pleaders or vakils (*r*) have an implied authority to bind their clients by admissions of *fact*, pro vided such admissions are made during the actual progress of litigation and not in mere conversation (*s*) Thus an admission of liability by a vakil is sufficient to warrant a decree against his client in the suit (*t*) The result is that the client will be bound by the admission even though it may be erroneous But counsel, solicitor, or vakil cannot bind his client by an admission on a point of *law* Hence if the admission be erroneous the client is free to repudiate it (*u*) It may here be observed that the omission of a pleader or counsel to argue a question of law, or his abandoning a question of law does not pre clude the Court from dealing with the question (*v*)

Power to abandon issue—A pleader's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press (*w*)

(16) "prescribed" means prescribed by rules:

(17) "public officer" means a person falling under any of the following descriptions, namely:—

(*a*) every Judge;

(*b*) every member of the Indian Civil Service;

(*c*) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government;

(*d*) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person

(*n*) *Chambers* v *Mason* (1858) 5 C B N S 59 *Strauss* v *Francis* (1866) L R 1 Q B 379

(*o*) *Ram Coomar* v *Collector of Beerbhoom* (1866) 5 W R 80

[illegible]

(*s*) *Young* v *Wright* (1807) 1 Cam 139 [illegible] v *Hawkshaw* (1817) 2 St 239, *Patch* v *Lyon* (1846) 9 Q B 147

(*t*) *Steemutty Dossee* v *Pitamber* (1874) 21 W R [illegible]

[illegible] v *Fakir* (1894) 3 C W N 2[illegible] [illegible] v *Dudhnath* (1900) [illegible] I A 216 (counsel), [illegible] 24 Bom 360 363

[illegible] v *Dudhnath* (1900) 27 Cal 156

[illegible] v [illegible] (1902) 25 Mad [illegible]

especially authorised by a Court of Justice to perform any of such duties ,

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ,

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ,

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government , and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125

As to the relation of the body of the Code to rules see notes to s 1 p 2 para No 6

(19) "share in a corporation shall be deemed to include stock, debenture stock, debentures, or bonds and

(20) "signed," save in the case of a judgment or decree, includes stamped

3 [S 2] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

Subordination of Courts

Different rulings of different High Courts —Where there are different rulings of different High Courts on a particular point a Subordinate Judge should follow the decision in law of a Bench of the High Court to which he is subordinate unless the

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decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature (x)

4. [S. 4.] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force

Savings

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1) nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land

"Any special form of procedure"—It has been held having regard to these words that where two Judges differ in an appeal from the *Original* Side of the High Court the special procedure laid down in cl. 36 of the Letters Patent should be followed and not the rule laid down in s 98 of the Code (y)

5 [S. 4 A] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government may prescribe

Application of the Code to Revenue Courts

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature

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(x) *Pattu Lal* v *Parbati* (1915) 42 I A 155 160 37 All 359 366 29 I C 617, *Korban Ally* v *Sharoda Proshad* (1884) 10 Cal 82 *Sesamirao* v *Kashinath* (1891) 15 Bom 419 *Lalaji* v *Sakharam* (1893) 17 Bom 555, *Kamla Prasad* v *Pandey Ram* (1919) 4 Pat L J 565 51 I C 496

(y) *Bhagwandas* v *Bai Gulab* (1921) 49 I A 181 45 Bom 718 60 I C 8 ; *Surajmal* v *Horniman* (1918) 20 Bom L R 185 217 47 I C 449

6 [S 6] Save in so far as is otherwise expressly provided, *nothing herein contained* shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Pecuniary Jurisdiction

Pecuniary limits of jurisdiction—See notes to s 15 under the head ' Court of lowest grade competent to try a suit

Pecuniary jurisdiction in passing decrees—The jurisdiction of a Munsif in Bengal N W P and Assam extends to suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs 1 000 and in the Madras Presidency to suits of which the value does not exceed Rs 2 500 It has been held by the High Courts of Calcutta (z) Allahabad (a) Madras (b) and Patna (c) that where a suit is properly brought in the Court of a Munsif for recovery of possession of land and mesne profits prior to the date of the suit and mesne profits also from the institution of the suit which are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction The value of such a suit for the purposes of jurisdiction is the value of the immoveable property plus mesne profits up to the date of the suit Mesne profits after the date of the suit do not form part of the cause of action on which the suit is brought The forum of appeal also is determined by the value of the suit and not by the amount decreed See notes to s 38 Jurisdiction of Court executing decree and notes to s 96 Forum of appeal.

A sues *B* for possession of land valued at Rs 686 and for mesne profits up to the date of the suit valued approximately at Rs 200 and for mesne profits subsequent to the date of the suit not valued at all The suit is brought in the Court of a Munsif whose pecuniary jurisdiction is limited to Rs 1 000 A decree is passed in the suit for the plaintiff for possession and for mesne profits up to the date of the suit Subsequently the plaintiff applies to the Munsif for assessment of mesne profits after the date of the suit claiming Rs 60 000 for such profits According to the Calcutta Allahabad, Madras and Patna High Courts the Munsif can pass a decree for Rs 60 000 though the amount exceeds his pecuniary jurisdiction

7 [S 5] The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts

Provincial Small Cause Courts

(z) *Bidyadhar v Manindra Nath* (19?5) ?9 C [illegible]

(a) *Sudarshan Das v Ram Prasad* (1911) 33 All 97 7 I C 335 *Madho Das v Ramji* (1894) 16 All ?86

(b) *Arogya v Appachi* (190?) 25 Mad 543 *Kannayya v Venkata* (1917) 40 Mad 1 7 8 39 I C 439

(c) *Sheikh Mohammad v Maltab* (1917) 2 Pat L J 394 41 I C ?31 *Dinanath v Musst Mayawati* (19?1) 6 Pat L J 54 60 I C 346

Ss. 3-5.

decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature (x)

4. [S. 4.] Savings (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land

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v *Pandey Ram* (1919) 4 Pat L J 565, 51 I C 496

(y) *Bhadas* v *Bai Gulab* (1921) 48 I A 181 45 Bom 718 60 I C 8[illegible] *Surajmal* v *Hornman* (1918) 20 Bom L R 185 217 47 I C 449

8 [S 8] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay,

Presidency Small Cause Courts

Provided that—

(1) *the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act,* 1882, *and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court*

(2) *All rules heretofore made by any of the said High Courts under section* 9 *of the Presidency Small Cause Courts Act,* 1882, *shall be deemed to have been validly made*

The provisoes were inserted in the section by the Code of Civil Procedure Amendment Act I of 1914 s 2

PART I.

Suits in General.

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Courts to try all civil suits unless barred

9 [S. 11.] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred

Explanation —A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies

Alterations in the section —The words either expressly or impliedly barred have been substituted for the words barred by any enactment for the time being in force which occurred in s 11 of the Code of 1882 The latter words were held to mean *expressly* barred (h)

Onus —A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so (i)

Suits of a civil nature —Suits may be divided into two classes—(1) those which are of a civil nature and (2) those which are not of a civil nature It is suits only of a civil nature which a civil Court has jurisdiction to entertain A civil Court has no jurisdiction to try suits which are not of a civil nature A suit is *not* of a civil nature if the principal or only question in the suit is a caste question or a question relating to religious rites or ceremonies But when (1) a caste question or a question relating to religious rites or ceremonies is not the principal question in the suit, but is merely a subsidiary question and (2) *the principal question is of a civil nature, e g*, a question as to any right to property or to an office or to any other civil right, and (3) the principal question which is of a civil nature cannot be determined without deciding the caste question or question relating to religious rites or ceremonies, the Court has the power to decide the caste question or question relating to religious rites or ceremonies *to enable it to decide* the principal question (j) It is upon this principle that the Explanation to the section is based. We may therefore say that a suit is of a civil nature if the *principal* question in the suit relates to a civil right The mere fact that the determination of such a question depends entirely on the decision of caste questions or questions as to religious rites or ceremonies does not take the suit out of the category of suits of a *civil* nature (see the Explanation to the section) We now proceed to consider the leading cases in which the Courts have refused to try suits on the ground either (1) that the principal question in the suit was a caste question, or (2) that it related to religious rites or ceremonies

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(h) *Kishori Mohun* v *Chundra Nath* (1887) 14 Cal 644 649

(i) *Srinath Jagannatha* v *Kutumbarayudu* (1916) 30 Mad 21 22 25 I C 891

(j) *Lalji* v *Walji* (1895) 19 Bom 507 *Pragji* v *Govind* (1887) 11 Bom 534

S. 9.

Suits in which the principal question is a caste question are not suits of a civil nature—A caste is any well defined native community (be it Hindu or Mahomedan) governed for certain internal purposes by its own rules and regulations (*k*) A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations (*l*)

To determine whether or not a question is a caste question, the test is—Would the cognizance of the matter in dispute by the Court be an interference with the autonomy of the caste? Would the Court be deciding the question which the caste as a self governing body is entitled to decide for itself? If yes, the question is a caste question and no civil Court has jurisdiction to entertain it (*m*) Thus a caste may pass a resolution depriving a member of *man pan* invitation, or invitation to dinner, or to *munj* or other ceremonies, for an alleged breach of a caste rule. The excluded member has no remedy in law, for all that he has lost is a *social* privilege, and not a *legal* right, and the caste is the only tribunal to which a casteman deprived of that privilege can resort A civil Court has no power by its decree to compel the members of a caste to invite a casteman to dinner or to any ceremony (*n*) Similarly a Court has no power to compel barbers belonging to a certain caste to shave a casteman or to pare his nails though the party aggrieved may allege that he would lose caste by the loss of service at the hands of the barbers (*o*) On the same principle a member of a caste is not entitled to any remedy in law if the other members refuse to go to his house on the occasion of a death in his family and assist him in the removal of the dead body, though they may, in doing so, break a rule of the caste. It is not for a Court of law to enforce a caste rule or resolution: it is for the caste itself that makes the rule or passes the resolution to do so (*p*). Hence a Court will not compel a defaulting member to pay to the caste a sum of money which by a resolution of the caste every casteman is liable to pay on the occasion of a marriage in his family (*q*)

Expulsion from caste—To exclude a member of a caste from invitation to caste dinners or ceremonies is, as stated above, to deprive him of a *social* privilege But to *expel* him from the caste is to deprive him of a *legal right* which forms part of his *status* Hence a suit *will* lie for a declaration that the plaintiff is entitled to be re admitted into the caste and also for damages for expulsion from the caste (*r*) But to entitle the plaintiff to a decree, it must be shown that his excommunication was wrongful, and the Court will in such cases enquire into the validity of the sentence of excommunication Excommunication is wrongful, if a member is expelled from the caste without opportunity of explanation being offered to him (*s*) It is also wrongful if a member is expelled for an alleged breach of a caste rule which, as a matter of fact, he has not broken (*t*) In the mufassal of Bombay, however, a suit does not lie for *restoration* to caste, the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827, s 21 (*u*) But a suit is maintainable for "*damages*" on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party.

Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature.—Thus a suit will not lie to establish

(*k*) *Abdul Kadir* v *Dharma* (1896) 20 Bom 190
(*l*) *Appaya* v *Padappa* (1899) 23 Bom 122, 130, *Jethabhai* v *Chapsey* (1910) 34 Bom 467 481, 4 I C 108
[illegible]
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Suits for religious office—*Quaere whether every suit for a religious office is a suit of a civil nature?* The Explanation to the section assumes that a suit in which the right to an 'office' is contested is a suit of a civil nature. Now an office may be either secular or religious in its character. We are here principally concerned with an office of a religious character, for the question as to *religious* rites and ceremonies contemplated by the Explanation can only arise when the right to a *religious* office is contested. Religious offices may be divided into two classes, namely,—

I.—Those to which *fees* are appurtenant as of right, such as the office of the *Kazi* of Bombay, or of the *Joshi* of a village, or the *Upadhyaya* of a caste.

II.—Those to which no fees are attached, but which entitle the holder thereof to receive such *gratuities* as may be paid to him, such as the office of *pujaris* or officiating priests in a temple, or of the *Aya* of a *math*.

Fees are to be distinguished from *gratuities*. When fees are attached to an office, the holder of the office is entitled on performance of the services to the stipulated or customary fees. Thus a *Kazi* or *Joshi* is entitled on performing a marriage ceremony to the marriage fee, and if the fee is not paid to him, he may enforce payment by a suit. In fact, a fee is a sum which the holder of an office is entitled to demand as payment for the execution of functions attached to the office. Besides the fee paid to a *Kazi* or to a *Joshi* on the occasion of a marriage, there may be gratuities paid to him which are entirely voluntary in their character. If a person invites a *Joshi* for performing a marriage ceremony at his place, and pays him the fee, but no gratuity, a suit will not lie at the instance of the *Joshi* for payment to him of any sum by way of gratuity though it may be usual to pay gratuities on such occasions, the reason is that there is no *obligation in law* on the part of the person inviting a *Joshi* to make any payment by way of *gratuity* (*f*). The same remark applies to holders of religious offices referred to in class II above.

The question which concerns us at present is whether a suit will lie at the instance of the holder of a *religious office* for disturbing him in the exercise of his *office*? If the office is wrongfully usurped can the person claiming to be the rightful holder of the office sue the intruder in a civil Court for a declaration that he is entitled to the office? Will a civil Court entertain such a suit? To answer these questions we must deal with the two classes of religious offices separately.

As regards religious offices of the first class, that is, offices to which fees are attached, there is no doubt that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff. Such a suit is a suit of a civil nature (*g*).

Turning now to religious offices of the second class, the question that faces us is, whether a suit will lie for an office to which no fees are attached? Different views have been held on this point by different Courts. It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature, and will therefore be entertained by a civil Court though no emoluments are attached to the office at all. This conclusion is based upon the reasoning that a religious office, though no fees are attached to it, is an "office" within the meaning of the Explanation to this section and that the section assumes that a suit for an "office" is a suit of a civil nature. The office in that case was that of musicians who chanted holy songs in a

(*f*) *Muhammad* v. *Sayad Ahmed* (1861) 1 Bom. H. C. App. p. xxiii.

(*g*) *Muhammad* v. *Sayad Ahmed* (1861) 1 B. H. C. App. p. xviii [Kazi Joshi]; *Ghelabhai* v. *Hargowan* (1912) 36 Bom. 94, 12 I. C. 928; *Chintaman* v. *Murlidhar* (1921) 45 Bom. 234, 59 I. C. 271 [Upadhayaya—injunction granted against Panch of the caste on the ground that the hereditary office of a priest is in the nature of Vritti or immoveable property].

9. *satra* at a certain village (*h*) In another case, the office was that of a *shebait*, and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as *shebait* at the worship performed by votaries at the foot of a certain tree It was held that the suit was maintainable In this case also there were no *fees* attached to the office, but voluntary offerings were made by the votaries (*i*) It is worthy of note that in both these cases the office was one attached to a *place* as distinguished from an *absolutely personal* office

On the other hand, it has been held by the High Court of Madras that a suit does not lie for a religious office to which no fees are attached According to that Court a religious office to which no fees are attached is not an "office" within the meaning of this section (*j*) The office in one of these cases was that of priest of Samayacharm, of which the duties were to exercise spiritual and moral supervision over a certain class of persons

As regards Bombay decisions if we are to reconcile them all, we must divide them into two classes, namely (1) those in which the religious office is attached to a temple, shrine, or sacred spot, and (2) those in which the office is entirely personal in its character And it may be safely said that a suit will lie for a religious office which is attached to a place, though no fees are appurtenant to it, such as the office of officiating priests in a temple or of *Aya* of a *math* (*k*) But a suit will not lie for an office to which no fees are attached if the office be personal in its character such as the office of *Chalwady* (*l*) (bearer on public occasions of the insignia of a caste) or the office of *Guru* (*m*) The distinction between offices that are attached to a place such as a temple or a *math* and offices that are in their nature personal is our own, and it must be said that none of the Bombay decisions turns expressly on any such distinction This distinction has been devised to harmonize what would otherwise be a mass of conflicting decisions, though it must be observed that even then there remains one Bombay decision in which the office was a personal one and there were no fees attached to the office and yet it was held that a suit would lie for the office The principal question in that case was whether a suit lies for the office of *Khatib* (preacher), *regard being had to the fact that no fees were attached to the office*, and it was held that it does The Court said "Had it been the intention of the Legislature that such a suit should not lie, the same would have been clearly provided for" (*n*) But if it is a question of the intention of the Legislature, it may be said that the *Explanation* to the section, which did not occur in the Code of 1877, appears to have been suggested directly by a passage in a judgment in a Madras case decided in 1871 (*o*), which was approved in a subsequent case by the Privy Council (*p*), and the religious office in both those cases was one *to which fees were attached*

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The Patna High Court has held that a right to officiate at funeral ceremonies performed upon the banks of the Ganges between certain points, which did not carry any fees with it, but merely gratuities, cannot be enforced in a Civil Court (*r*)

Suits for recovery of fees attached to an office are suits of a civil nature, but not suits for recovery of gratuities.—It is settled law that if

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(*q*) *Chunnu Dat* v *Babu Nandan* (1910) 32 All 527 6 I C 2-3
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a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the *usurper* to recover the *fees* properly payable to him But the case is different where the payments are merely *voluntary*, and a suit will not lie to recover *voluntary gratuities* that may have been received by the usurper (*s*) The reason is that where *voluntary* offerings are made, they must be taken to have been intended for the very person who was then *actually* performing the ceremony, whether rightfully or wrongfully, and, further, that it is quite possible that no gratuities would have been given at all if the rightful owner officiated at the ceremony instead of the usurper (*t*) The same principles apply when a suit is brought by the lawful holder of an office against a *member* of the caste for employing the usurper for performing ceremonies which the rightful holder was entitled to perform Thus a village priest may be entitled by hereditary right to officiate and take fees in the families of a particular caste in the village, and if a member of the caste employs an intruder in the office to perform the ceremonies, the village priest is entitled to recover from the casteman the *fees* which would properly be payable to him if he had been employed to perform those ceremonies (*u*) But a suit will not lie against a casteman for a *gratuity* which the party might have refused to give if he had pleased (*v*) If for determining the plaintiff's right to the *fees* claimed it becomes necessary to determine incidentally the right to perform the ceremonies, the Courts should try and decide that right (*w*) The above principles have been held to apply to Vatandar barbers who are entitled to render services as barbers on ceremonial occasions and to receive the customary fees (*x*)

The cases in which a suit by the rightful owner of a religious office against a *usurper* for recovery of voluntary gratuities has been held not to be maintainable must be distinguished from those where a suit is brought by a sharer in a religious office against his *co sharers* for recovery of his share of the voluntary gratuities In the latter class of cases it has been held that a suit will lie, for the basis of the claim in such cases is an *agreement*, expressed or implied, that all the sharers should have a share in the gratuities (*y*)

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Suits relating to caste property —Suppose that a caste is divided into two factions, *F*1 and *F*2, and that *F*1 owns certain property which stands in the names of some of its members If these members secede from faction *F*1 and go over to faction *F*2, a suit will lie to recover the property from them at the instance of faction *F*1 (*a*). Here the subject matter of the suit is property belonging to *one section* of the caste, and the claim is against persons *outside* that section Suppose, next, that a caste owns a property purchased out of the caste funds, and that it is *subsequently* divided into two factions *F*1 and *F*2 If faction *F*2 happens at the time of the division to be in possession of the caste property, faction *F*1 cannot maintain a suit against faction *F*2 for recovery of one half of the caste property, or its value (*b*) Here the subject matter of the suit is *caste* property, and the claim is not against an outsider, but against *another section of the caste*

(*s*) *Sitaram Bhat* v *Sitaram Ganesh* (1869) 6 B H C 250 *Raja Valad* v *Krishnabhat* (1879) 3 Bom 232, *Hair* v *Bachu* (1916) 1 Pat L J 331, 35 I C 345

(*t*) *Kashi Chandra* v *Kailash Chandra* (1899) 26 Cal 356

[illegible] *Che* 12 I 906 [illegible] (suit [illegible] his dis- ciples]

(*w*) *Krishnama* v *Krishnasami* (1879) 2 Mad. 62 6 I A 120

(*x*) *Bhagoji* v *Babu*(1920)44Bom 733, 57 I C 135

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(z) *Barsati* v *Chamru* (1907) 29 All 683

(a) *Mehta Jethalal* v *Jamiatram* (1888) 12 Bom 225 *Pragji* v *Govind* (1887) 11 Bom 534

(b) *Girdhar* v *Kalya* (1881) 5 Bom 83 *Nemchand* v. *Savaichand* (1886) 5 Bom 84 (footnote).

S. 9.

As regards user of caste property, it has been laid down that a majority of a caste has the right to regulate the use of the property, and the minority is bound by the resolution of the majority, provided the resolution is not so subversive of the interests of the minority as to amount to a complete denial of their rights. Thus if the majority of a caste passes a resolution that the caste oart should not be used for feasting any Brahmans, and the minority invites Brahmans to a feast in the oart, a suit will lie to restrain the minority from using the oart in contravention of the resolution (c).

Suits for inspection of accounts of caste property.—Such a suit relates purely to a caste question, and it cannot therefore be entertained by a civil Court (d).

Interference with temple property.—Removal or alteration of namams or religious marks in a temple, which are recognized as the badges of a particular religious denomination, amounts to an interference with *property* and is a ground of action in civil Courts (e).

Interference with right of worship.—Suits for a declaration of the right to worship or to offer prayers at a certain place are suits of a civil nature. It often happens that the members of a particular class are alone entitled to worship in the sanctuary of a temple and to perform certain portions of the religious worship. Such a right is one of a civil nature and it may be enforced by a suit in a civil Court (f). Similarly the right of burial is a civil right and it has accordingly been held that an interference with the rights of the relatives of a deceased Mahomed in to recite prayers over his body before burial in front of a particular mosque being an invasion of a civil right may be enforced by suit (g).

Religious processions.—Members of a religious body possess the right to conduct a religious procession with its appropriate observances along a highway and a suit will lie against those who prevent the procession with its observances. The worshippers in a mosque or temple which abut on a high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. But no one sect can claim the exclusive use of the highway for their worship (h).

Suit to declare election of directors void and for injunction.—Such a suit is of a civil nature and the Court is entitled to take cognizance of it. The matters involved in such a suit are not matters of internal management of the company (i).

Suit to administer the estate of a living Hindu debtor.—Such a suit is not cognizable by a civil Court (j).

Suits expressly barred.—The general rule of law is that when a legal right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of a suit, the ordinary civil Courts are bound to entertain the claim (k). This is in substance the rule laid down in the present section which provides that suits, though of a *civil* nature, are not triable by civil Courts, if the cognizance of such suits is *expressly* or *impliedly* barred. By expressly barred is meant barred by any enactment for the time being in force. Thus it is provided by the Income Tax Act,

(c) *Lalji v. Balji* (1895) 19 Bom. 50.
(d) *Jethabhai v. Chapsey* (1909) 34 Bom. 467, 4 I. C. 103.
(e) [illegible]
(f) [illegible]
(g) [illegible]
(h) [illegible]
(i) *Sarat Chandra v. Tarak Chandra* (1924) Cal. 916, 83 I. C. 405, (1924) A. C. 932.
(j) *Gangaram v. Nagindas* (1908) 32 Bom. 381.
(k) *Lalli v. Corporation of Madras* (1915) 38 Mad. 41, 16 I. C. 9 1.

s 39, that ' no suit *shall lie* in any civil Court to set aside or modify any assessment made under that Act (*l*) Similarly, it is provided by the Pensions Act 23 of 1871, s 4, that except as provided by that Act, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government (*m*) But the provision must be *express* to exclude a suit of a civil nature from the cognizance of ordinary Courts The mere fact that an enactment provides a summary remedy in a certain case does not constitute a bar to a regular suit. We may turn for an instance to O 21, r 95 (Code of 1882, s 318) That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment debtor But it does not say that no *suit shall lie* to recover possession The purchaser may therefore resort to the remedy provided by that section or he may at his option bring a regular suit (*n*) Further, the jurisdiction of a civil Court is not excluded unless the cognizance of the entire suit as brought is barred (*o*) The general rule is that statutes affecting the jurisdiction of Courts are to be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (*p*)

It has been held by the High Court of Bombay that the jurisdiction of civil Courts to try suits brought by superior holders to recover their dues from inferior holders is not barred by s 85 of the Bombay Land Revenue Code [Act 5 of 1879] (*q*) It has been held by the same Court that s 4 (c) of the Bombay Revenue Jurisdiction Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue (*r*)

Suits impliedly barred —Besides suits of which the cognizance is expressly barred there are suits which are barred by general principles of law, such as suits relating to acts of State and public policy Thus a suit will not lie against the Secretary of State for damages for publication of a Government resolution in the Government Gazette respecting the conduct of a public servant, though it may amount to a libel Such a publication is an act of State in respect of which no action lies (*s*) Similarly a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness The ground of this principle is, ' that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury (*t*) See notes to s 79 below See also notes Alterations in the section, on p 18 above

Criminal Procedure Code, 1898, ss 523-524 —A civil Court has jurisdiction to entertain a suit for the recovery from Government of the proceeds of the sale of property attached and sold under ss 523 and 524 of the Criminal Procedure Code (*u*)

Political questions —The Courts of British India may determine the title of property situated within their jurisdiction belonging to a Native Prince, though a

(*l*) *Forbes* v *Secretary of State* (1915) 42 Cal 151, 26 I C 893

(*m*) *Balkrishna* v *Dattatraya* (1918) 42 Bom 257 45 I C 580

(*n*) *Kishori* v *Chunder Nath* (1887) 14 Cal 644 See also *Naginlal* v *Official Assignee* (1911) 35 Bom 473 12 I C 391 *Duni Chand* v *Muhammad* (1917) P R no 22 p 83 40 I C 220 [Suits against Official Assignee] Contrast *Narsha* v *Lagmya* (1889) 13 Bom 83 *Bhira* v *Vithya* (1901) 25 Bom 186 *Mahadu* v *Krishna* (192.) 47 I

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(*q*) *Vishwanath* v *Kondaji* (1918) 42 Bom 49, 43 I C 995

(*r*) *Gangaram* v *Dinkar* (1913) 37 Bom 542, 20 I C 528

(*s*) *Jehangir* v *Secretary of State* (1903) 27 Bom 189

(*t*) *Baboo Gunesh Dutt* v *Mungneeram* (1873) 11 B L R 321 *Mugnee Ram* v *Ganesh* (1865) 5 W R 134 *Chidambara* v *Thirumani* (1887) 10 Mad 87 *Nathaji* v *Lalbhai* (1890) 14 Bom 97 *Templeton* v

P [illegible]

[illegible] 31 I C 495

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(*i*) *Sarat Chandra* v *Taral Chandra* (1924) Cal 916 82 I C 405 (24) A C 942

(*j*) *Gangaram* v *Nagindas* (1908) 32 Bom 351

(*k*) *Lalli* v *Corporation of Madras* (1915) 38 Mad 41 16 I C 971

s 39, that "*no suit shall lie* in any civil Court to set aside or modify any assessment made under that Act (*l*) Similarly, it is provided by the Pensions Act 23 of 1871, s 4, that except as provided by that Act, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government (*m*) But the provision must be *express* to exclude a suit of a civil nature from the cognizance of ordinary Courts The mere fact that an enactment provides a summary remedy in a certain case does not constitute a bar to a regular suit. We may turn for an instance to O 21, r 95 (Code of 1882, s 318) That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment debtor But it does not say that no *suit shall lie* to recover possession The purchaser may therefore resort to the remedy provided by that section or he may at his option bring a regular suit (*n*) Further, the jurisdiction of a civil Court is not excluded unless the cognizance of the entire suit as brought is barred (*o*) The general rule is that statutes affecting the jurisdiction of Courts are to be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (*p*)

It has been held by the High Court of Bombay that the jurisdiction of civil Courts to try suits brought by superior holders to recover their dues from inferior holders is not barred by s 85 of the Bombay Land Revenue Code [Act 5 of 1879] (*q*) It has been held by the same Court that s 4 (c) of the Bombay Revenue Jurisdiction Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue (*r*)

Suits impliedly barred —Besides suits of which the cognizance is expressly barred there are suits which are barred by general principles of law, such as suits relating to acts of State and public policy Thus a suit will not lie against the Secretary of State for damages for publication of a Government resolution in the Government Gazette respecting the conduct of a public servant, though it may amount to a libel Such a publication is an act of State in respect of which no action lies (*s*) Similarly a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness The ground of this principle is that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely, should be an indictment for perjury (*t*) See notes to s 79 below See also notes, Alterations in the section, on p 18 above

Criminal Procedure Code, 1898, ss 523-524 —A civil Court has jurisdiction to entertain a suit for the recovery from Government of the proceeds of the sale of property attached and sold under ss 523 and 524 of the Criminal Procedure Code (*u*)

Political questions —The Courts of British India may determine the title of property situated within their jurisdiction belonging to a Native Prince, though a

(*l*) *Forbes* v *Secretary of State* (1915) 42 Cal 151, 26 I C 893

(*m*) *Balkrishna* v *Dattatraya* (1918) 42 Bom 257 45 I C 580

(*n*) *Kishori* v *Chunder Nath* (1887) 14 Cal 644 See also *Vaginlal* v *Official Assignee* (1911) 35 Bom 473 12 I C 391 *Buni Chand* v *Muhammad* (1917) P R no 22 p 83 40 I C 220 [Suits against Official Assignee] Contrast *Parsha* v *Lagmya* (1889) 13 Bom 83, *Bhira* v *Vithya* (1901) 25 Bom 186

(*q*) *Vishwanath* v *Kondaji* (1918) 42 Bom 49, 43 I C 995

(*r*) *Gangaram* v *Dinkar* (1913) 37 Bom 542 20 I C 526

(*s*) *Jehangir* v *Secretary of State* (1903) 27 Bom 189

(*t*) *Baboo Gunesh Dutt* v *Mungneeram* (1872) 11 B L R 321 *Mugnee Ram* v *Ganesh* (1865) 5 W R 134 *Chidambara* v *Thirumani* (188) 10 Mad 87, *Nathuji* v *Jalbhai* (1890) 14 Bom 97 *Templet* v

political question is involved (t) But where the real object of the suit is to settle the right of succession to the throne, and the property right involved is only contingent, the Court should decline jurisdiction (w)

10. [S 12] No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council

Stay of suit

Explanation —The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action

Alterations in the section —The words proceed with the trial have been substituted for the word try The words except where a suit has been stayed under section 20 which occurred at the commencement of the corresponding section of the Code of 1882 the words for the same relief which occurred after the words "previously instituted suit and the words whether superior or inferior which occurred after the words any other Court have been omitted The words litigating under the same title are new

Scope and object of the section —The present section provides that where a suit is instituted in a Court to which the Code applies, the Court shall not proceed with the trial of the suit if—

first the matter in issue in the suit is also directly and substantially in issue in a previously instituted suit between the same parties,

secondly the previously instituted suit is pending—

(a) in the same Court in which the subsequent suit is brought *or*

(b) in any other Court in British India (whether superior, inferior or co-ordinate) *or*

(c) in any Court beyond the limits of British India established or continued by the Governor General in Council, *or*

(d) before His Majesty in Council, and

thirdly where the previously instituted suit is pending in any of the Courts mentioned in cl (b) or cl (c) such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit (x)

The object of the section is to prevent Courts of concurrent jurisdiction from *simultaneously* trying two parallel suits in respect of the same matter in issue *B*, residing in Calcutta, has an agent *A* at Calicut employed to sell his goods there *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and *B* During the pendency of the suit in the Calicut Court, *B* institutes a suit against *A* in Calcutta for an account and for damages caused by his alleged negligence Here

(t) *Neel Kristo Deb* v *Beer Chandra* (1869) 12 M I A 523

(w) *Samarendra* v *Birendra* (1908) 12 C W N 777

(x) *Pala Mal* v *Rajnarain* (1919) P R no 114 p 293 53 I C 467

the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit; further both the suits are between the same parties; therefore, if the Court at Calicut is a Court of jurisdiction competent to grant the relief claimed in *B*'s suit, the Calcutta Court must not proceed with the trial of *B*'s suit, and the suit in the Calicut Court, being the one instituted *prior in point of time*, should alone be proceeded with (*y*). But if *A* was *B*'s agent at Pondicherry instead of at Calicut, and the suit was brought by him in the Pondicherry Court, the Calcutta Court would not be precluded from proceeding with the trial of *B*'s suit, the Pondicherry Court being a "foreign" Court. See the Explanation to the section.

Whether the subject-matter of both suits must be the same.—S. 12 of the Code of 1882 contained the words "for the same relief" after the words "previously instituted suit." Hence it was necessary for the application of the section not only that the matter in issue in the second suit should also be directly and substantially in issue in the first suit, but that the second suit must be *for the same relief* as that claimed in the first (*z*). The words "for the same relief" have been omitted in the present section. The omission of these words, it has been held, does not alter the law as it stood under the old section. In a recent Calcutta case (*a*), Rankin J. said: "It does not follow, because the words 'the same relief' are no longer in the section, that sec. 10 is applicable to suits for recovery of successive rents." The learned Judge held that the *subject matter* of both the suits must be the same, and that the section does not apply to claims for rent or for debt which had *not become due when the first suit was filed*. The same view was taken in a recent Madras case where it was held that a suit could not be stayed under this section even if the main issue in both the suits was the same, if the subject matter of the second suit was different from that of the first suit (*b*). Thus a previous suit for rent, or for pension, or for other recurring liability for a particular year, is no bar to the trial of a subsequent suit for rent, or for pension or other recurring liability for subsequent years. The effect of these decisions is that the expression "matter in issue" in this section is equivalent to "subject matter."

Previously instituted suit.—Note that it is the pendency of the previously instituted *suit* that constitutes a bar to the trial of the subsequent suit. The word "suit" includes appeal. It also includes an appeal to His Majesty in Council (*c*). But it does not include an *application for leave to appeal* to His Majesty in Council, for the application may not be granted at all, and, if granted, the applicant may not prefer any appeal (*d*). It seems that it does not also include applications under s. 47 (*e*).

Shall not proceed with the trial.—These words indicate the action to be taken by the Court under this section. The second suit is not to be *dismissed* as barred; it is only the *trial* of the suit that is not to be proceeded with. That may render the institution of a subsequent suit unnecessary in many cases, but the section is *no bar to the institution of such suit*. Nay, there are cases in which it is necessary for a party to institute a regular suit to establish a right claimed by him, and failure to institute the suit within the period of limitation may preclude the party from asserting the right in any other suit or proceeding. Suits referred to in O. 21, r. 63 (Code of 1882,

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(*y*) *Padamsee* v. *Lakhamsee* (1916) 43 Cal. 144, 33 I. C. 283; *Meckjee* v. *Kasowji* (1879) 4 C. L. R. 282.

(*z*) *Balkishan* v. *Kishan Lal* (1889) 11 All. 148; *Ramalinga* v. *Ragunatha* (1897) 20 Mad. 418, 420; *Bissessur* v. *Gunput* (1880) 8 C. L. R. 113; *Raja Ranajit Singha* v. *Bhagabutty* (1900) 7 C. W. N. 720.

(*a*) *Chowdhury Jamini Nath* v. *Midnapur Zemindary Co.* (1923) 27 Cal. W. N. 772, 774, 75 I. C. 231, ('23) A. C. 716; *Bepin* v. *Jogendra* (1916) 24 Cal. L. J. 514, 36 I. C. 641; *Mohar aja Kesho Prasad* v. *Shiva Saran* (1919) 4 Pat. L. J. 537, 51 I. C. 36 (pension).

(*b*) *Kuberan* v. *Koman* (1925) 48 Mad. L. J. 251, 88 I. C. 421, ('25) A. M. 574.

(*c*) 27 Cal. W. N. 772, 75 I. C. 231, ('23) A. C. 716, *supra*.

(*d*) *Nainappa* v. *Chidambaram* (1898) 21 Mad. 18.

(*e*) *Venkata* v. *Venkatarama* (1899) 22 Mad. 256.

s 283) are suits of this character This section does not dispense with the necessity of instituting such suits (*f*) A suit may be stayed under this section even after the hearing has commenced (*ff*)

"Between the same parties —The mere fact that the first suit is between Z and J as plaintiffs and W X and Y as defendants and the second suit is between W as plaintiff and Z J and S (not a party to the first suit) as *defendants will not take the case out of the operation of this section if the other* conditions of the section are satisfied (*g*)

Interlocutory orders pending stay—A stay order under this section does not take away the power of the Court in the stayed suit to make interlocutory orders such as orders for a receiver or an injunction or an attachment before judgment (*h*)

Inherent power to grant stay—See notes to O 39 r 1

11 [S 13] No Court shall try any suit (*p* 39) or issue in which the matter directly and substantially in issue (*pp* 31 35) has been directly and substantially in issue in a former suit (*p* 37) between the same parties (*p* 49) or between parties under whom they or any of them claim (*p* 50) litigating under the same title (*p* 54) in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised (*p* 55) and has been heard and finally decided (*p* 61) by such Court

Res Judicata

Explanation I—The expression former suit shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto (*p* 37)

Explanation II—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court (*p* 60)

Explanation III—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other (*p* 31)

Explanation IV—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit (*p* 39)

Explanation V—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused (*p* 60)

(*f*) *Vemagauda* v *Paresha* (1893) [illegible] Bom 640
(*ff*) *Wahid un Nissa* v *Zaman* (1920) 4[illegible] All [illegible]90 55 I C 89 ([illegible]) A B [illegible]76
(*g*) *Wahid un-Nissa* v *Zaman* (1920) 4[illegible] All [illegible]90 55 I C 89 See also *M Khan* v *Gill & Co* (1919) [illegible] L R 963
(*h*) *Annaji* v *Janaji* (1922) 46 Bom 431 64 I C 58 ([illegible]) A I [illegible]76

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating (*p. 51*).

S.

Alterations in the section —

1 Explanation I is new See notes under the head Former suit, p 37 below

2 Explanation II is also new See notes, p 60 below

3 Explanation IV to s 13 of the Code of 1882 has been omitted The reason of the omission is stated to be that it was liable to misconstruction, and that the law was well established apart from the Explanation The words of the Explanation if literally interpreted, would relieve parties from the bar of res judicata whenever there existed a latent power of alteration: see s 149, O 20, r 3, and O 20, r 11

4 The words "public right" have been added into Explanation VI in view of the provisions of section 91 relating to public nuisances

Res Judicata —The present section deals with the doctrine of res judicata The leading case on the subject is the *Duchess of Kingstone's* case (i) Contrasting the present section with s 10, it may be said that the rule in s 10 relates to *res sub judice*, that is, a matter which is pending judicial inquiry, while the rule in the present section relates to res judicata, that is, a matter adjudicated upon or a matter on which judgment has been pronounced Section 10 bars the trial of a *suit* in which the matter directly and substantially in issue is *pending* adjudication in a previous suit The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue *has already been* adjudicated upon in a previous suit If *A* sues *B* for damages for breach of a contract, and the suit is decided against *A* no Court will try a subsequent suit by *A* against *B* for damages for breach of the same contract This is the doctrine of res judicata stated in its simplest form The question of *A's* right to claim damages from *B* having been *decided* in the previous suit, it becomes res judicata, and it cannot therefore be retried in another suit It would be useless and vexatious to subject *B* to another suit for the same cause Moreover, public policy requires that there should be an end of litigation The rule of res judicata may thus be put upon two grounds—the one, the hardship to the *individual* that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the *State* that there should be an end of litigation (j) Looking at the matter from the side of jurisprudence it may be said, that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit of *A*, it being *merged* in the judgment in the first (k) For what is *A's* cause of action in the subsequent suit? It is that he has sustained damages by reason of failure on the part of *B* to perform a contract with him But this cause

(i) 2 Smith's L C 731
(j) *Lockyer* v *Ferryman* (1877) L R 2 A C 519

(k) *King* v *Hoare* (1844) 13 M & W 494, 504 *Kendal* v *Hamilton* (1879) L R 4 A C 504, 526

S. 11. of action is the same as that in the first suit, and there being a judgment pronounced upon it in that suit it is merged in that judgment The cause of action having *merged* in the judgment, it is *extinct* in the eye of the law, and incapable of sustaining the subsequent suit

Section not exhaustive.—Sec 11 of the Code provides that a decision on a matter directly and substantially in issue in a *former suit* may be res judicata in a subsequent proceeding But the section is not exhaustive of the circumstances in which an issue is res judicata The plea of res judicata rests on the principle that there must be a finality in litigation, and the plea still remains apart from the limited provisions of the Code Hence an issue may be res judicata though it may not have been decided in a *former suit* Thus a decision on a question whether a gift over was valid in an administration suit may be res judicata in a subsequent proceeding in the *same* suit (*l*) It has similarly been held that a decree on a dispute as to the title to receive compensation under the Land Acquisition Act I of 1894, sec 31 (2) the decree not being appealed from, renders the question of title res judicata in a subsequent suit between the parties to the dispute or those claiming under them whether or not the decree is to be regarded as one in a former suit within the meaning of this section (*m*) The binding force of such a judgment in such a case as the present depends not upon s 13 of Act 10 of 1877 (s 11 of the present Code) but upon general principles of law If it were not binding there would be no end to litigation (*n*) On the same principle it has been held that an order passed after contention in a probate proceeding is res *judicata in a subsequent proceeding against the caveators who contested it* (*o*) See notes Orders in execution proceedings on p 68 below

Conditions of res judicata—It is not every matter decided in a former suit that can be pleaded as res judicata in a subsequent suit To constitute a matter res judicata the following conditions must concur

I —The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue*, either actually (*Explanation III*) or constructively (*Explanation IV*) in the former suit (*pp 31-39*)

II The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim* *Explanation VI* is to be read with this Condition (*p 49*)

III —The parties as aforesaid must have *litigated under the same title* in the former suit (*p 54*)

IV —The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which *such issue is subsequently* raised. *Explanation II* is to be read with this Condition (*p 55*)

V —The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit *Explanation* I is to be read with this Condition (*p 61*)

We proceed to consider the above Conditions in order

(*l*) *Hook* v *Administrator-General of Bengal* (1921) 48 I A 187 48 Cal 499 60 I C 631 *Badar Bee* v *Habib Merican Noordin* 1909] A C 615 623

(*m*) *Ramachandra* v *Ramachandra* (1922) 49 I A 129 45 Mad 320 67 I C 403 (22) A P C 80

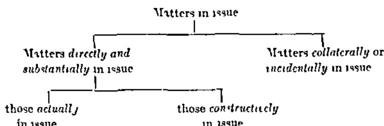
(*n*) *Ram Kirpal* v *Rup Kuari* (1884) 11 I A 37 6 All 269

(*o*) *Venkataratnam* v *Ranamandara* (1924) 66 Mad L J 393 79 I C 44 (24) A M 573

CONDITION I :—Explanation III herein

A —Matter directly and substantially in issue.

The following table sets forth the several matters which we have to consider under Condition I —



Matter in issue and pro forma defendant —It is only a matter directly and substantially in issue that can constitute res judicata In other words, to constitute a matter res judicata it must have been, in the first place, *in issue* in the former suit, and, in the next place, it must have been in issue in that suit *directly and substantially* If a matter was *not in issue at all* in the former suit, it is clear that it could not constitute res judicata in the subsequent suit If *A* sues *B* for damages for breach of a contract, and *B* denies the contract, the *factum* of the contract is *in issue* between *A* and *B* This is an illustration of the case in which a matter *is* in issue between the parties to a suit There is one class of cases in which a matter put in issue by a plaintiff in a suit *can never be in issue* as between him and a defendant in that suit Those are cases in which there are two or more defendants, and there is no relief sought by the plaintiff against a *particular* defendant or set of defendants A defendant against whom no relief is claimed is called *pro forma* defendant, he is merely a *formal* party to the suit For it must be remembered that a person may be joined as defendant in a suit though no relief is claimed against him if his presence before the Court is necessary to enable the Court effectually and completely to adjudicate upon the question involved in the suit [see O 1 r 10 (2) Code of 1882 s 32] *A* claiming to be entitled to possession of a certain tank as tenant of *X* sues *B* to recover possession thereof from him *X* is joined as defendant but there is no relief claimed against him The suit is dismissed on a finding that *B* and not *X* is the owner of the tank Subsequently *X* sues *B* to recover possession of the tank *B* contends that the suit ought to be dismissed, on the ground that the matter of the ownership of the tank was in issue in the former suit, and it was decided in his favour in other words, that the suit is barred as res judicata. The suit is not barred as res judicata for the matter of the ownership of the tank in the former suit was in issue between *A* and *B*, and not between *X* and *B* *X* being merely a formal party to that suit (*p*)

Matter directly and substantally in issue: Explanation III —It is not enough to constitute a matter res judicata that *it was in issue* in the former suit It is further necessary that it must have been in issue *directly and substantially* A matter cannot be said to have been directly and substantially in issue in a suit, unless it was *alleged* by one party *and denied or admitted* either expressly or by necessary implication by the other It is not enough that the matter was *alleged* by one party (*q*)

(*p*) *Brojo Behari Mitter* v *Kedar Nath* (1886) 12 Cal 580 *Ramdas* v *Vazirsaheb* (1901) 25 Bom 589 *Malhi* v *Inam ud-din* (1905) 27 All 59

(*q*) *Sheo Paran* v *Sheo Sahai* (1884) 6 All 358, 367

At the same time it is not necessary to constitute a matter "directly and substantially" in issue that a *distinct* issue should have been raised upon it, it is sufficient if the matter was in issue *in substance* (r) Similarly an issue is res judicata when the judgment of an appellate Court shows that the issue was treated as material, and was decided although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (s)

Matter collaterally or incidentally in issue—Every suit *must* involve a matter directly and substantially in issue It *may* also involve a matter "collaterally or incidentally in issue To constitute a matter res judicata it is necessary that it must be in issue directly and substantially in the suit under trial and that it must have been in issue also directly and substantially as distinguished from collaterally or incidentally, in a former suit

All matters involved in a suit may be directly and substantially in issue but they cannot all be "collaterally or incidentally in issue A *collateral* or *incidental* issue is one that is ancillary to a *direct and substantive* issue the former is an *auxiliary* issue, the latter the *principal* issue When we speak of a matter as being collaterally or incidentally in issue in a suit it is understood that there is another matter which is 'directly and substantially in issue in *that suit* A matter collaterally or incidentally in issue is *ancillary* or *auxiliary* to a matter directly and substantially in issue

Distinction between matter "directly and substantially" in issue and matter "collaterally or incidentally" in issue—The leading case on the subject is *Barrs* v *Jackson* (t) Every suit *must* involve a matter or matters in respect of which relief is claimed by the plaintiff It *may* also involve a matter or matters which though there is no relief claimed in respect of them are brought in issue for the purpose of deciding on the matter or matters in respect of which relief is claimed

Matter directly and substantially in issue—Every matter in respect of which relief is claimed in a suit is necessarily a matter directly and substantially in issue

Illustrations

1 *A* sues *B* for the rent due for the year 1907 The defence is that no rent is due Here the claim for rent is the matter in respect of which relief is claimed This therefore is a matter directly and substantially in issue

2 *A* sues *B* (1) for a declaration of title to certain lands, and (2) for the rent of those lands *B* denies *A*'s title to the lands, and contends that no rent is due Here there are two matters in respect of which relief is claimed, namely, (1) the matter of title, and (2) the claim for rent Both these are matters "directly and substantially in issue

Matter collaterally or incidentally in issue—A matter in respect of which no relief is claimed but which is put in issue for the purpose of enabling the Court to adjudicate upon a matter in respect of which relief is claimed, may be either directly and substantially in issue or it may be in issue 'collaterally or incidentally' It would be a matter 'directly and substantially in issue, if it was necessary to decide it to find on the principal issue and if the judgment was based upon it Otherwise it would be a matter collaterally or incidentally in issue

Examination of pleadings and judgment—Whether a matter has been dealt with in manner aforesaid is to be determined by a reference to the plaint, the written statement, the issues and the judgment The decree may also be referred to, but it is not enough to refer to the decree *without* the judgment for a decree states merely how a suit is

(r) *Sootjomonee* v *Suddanund* (1874) 12 B L R 304 315 Sup Vol I A 212
(s) *Midnapur Zamindary Co Ltd* v *Naresh Narayan Roy* (1924) 51 I A 293 51 Cal 631, 80 I C 827 (24) A PC 144
(t) (184.) 1 Y & C Ch Cas 586

disposed of, and it is in the judgment that the findings on the issues are recorded (u) The judgment is admissible under s 40 of the Evidence Act See O 20, rr 5 and 6 (Code of 1882, ss 204 and 206)

In *Sheoparsan* v. *Ramnandan* (v), the Judicial Committee, referring to the rule of *res judicata*, observed that ' the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law "

Rent suits and " matter directly and substantially " in issue.—We now turn to cases in which the distinction between a matter " directly and substantially " in issue and a matter " collaterally or incidentally " in issue arises frequently These cases may be divided into the following three classes —

A —Where the first suit is for *rent*, and the subsequent suit is for *title*

B —Where both suits are for *rent* or other recurring liability

C —Where both suits relate to the *rate* of rent of the *area* for which rent is payable

We shall deal with these three classes in order

A First suit for rent, subsequent suit for title —In this class of cases it is clear that the subsequent suit being one for *title*, the question of title is a matter " directly and substantially " in issue in that suit Whichever party therefore raises the plea of res judicata in that suit must show that the question of *title* was also " directly and substantially " in issue in the former suit, that is, in the previously decided suit If the question of title has been in issue *in its entirety* in the former suit, it will be said to have been ' directly and substantially " in issue in that suit But if the issue in the former suit does not cover the *entire* question of title, in other words, if it falls short of *going to the very root of the title*, and is confined only to some of the *incidents* of title, the question of title will be said to have been " collaterally or incidentally ' in issue in the former suit (w)

Illustrations

(a) *A*, claiming to be the *chela* and heir of a deceased *mohunt*, sues *B* (a tenant) for the *rent* of certain lands forming part of the estate of the *mohunt* *C* claims that he, and not *A*, is the *chela* and heir of the deceased and that he is therefore entitled to the rent *C* is thereupon added as a defendant to the suit (see O 1, r 10, Code of 1882, s (32) The issues raised are—

1 Whether *A* or *C* is the *chela* and heir of the *mohunt* ?

2 Whether any and what rent is due by *B* ?

The Court finds that *A* is the *chela* and heir of the *mohunt* It also finds that there is a sum of Rs 2,500 due by *B* for rent and it decrees *A*'s claim

Subsequently *C* sues *A* for a declaration that he is the *chela* and heir of the *mohunt* and claims that as such he is entitled to the *whole* of the property left by the *mohunt* *A* contends that the question, who is the *chela* and heir of the deceased is res judicata Is the question res judicata ? The answer is that it is, for though the former suit was for rent, the entire question of *title* to the property of the deceased was directly

(u) *Kali Krishna* v *Secretary of State* (1889) 16 Cal 173 183 15 I A 186 193 *Pun Bahadur's case* (1885) 11 Cal 301 310 12 I A 23 *Soorjomonee* v *Suddanund* (1872) 12 Beng L R 304 *Girdhar* v *Dayabhai* (1884) 8 Bom 174 180, *Ghela* v *Sankalchand* (1894) 18 Bom 597 601 *Amriteswari* v *Secretary of State* (1897) 24 Cal 504 519 24 I A 33 *Jalasutram* v *Bommalevara* (1906) 29 Mad 42 *Kurrutulain* v *Nusbat ul Dowla* (1906) 33 Cal 116, 32 I A 244 *Mitar Poddar* v *Jadab Chandra* (1917) 2 Pat L J 159 38 I C 211 *Raja Sashikanta* v *Raja Sarat Chandra* (1921) 34 Cal L J 415

(v) (1916) 43 I A 91 99 43 Cal 694 706 33 I C 914

(w) *Gobind* v *Taruck* (1878) 3 Cal 145 *Radha* v *Monohur* (1888) 15 Cal 756 15 I A 97 *Kasiswar* v *Mohendra Nath* (1898) 25 Cal 136 *Dwarkanath* v *Ramchand* (1899) 26 Cal 428.

11. and substantially in issue in that suit and it was decided against *C* *Toponidhee* v. *Sreeputty* (1880) 5 Cal 832

Note —In this and the following illustrations it is assumed that the other conditions of res judicata are present

(b) *A*, a Hindu, dies leaving a widow and a brother *C* The widow sues *B* (a tenant) for the rent of certain property alleging that it was the *separate* property of her deceased husband. *C* claims to be entitled to the rent on the ground that it was the *joint* property of himself and his deceased brother and that he became entitled to it by survivorship *C* is thereupon added as a defendant to the suit The issues are—

1 Whether the deceased alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with *C* ?

2. Whether any and what rent is due by *B* ?

The Court finds on the first issue that the deceased alone received the whole rent in his lifetime (The finding on the second issue is unnecessary for our present purposes)

Subsequently *C* sues the widow for a declaration that he and his brother were joint and claims the said property by right of survivorship. The question whether the deceased and *C* were joint or separate is not res judicata, for it was not directly and substantially in issue in the former suit It was in issue in that suit only "collaterally or incidentally for it will be seen on referring to the first issue in that suit that it did not cover the *entire* question of *C*'s *title* but related merely to the joint or separate receipt of *rent* *Pun Bahadur* v *Lucho Koer* (1885) 11 Cal 301 12 I A. 23 *Srihari* v *Khitish Chandara* (1897) 24 Cal 569

B *Both suits for rent or other recurring liability* —The same principles that apply to the preceding class of cases also apply here Thus where *A* sues *B* for rent due for a *particular period* and the defence is that *A* has no title to the land of which the rent is claimed, then, if a *direct* issue is raised and decided on the question of title the decision will operate as res judicata in a subsequent suit by *A* against *B* for the rent for a *subsequent period* either of the same (*x*) or other (*y*) property held under the same title But if there is no *direct* issue raised on the question of title, and the finding falls short of going to the *very root of the title* upon which the claim for rent is based, it will not have the effect of res judicata If the question of title is gone into in the previous suit, not as if the right of rent were sought to be established *for one particular year* but *once for all*, it will be said to have been *directly and substantially* in issue But if the question of title is gone into in the previous suit not as if the right of rent were sought to be established *once for all*, but for one particular year, it will be said to have been in issue *collaterally or incidentally* These principles also apply to other cases of recurring liability, such as malikana (*z*) maintenance (*a*) interest (*b*) annuity (*c*), &c

Illustration

A sues *B* for rent due for the year 1903. The defence is that the land is rent free An issue is raised, whether the land is rent free The Court finds that the land is rent free, and *A*'s suit is dismissed Subsequently *A* sues *B*, claiming rent for the year 1904. *B* again sets up the same defence, namely, that the land is rent free Here the question of *A*'s right to recover the rent having been *directly and substantially*' in issue in the previous suit the suit for the rent for 1904 is barred as res judicata *Rakhal Doss* v *Heera* (1874) 22 W R. 282, *Venkatachalapati* v *Krishna* (1890) 13 Mad 287, *Vishnu* v *Pamling* (1902) 26 Bom. 25, *Natesa* v *Venkatarama* (1907) 30 Mad 510, *Dwarka Das* v *Akhay Singh* (1908) 30 All 470.

(*x*) *Nobo* v *Forbes* (1906) 1 Cal 202
(*y*) *Chandi Prasad* v *Mahendra* (1902) 24 All 112
(*z*) *Palkishan* v *Kishan Lal* (1889) 11 All 148 *Gopi Nath* v *Bhugwat* (1884) 10 Cal 697

(*a*) *Bhikabhai* v *Bai Bhuri* (1903) 27 Bom 418
(*b*) *Pahlwan* v *Fizal* (1884) 4 All 55
(*c*) *Dwarka Das* v *Akhay Singh* (1908) 30 All 470

It may here be observed that each year's rent is in itself a separate and entire cause of action, and where a suit is brought for the rent due for a particular year, a judgment obtained in that suit, whatever the defence may have been, would seem only *to extend to the subject matter of the suit* and hence the landlord is at liberty to bring another suit for the *next year's* rent and the tenant is at liberty to set up *to that suit* any defence he thinks proper The above proposition however is subject to this and here comes in the doctrine of res judicata that neither party is at liberty to re open in the suit for rent for the next year any question that was substantially and necessarily tried and determined between them in the suit for rent for the *previous year* (d) For the essence of the doctrine of res judicata is that where a *material issue* has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other or as to a *right* or *title* claimed by either of them against the other, it cannot again be tried in another suit between them (e)

Maintenance —As regards maintenance, it is to be noted that a decree for maintenance at a particular rate is no bar to a subsequent suit for maintenance at an *enhanced* rate on the ground of altered circumstances, for the rate of maintenance is a variable quantity changing from time to time according to the circumstances of the parties affected by the decree (f)

C —Rate of rent or area for which rent is payable —In this class of cases also both the suits are for rent the first suit being for rent for a particular period and the second for rent for a subsequent period The matter which is pleaded as res judicata is not the plaintiff's *title* to the land of which the rent is claimed but the *rate* of rent or the *area* for which rent is payable If the Court in the first suit tries and determines the issue, what is the proper rate of rent or what is the proper area for which rent is payable it is clear that the issue relating from its very form not to the rent for a particular period but to the rent payable for the full term of the lease, the question of the rate or of the area as the case may be will be, res judicata in all subsequent suits for rent for the remaining period of the lease (g)

The decision in a previous rent suit *whether ex parte or contested* operates as res judicata in a subsequent rent suit even for a different period if it decides any question which arises in the suit *or omits to decide a question which ought to have been decided if objection were taken by a party* (h) See ill (5) on p 41 below

Ex parte decree —In the case of a suit in which a decree is passed *ex parte* [see O 9 r 6 Code of 1882 s 100] the only matter that can be directly and substantially in issue is the matter in respect of which relief has been claimed by the plaintiff in the plaint A matter in respect of which no relief is claimed cannot be directly and substantially in issue in a suit in which a decree is passed *ex parte* though the Court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter

Illustration

A sues *B* to recover Rs 500 being the rent due for the year 1906 at the rate of Rs 2 per square yard *A does not pray for a declaration in the suit that the rate of rent is Rs 2 per square yard* *B* does not appear and a decree *ex parte* is passed against him for Rs 500 Subsequently *A* sues *B* for rent due for the year 1907 also at the same rate *B* appears at the hearing and contends that the rate is Re 1 per square yard *B* is not

(d) *Nobo* v *Fozbux* (1876) 1 Cal 202

(e) *Krishna* v *Bunwari* (1874) 1 Cal 144 2 I A 283

(f) *Bingaru* v *Vijayamachi* (1899) 22 Mad 175 See also *Ricketts* v *Rameswar* (1901) 28 Cal 109

(g) *Bakshi* v *Nizamuddin* (1893) 20 Cal 505 *Mul Mathib* v *Brojo Nath* (1894) 21 Cal 236 *Bayyan Naidu* v *Surjanarayana* (1914) 37 Mad 70 17 I C 445 [F B] *Muttar Loddir* v *Jadab Chandra* (1917) 2 Pat L J 159 38 I C 211 [incidentally in issue] See also *Rajah of Ramnad* v *Ramanathaswami* (1921) 44 Mad 514 63 I C 20

(h) *Sarojini* v *Lakhi Priya* (19) 29 C W N 253 259 85 I C 123 (25) A C 4 7

11. and substantially in issue in that suit and it was decided against *C* *Toponidhee* v *Sreeputty* (1880) 5 Cal 832

Note —In this and the following illustrations it is assumed that the other conditions of res judicata are present

(b) *A*, a Hindu, dies leaving a widow and a brother *C* The widow sues *B* (a tenant) for the rent of certain property alleging that it was the *separate* property of her deceased husband *C* claims to be entitled to the rent on the ground that it was the *joint* property of himself and his deceased brother and that he became entitled to it by survivorship *C* is thereupon added as a defendant to the suit The issues are—

1 Whether the deceased alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with *C* ?

2 Whether any and what rent is due by *B* ?

The Court finds on the first issue that the deceased alone received the whole rent in his lifetime (The finding on the second issue is unnecessary for our present purposes)

Subsequently *C* sues the widow for a declaration that he and his brother were joint, and claims the said property by right of survivorship The question whether the deceased and *C* were joint or separate is not *res judicata*, for it was not "directly and substantially" in issue in the former suit It was in issue in that suit only "collaterally or incidentally," for it will be seen on referring to the first issue in that suit that it did not cover the *entire* question of *C*'s *title*, but related merely to the joint or separate receipt of *rent* *Run Bahadur* v *Lucho Koer* (1885) 11 Cal 301, 12 I A 23, *Srihari* v *Khitish Chandara* (1897) 24 Cal 569

B. Both suits for rent or other recurring liability—The same principles that apply to the preceding class of cases also apply here Thus where *A* sues *B* for rent due for a *particular period*, and the defence is that *A* has no title to the land of which the rent is claimed, then, if a *direct* issue is raised and decided on the question of title the decision will operate as res judicata in a subsequent suit by *A* against *B* for the rent for a *subsequent period* either of the same (*x*) or other (*y*) property held under the same title But if there is no *direct* issue raised on the question of title, and the finding falls short of going to the *very root of the title* upon which the claim for rent is based, it will not have the effect of res judicata If the question of title is gone into in the previous suit, not as if the right of rent were sought to be established *for one particular year* but *once for all*, it will be said to have been *directly and substantially* in issue But if the question of title is gone into in the previous suit not as if the right of rent were sought to be established *once for all*, but for one particular year, it will be said to have been in issue *collaterally or incidentally* These principles also apply to other cases of recurring liability, such as malikana (*z*), maintenance (*a*), interest (*b*), annuity (*c*), &c

Illustration

A sues *B* for rent due for the year 1903 The defence is that the land is rent free An issue is raised, "whether the land is rent free" The Court finds that the land is rent free, and *A*'s suit is dismissed Subsequently *A* sues *B*, claiming rent for the year 1904 *B* again sets up the same defence, namely, that the land is rent free Here the question of *A*'s right to recover the rent having been "*directly and substantially*" in issue in the previous suit the suit for the rent for 1904 is barred as res judicata *Rakhal Doss* v *Heera* (1874) 22 W R 282, *Venkatachalapati* v *Krishna* (1890) 13 Mad 287, *Vishnu* v *Ramling* (1902) 26 Bom 25, *Natesa* v *Venkatarama* (1907) 30 Mad 510, *Dwarka Das* v *Akhay Singh* (1908) 30 All 470.

(*x*) *Noba* v *Foyzbux* (1876) 1 Cal 202

(*y*) *Chandi Prasad* v *Mahendra* (1902) 24 All 112

(*z*) *Balkishan* v *Kishan Lal* (1889) 11 All 148, *Gopi Nath* v *Bhugwat* (1884) 10 Cal 697

(*a*) *Bhikabhai* v *Bai Bhuri* (1903) 27 Bom 418

(*b*) *Lakhiran* v *Lual* (1882) 4 All 55

(*c*) *Dwarka Das* v *Akhay Singh* (1908) 30 All 470

perties claimed in the two suits being different, the decision on the question of *A*'s adoption in the first suit cannot operate as res judicata in the second. On the same principle where in a suit brought by *A* against *B* for possession of one of two properties comprised in a sale deed passed by *B* to *A*, *B* contends that the deed is fictitious, and the Court finds that the deed is fictitious, the finding that the sale deed is invalid will operate as res judicata in a subsequent suit by *A* against *B* to recover the other property under the same sale deed (*k*). Similarly, in the illustration cited under class B of rent suits (p. 34 *ante*) it is no answer to the plea of res judicata that the subject matters of the two suits are different. The reason is that the matter directly and substantially in issue in both the suits is the same, namely, whether the particular land of which the rent is claimed is rent free, and the decision therefore on that issue in the first suit operates as res judicata in the subsequent suit. But the decision cannot apply to *other lands* held by *B* and *A*, unless they form part of the *same tenure* (*l*).

From the same fundamental principle that the matter directly and substantially in issue, and not the subject matter, constitutes the test of res judicata, it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit, the trial of that matter will *not* be barred as *res judicata*, though the subject matter of the two suits may be the same (*m*).

Where both the matter directly and substantially in issue and the subject matter are the same in both the suits, the matter in issue will be *res judicata* not because of the identity of the subject matter, but because of the identity of the matter directly and substantially in issue (*n*). Where the matter directly and substantially in issue and the subject matter are both different in the two suits, the matter in issue is not *res judicata*, not because the subject matters are different, but because the matters directly and substantially in issue in the two suits are different (*o*).

Former suit : Explanation I.—We have said above that a decision in a *former* suit may operate as res judicata in a subsequent suit. What is the meaning of "*former* suit"? Does it refer to the suit that has been first *instituted* or to the suit that has been first *decided*? The answer is that it refers to the suit that has been first *decided*; in other words, former suit means a previously *decided* suit. The result therefore is that if suit No. 2 is instituted after the date of the institution of suit No. 1, and suit No. 2 is decided first, the decision in suit No. 2 may operate as res judicata in suit No. 1 (*p*). The same rule applies to appeals (*q*). Explanation I, which is new, does no more than give effect to these decisions.

Suits tried together: one judgment.—*A* sues *B* for possession of certain premises alleged to have been let to *B* as a monthly tenant. *B* then sues *A* for a declaration that he holds the premises under a lease from *A* of which two years are yet to expire. Both the suits are heard together, and *only one judgment* is delivered in both, the finding of the Court being that *B* held the premises not under a lease as alleged by him, but as a monthly tenant. A decree is passed in *A*'s suit directing *B* to deliver up possession, and a *separate decree* is passed in *B*'s suit dismissing the suit with costs. *B* does not appeal from the decree passed against him in *A*'s suit, but prefers an appeal from the decree passed against him in his own suit. *A* contends that the appeal is barred as res judicata, stating as a reason that no appeal having been preferred by *B* within the period of limitation from the decree in his (*A*'s) suit,

(*k*) *Kedar Nath* v. *Sheo Shankar* (1923) 45 All 515, 76 I C 370 (1923) A A 613.
(*l*) *Ram Chunder* v. *Madho* (1886) 12 Cal 484, 12 I A 188.
(*m*) *Jugaljit* v. *Sarabjit* (1892) 19 Cal 159, 177, 18 I A 165, 176.
(*n*) *Triloki* v. *Pertab* (1888) 15 Cal 809, 15 I A 13.
(*o*) *Zamindar of Pittapuram* v. *Proprietors of Kolanka* (1878) 2 Mad 23, 5 I A 206.
(*p*) *Gururajammah* v. *Venkata Krishnama* (1901) 24 Mad 350; *Balkishan* v. *Kishan Lal* (1889) 11 All 148.
(*q*) *Ram Lal* v. *Chhab Nath* (1890) 12 All 578; *Ram Natho* v. *Indar Sahai* (1909) 32 All 67, 3 I C 707.

11. that decision became final, and that decision having been given in a 'former suit," the matter could not be re tried *in the appeal from the decision in B s suit*. *Does the decree passed in A's suit operate as res judicata so as to preclude the appellate Court from hearing the appeal preferred by B from the decree passed in his (B's) suit?* No, according to the Calcutta and Madras High Courts, the reason given being, that there being but one judgment in both suits, neither suit can be said to be a 'former suit' in relation to the other (r). Yes, according to a three judges decision of the Allahabad High Court in *Zaharia v Debia* (s), the reason given being that if B's appeal were heard and the appellate Court reversed the decree of the lower Court, there would be two inconsistent decrees on the files of the Court, the one in A s suit (in which no appeal was preferred by B) in A's favour, and the other in B s suit in B s favour, in respect of the same matter in issue and this would cause a complete *impasse* in execution proceedings. In *Zaharia s case*, two rival suits for pre emption in respect of the same sale were brought by two claimants A and B, each of whom asserted, as against the other, that he had a paramount title to pre empt. A was made a party defendant in B's suit and B was made a party defendant in A s suit. A's suit was decreed and B s suit was dismissed. B appealed from the decree in his own suit, but he did not prefer any appeal from the decree in A s suit. It was held that as the same issue had been raised in both the suits and the decision of it in A s suit had become final, no appeal having been preferred from it it operated as res judicata, and the issue could not be re opened and tried in the appeal preferred by B in his own suit. The decision in *Zaharia v Debia* was treated in subsequent cases (t) as laying down a general rule to be followed in all cases in which an unappealed decree passed in contemporaneous proceedings arising out of the same dispute was outstanding in the lower Court. The question came up again before a Full Bench of the same Court in *Ghansham Singh v Bhola Singh* (u). In that case G sued B for a sale of certain property mortgaged by B to G. The trial judge passed a preliminary decree for sale but did not give G his costs. He also disallowed B's contention that the amount of interest claimed was excessive. G appealed from the decree in so far as it disallowed costs. B appealed from the decree as to the amount of interest. Both appeals were heard together and were decided by one judgment and both appeals were allowed, but two separate decrees were passed, the terms of which were *identical* each comprising the decision in *both* appeals. G appealed to the High Court from the decree in B's appeal [as to interest] but did not appeal from the decree in his own appeal [as to costs]. In fact, the latter decree being in his favour he had no occasion to do so. Upon these facts it was held by the Full Bench that the fact that no appeal was preferred by G from the decree in his appeal was no bar to the hearing of the appeal from the decree passed in B's appeal. The Full Bench held that *Zaharia v Debia* was rightly decided on own facts and that the cases cited in foot note (t) must be treated as no longer law. They also held that *Damodar Das v Sheo Ram Das* (v) which was treated in some cases as overruled by *Zaharia v Debia*, was rightly decided. In the course of the judgment the learned judges said: "Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before it in appeal, *and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds*, the right of appeal is not barred either by the rule of res judicata, or at all by reason of his failure to appeal from the decree which does not prejudice him. It would indeed be wrong for an appellant to appeal

(r) *Abdul Majid v Jew Narain* (1889) 16 Cal 233; *Mariamnissa v Joynab Bibi* (1906) 33 Cal 1101; *Panchanada v Vaithinatha* (1906) 29 Mad 333.
(s) (1911) 33 All 51, 7 I C 156.
(t) *Dalhai Das v Syed Ali* (1911) 33 All 151, 7 I C 949; *Anant Das v Udai Bhan* (1913) 35 All 187, 19 I C 76.
(u) (1923) 45 All 506, 74 I C 411, ('23) A A 490.
(v) (1907) 29 All 730.

against a decree *which did not prejudice him and to which he did not object*, or to appeal against two *duplicate* decrees where an appeal against one of them would be sufficient, and he is certainly under no obligation to do so The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of appeal" The decisions of the Lahore Court on this point are not uniform (w)

Suits tried together separate judgments—*D* brings a criminal case against *P* alleging that *P* used abusive language to him. That case is dismissed *P* then sues *D* for damages for malicious prosecution Subsequently *D* sues *P* for damages for using abusive language to him The suits are tried together, the issue raised being whether *P* used abusive language to *D* It is found that he did not, and *two separate judgments are pronounced*, the Court decreeing *P*s suit, and dismissing *D*s suit *D* appeals from the decree in *P*s suit, but does not appeal from the decree in his own suit *Held* that *D* not having appealed from the decree in his own suit, that decree operated as res judicata in the other suit so as to bar the appeal preferred by him in *P*s suit (x)

Suit — There is no definition of the word 'suit,' probably because it is not possible to frame one which will satisfactorily survive every test But on the other hand it is not difficult to decide in the vast majority of cases whether a proceeding is in fact a suit or whether it is merely a summary or subsidiary application" (y) In the case of *Venkatachandrappa* v *Venkatarama* (z), where the proceeding was held not to be a suit, it was said, 'suit is a very comprehensive term It includes any proceeding in a court of justice by which a party pursues the remedy which the law gives him If a right is litigated between parties in a court of justice, the proceeding by which the decision of the Court is sought is a suit"

The matter of which the trial is barred under this section must have been heard and decided in a former *suit* A proceeding under s 22 of the Provincial Insolvency Act, 1907, for a declaration of title and for possession of property attached by the Insolvency Court as being property of the insolvent has been held to be a "suit," and the decision in such proceeding is a bar to a subsequent suit, by the applicant in a civil Court for the same relief (a) But an application to file an award under Sch II, para 20, is not a suit," and the refusal to file the award is no bar to a subsequent suit to enforce the award (b) See notes, 'Orders in execution proceedings," on p 68 below

B.—Explanation IV : Matter directly and substantially in issue "constructively."

Matter which might and ought to have been made ground of attack or defence—A matter directly and substantially in issue may be either actually' in issue or it may be in issue constructively In all the cases cited above, where a matter was held to have been in issue directly and substantially, it was "actually in issue directly and substantially, for it was *actually* alleged by one party and denied by the other It often happens that a matter which *might and ought* to have been made *ground of attack* by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack, and also that a matter which *might and ought* to have been made *ground of defence* by the defendant is not set up as a ground of defence A matter which *might and ought* to have been made ground of attack or

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Lal (1922) 4 Lah L J 344 [appeal barred]
(x) *Gangadhar* v *Sekali* (1921) 34 Cal L J 281 64 I C 574
(y) *Pita Ram* v *Jujhar Singh* (1917) 39 All 626 634 43 I C 573
(z) (1899) 22 Mad 256
(a) *Pita Ram* v *Jujhar Singh* (1917) 39 All 626 43 I C 573
(b) *Rajmal* v *Maruti* (1921) 45 Bom 329, 59 I C 755

11. defence in the former suit but which has not been alleged as a ground of attack or defence will be deemed to have been a matter directly and substantially in issue in such suit (*Explanation IV*) That is to say though it has not been *actually* in issue directly and substantially, it will be regarded as having been *constructively* in issue directly and substantially This section draws no distinction between the claim that *was actually* made in a suit, and the claim that *might and ought* to have been made Where a matter has been *actually* in issue it is necessary to constitute res judicata that it should have been *heard and finally decided* But where a matter has been *constructively* in issue it could not from the very nature of the case be heard and decided and it will be *deemed* to have been heard and decided against the party omitting to allege it This is in accordance with the view of the section taken by the High Courts of Allahabad and Bombay (c) In *Kailash Mondal* v *Baroda Sundari Dasi* (d) Banerjee J observed that though a matter which might and ought to have been made ground of attack or defence should be *deemed* as provided by Explanation IV, to have been *directly and substantially* in issue yet it could not be deemed to have been heard and finally decided as there was nothing in Explanation IV to suggest that such matter should *also* be deemed to have been *heard and finally decided* This view was followed in a subsequent case (e) But this view it is submitted, is not correct and it has been rejected by the same Court in later cases (f) and also by the Chief Court of the Punjab (g) Moreover in a recent case the Judicial Committee took exception to the language in which the observations of Banerjee J were couched saying that the language was not so careful as it might have been (h) The Privy Council case illustrates the rigidity with which the principle laid down in Explanation IV is to be applied

Illustrations

1 *X* a Hindu dies leaving a widow The widow makes a gift to her brother *B* of certain property belonging to her husband After the death of the widow *A* alleging that he and *X* were members of a joint family sues *B* for a declaration that he is entitled to the property by right of *survivorship* The Court finds that *A* and *X* were separate and *A* s suit is dismissed Subsequently *A* sues *B* for the recovery of the same property alleging that as the nearest reversionary heir of *X* he became entitled to the property on the death of the widow and that the alienation made by her in favour of *B* was not binding upon him The suit is barred as res judicata *A might and ought* to have set up the title by *heirship* as a *ground of attack* in the former suit It will therefore be *deemed* to have been directly and substantially in issue in that suit, and it will also be deemed to have been heard and finally decided against *A* *Guddaja* v *Tirlappa* (1901) 25 Bom 189 [The Bombay ruling was dissented from in *Ramasuami* v *Vythinatha* (1903) 26 Mad 760 a case on different facts altogether The grounds of dissent it is submitted are not satisfactory See also *Masilamania* v *Thiruvengadam* (1908) 31 Mad. 385 being ill (3) below]

2 *A* a Hindu dies leaving a widow and a brother *B* The widow sues *B* for recovery of certain property alleging that it was the self acquired property of her husband and that a will alleged to have been executed by her husband and relied on by *B* is a forgery *B* alleges that the property was joint family property and that on the death of *A* he became entitled thereto by *right of survivorship* but he does not claim any title to the property under the will The Court finds that the property was the self

85 I C 1 3 (.5) A C 4 see also *Payyan* ... *v Survan* ... (1914) 3[?] Mad ...
... 17 I C 445 *Maung* ... v *Maung* ...
(19 3) 1 Pang 363 365-366 ... I C 61...
(...3) A I 239

(g) *Gobindlal* v *Baldeo Singh* (1915) 1 P No 1[?] p 69 24 I C 931

(h) *Fateh Singh* v *Jagannath Baksh Singh* (19 5) 5[?] I A 100 47 All 15[?] (...) A I C ...

acquired property of *A*, and decrees the widow's claim Subsequently *B* sues the widow to recover the same property from her, now claiming the same *as a devisee* under *A*'s will The suit is barred as res judicata *B might and ought* to have set up the claim *under the will* as a *ground of defence* in the former suit. "When a plaintiff claims an estate, and defendant, being in possession, resists that claim, he is bound to resist it upon *all the grounds* that it is possible for him according to his knowledge then to bring forward" *Srimut Rajah* v *Katama Natchiar* (1866) 11 M I A 50, *Doorga Persad* v *Doorga Konwari* (1879) 4 Cal 190, 5 I A 149

3 *A* sues *B* to recover certain property belonging to the estate of *C*, alleging that his father had been adopted by *C*s brother, *D*, to whom the property descended on *C*s death The suit is dismissed on the ground that the adoption is not proved *A* then sues *B* to recover the same property claiming it as *C*s bandhu The suit is barred as res judicata *A* ought to have in the first suit claimed the property in the alternative as *C*s bandhu *Masilamania* v *Thiruvengadam* (1908) 31 Mad. 385

4 *A*, claiming as the next reversioner of a deceased Hindu, sued his widow for a *declaration* that a gift by her to *D* of property inherited by her from her husband was void. *D* was joined as a party defendant, and so also *G* who claimed to be a reversioner nearer than *A* As to *G*, *A* alleged that he was colluding with the widow and the donee *D* The defence was that *G* was the nearest reversioner and the only person entitled to dispute the gift In this state of pleadings the widow died On the death of the widow the question of collusion became comparatively unimportant, for if *G* was the nearest heir, *A* could get no title to the property *A* then applied for leave to amend the plaint by setting forth the death of the widow, and claiming that he had become entitled to institute a suit for *possession* and by setting up a family custom that he was equal in degree with *G* The application was rejected on the ground that it was an attempt to introduce a new case The question then arose whether it was worth while contesting the suit *A*s counsel admitted that apart from custom, *A* was one degree more remote than *G*, and that if *A* could not make out the case of a family custom, the suit must fail The trial judge thereupon dismissed the suit with costs, but gave liberty to *A* to bring a fresh suit for possession Subsequently *A* sued *D* and *G* for *possession of one half* of the property founding his title on family custom The Privy Council held that the second suit was barred for *A* might and ought to have alleged the family custom in the first suit it being clearly a ground of attack in that suit As the first suit was dismissed and not withdrawn under O 23 the trial Judge had no power to grant leave to bring a fresh suit *Fateh Singh* v *Jagannath Baksh Singh* (1925) 52 I A 100, 47 All 158 (25) A PC 55

5 *A* sues *B*, *C* *D* and *E* as joint tenants for rent on the basis of a pottah The property in respect of which the rent is claimed consists of 25 *kittas* of land. None of the defendants appears in the suit and an *ex parte* decree is passed against them *A* then sues *B* *C*, *D* and *E* for rent for a subsequent period *B* appears and contends that he does not hold the land jointly with *C*, *D* and *E*, and that he is liable only for one fourth rent for one fourth of the whole area Is *B* estopped from setting up the case of a separate tenancy? Yes, because he might and ought to have set up that case in the previous suit It is immaterial that the decree in the previous suit was passed *ex parte* *Sirojini* v *Lakhi Priya* (1924) 29 C W N 203 85 I C 123, (25) A C 427

Test—The question whether a matter *might* have been made a ground of attack or defence in the former suit rarely presents any difficulty Whether it *ought* to have been made a ground of attack or defence depends on the particular facts of each case As a general rule we may say that if a matter could have been set up as a ground of attack or defence in the former suit *and* if its introduction into that suit was *necessary* for a complete and final decision of the right claimed by the plaintiff therein it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in

S. 11. that suit, *unless* the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion (*i*). Thus in ill. (l) above the title by heirship could have been made a ground of attack *in the alternative* in the first suit; it was not forbidden by any rule of pleading; moreover, it was *necessary* for the complete and final disposal of all questions as to A's right to the property. Further, the question in both suits being the same, namely, whether A was entitled to the property *or B*, the title by *survivorship* and the title by *heirship* could not be said to be so dissimilar that their union might lead to confusion. It may appear at first sight that the two matters are dissimilar, for the title by survivorship and the title by heirship have to be supported by *different evidence*. But the test of *evidence* which was brought to the front in some old decisions [illegible] a satisfactory one, and though it was advanced in argument in two cases before the Judicial Committee of the Privy Council, it was not even noticed in the judgments [illegible]. The reason is obvious, for when a plaintiff sets up *alternative* grounds of attack, or when a defendant sets up *alternative* grounds of defence, the evidence in support of such alternative grounds must, *in the majority of cases*, be *different*. But where the evidence [illegible] of one ground is such as might be destructive of the other ground, the two [illegible] has been said, need not be set up in the same suit. The reason given [illegible] that the test [illegible] determining whether both the grounds ought to have been set up in the same [illegible] afforded by the provisions of O. 2, r. 1, and the provisions of that rule as to the framing of suits are *only* to be applied as far as practicable.

It is clear that it cannot be said of any matter that it *might* have been set up as a ground of attack in a former suit, if its introduction would have [illegible] the matter of that suit (*m*). Thus a person claiming certain property [illegible] that it is wakf property and that he is the manager thereof is not bound to claim the property in the same suit alternatively in his own right in the event of its being held that the property was not wakf property. Having asserted that the [illegible] property was wakf property, [he] could not have consistently claimed the same property as his personal property except possibly in an alternative form. [He was, however, not under an obligation to adopt the latter course.] The mere fact that he could have claimed the property *in the alternative* as his own property is no ground for saying that he *ought* to have done so (*n*). See Rule IV below.

The decisions bearing on this branch of the subject are numerous and at first sight conflicting. A careful examination of these decisions leads to the following four Rules.

Rule I.—Where the *right claimed* in both suits is the *same*, the subsequent suit will be barred as res judicata, though the right in the subsequent suit may be sought to be established by a *title different* from that in the first suit.

But the dismissal of a plaintiff's suit for the recovery of land based on [illegible] lease is no bar to a subsequent suit for the [illegible] his [illegible] suit [illegible].

[illegible] following rules when it is said that the subsequent suit is *barred* as res judicata, it is understood that it is barred by virtue of Explanation IV, and that the other conditions of res judicata are present.]

(*i*) *Kameswar* v. *Rajkumari* (1893) 20 Cal. 79, 85, 19 I. A. 234; *Moosa* v. *Ebrahim* (1913) 40 Cal. 1, 39 I. A. 237, 18 I. C. 70; *Guddappa* v. *Tirkappa* (1901) 25 Bom. 189, 192; *Srimut Rajah* v. *Katama Natchiar* (1866) 11 M. I. A. 50, 73; *Woomatara* v. *Unnopoorna* (1873) 11 B. L. R. 158, 16; *Girdhari Lal* v. *Cundajan* (1921) 2 Lah. L. J. 213, (22) 63 I. C. 717.

(*j*) *Maru Chetti* v. *Marian Chetti* (1899) 4 Mad. 296, 299; *Naro* v. *Ramchandra* (1893) 13 Bom. 28, 322.

(*k*) 11 M. I. A. 50 and 11 B. L. R. 158 supra.

(*l*) *Manikmana* v. *Thuvarajam* (1914) 31 [illegible] 290; *Ramaswami* v. *Vythinatha* (1903) 26 Mad. 760.

(*m*) *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1907) 29 All. 331, 34 I. A. 72; *Lea-nomi Ram* v. *Kashwar* (1917) 4 [illegible] 17 C. W. N. 604, 19 I. C. 291 (P. C.); *Diwan Chand* v. *Hari Chand* (1914) P. R. No. 102 p. 353, 76 I. C. 638; *Ashan* v. *Muhammad* (1916) P. R. No. 91 p. 323, 37 I. C. 119.

(*n*) *Kanhaiya Lal* v. *Ashraf Khan* (1924) 45 All. 223, 78 I. C. 482, (24) A. A. 345; *Dalu* v. *Lalva* (1922) 45 Bom. 863, 65 I. C. 815, (22) A. B. 29.

Illustrations of Rule I

1 *Guddappa* v *Tirkappa* (1901) 25 Bom 189, ill (1) on p 40 above, *Masilamania* v *Thiruvengadam* (1908) 31 Mad 385, ill (3) on p 41 above, and *Fateh Singh* v *Jagannath Baksh Singh* (1925) 52 I A 100, 47 All 158, ('25) A PC 55, ill (4) on p 41 above, are cases under this Rule

2 A Hindu, *H*, dies leaving a widow *W*, and a son in law, *S*, being the husband of a predeceased daughter, *D* *W* sues *S*, *as the heir of her husband H*, to recover certain property, alleging that it forms part of the estate of *H* The defence is that *H* had made a gift of the property to his daughter, *D*, and that on *D*'s death, *S* as *D*'s husband, became entitled to the property as *D*'s heir *W* alleges that the deed of gift relied upon by *S* is a forgery The Court finds that the deed of gift is genuine, and the suit is dismissed *W* then sues *S* to recover the same property, alleging that it being found that the property belonging to *D* she is entitled to the property *as the heir of her daughter, D* The suit is barred as res judicata Here the right claimed in both the suits is the same, namely the right to the property in question In the first suit, it was claimed by *W* as her *husband's heir* In the second suit it is sought to be established by her by a different title, namely, as her *daughter's heir* *W* "might and ought to have claimed in *the alternative* as her *daughter's heir* in the former suit Having failed to do so, her title, as her daughter's heir, will be deemed to have been directly and substantially" in issue in the former suit, and it will also be deemed to have been heard and finally decided against her in that suit *Denobundhoo* v *Kristomonee Dossee* (1877) 2 Cal 152, dissented from in *Ummatha* v *Cherta* (1882) 4 Mad 308 The Madras case falls within the *Exception* rather than the *Rule*

3 *A* lends Rs 50 000 to a Hindu widow on a mortgage of her husband's property. The widow then surrenders the property to *B*, the reversionary heir of her husband, on *B* agreeing to pay all her debts *A* sues *B* and the widow to recover *Rs 50 000 by sale* of the mortgaged property *A* also asks for a *personal* decree against the widow, *but he does not ask for a personal decree against B* *B* is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him The Court finds that the mortgage is not binding upon the husband's estate, and the suit against *B* is accordingly dismissed As against the widow, a personal decree is passed for the amount of the loan *A* realises Rs 5 000 only from the widow and after *her death he sues B for the balance of the money due under the decree (that is to say, A* asks for a *personal* decree against *B* for the balance) alleging that *B* was *personally* liable under the agreement with the widow to pay her debts The suit is barred as res judicata, for *A* "might and ought to have alleged in the former suit that if the mortgage was not binding on the estate *B* was at all events *personally* liable to pay the debt in consequence of the *agreement* which he (*B*) had entered into with the widow *Kameswar Pershad* v *Rajkumari* (1893) 20 Cal 79 19 I A 234

Note—*Suppose that in the above illustration, A* had applied in the first suit for amendment of the plaint by adding a claim for relief against *B* personally, but the application was refused In such a case it has been held that the subsequent suit would not be barred *Alagirisami* v *Sundareswara* (1898) 21 Mad 278, *Thakore* v *Thakore* (1890) 14 Bom 31 But this view, it is submitted, is not correct *Fateh Singh* v *Jaganath Bakhsh* (1925) 52 I A 100, 47 All 158, ('25) A.PC 55

4 *A* sues *B* to recover certain land from him, alleging that *B* held the land under a *lease*, and that the lease had expired The lease is not proved and the suit is dismissed Subsequently *A* sues *B* to recover the same land on the strength of his *title* The suit is not barred as res judicata *Zamorin of Calicut* v *Narayanan* (1899) 22 Mad 323 *Kutti Ali* v *Chindan* (1900) 23 Mad 629, *Kandunni* v *Katiamma* (1886) 9 Mad 251, *Ummatha* v *Cheirta* (1882) 4 Mad 308, *Girdhar* v *Dayabhai* (1884) 8 Bom 174

. 11. For other cases under this Rule, see foot note (o)

Rule II —If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit, but was omitted to be so alleged in that suit, it will be *deemed* to have been directly and substantially in issue in that suit within the meaning of *Explanation IV*

This rule contemplates cases in which the plaintiff in the subsequent suit was defendant in the former suit

Illustrations

1 *Srimut Rajah* v *Katama Natchiar* (1866) 11 M I A 50 which is ill (2) on p 40 above, *Doorga Persad* v *Konwari* (1879) 4 Cal 190, 5 I A 149, cited in that illustration, and *Sarojini* v *Lakhi Priya* (1925) 29 C W N 253 85 I C 123, (25) A C 427, ill (5) on p 41 above, belong to this class

2 *A* and *B*, two Hindu brothers who have become separate in estate own a garden which has not yet been divided between them *A* dies leaving a widow who sells *A*'s half share in the garden to *C* After the death of the widow *C* sues *B* for partition of the garden, and a decree *ex parte* is passed under which he (*C*) enters into possession of a moiety of the garden *B* then sues *C* to recover possession of the moiety sold by *A*'s widow to *C*, alleging that the sale was made by the widow without legal necessity and that on the death of the widow he became entitled to the moiety as the reversionary heir of *A* The suit is barred as res judicata *B* might and ought to have raised the question of the validity of the sale as a ground of defence in the former suit *Sitara Charan* v *Mrinmayi Debi* (1904) 31 Cal 79

3 A mortgagee who holds the mortgaged property also as lessee from the mortgagor sues the mortgagor to recover Rs 3,000 being the amount of the mortgage debt At the date of the suit the mortgagee owes Rs 4 000 to the mortgagor for rent under the lease and this sum the mortgagor claims to set off against the mortgage debt under an *express agreement* in that behalf The agreement is not proved and a decree is passed against the mortgagor for Rs 3 000 The property is sold in execution of the decree and it is purchased by the mortgagee with the leave of the Court The mortgagor then sues the mortgagee to have the sale set aside, and for a declaration that the mortgage debt is extinguished now claiming that a *general account* may be taken as between him and the mortgagee, and that in taking such account the rent due to him may be set off against the mortgage debt The suit is barred for the mortgagor might and ought to have set up that claim in the alternative in the former suit *Mahabir Pershad* v *Macnaghten* (1889) 16 Cal 682 16 I A 107

4 *A* who owns a share in a village, mortgages it to *B*, and sells it subsequently to *C* *C* sues *B* for redemption of the mortgage, and obtains a decree Subsequently *B* sues *C* for pre emption of the share sold by *A* to *C*, alleging that he is a co sharer in the village and entitled as such to a right of pre emption The suit is not barred The right of pre emption not being a " vested and ascertained " right when *B* filed his written statement in the former suit, it could not have been properly pleaded by *B* as an answer to the claim for redemption in that suit *Ram Chand* v *Durga Prasad* (1904) 26 All. 61

For other cases under this rule, see foot note (p)

(o) *Akaya* v *Ayisaa* (1903) 26 Mad 645 *Imam Khan* v *Ayub Khan* (1897) 19 All 517 *Haji Hasam* v *Mancharam* (1879) 3 Bom 137 *Woomatara* v *Unnopoorna* (1873) 11 B L R 158 (P C) *Kesar Singh* v *Ata Singh* (1913) P R no 66 p 303 20 I C 890, *Muhammad* v *Abdul* (1923) 46 Mad 133 72 I C 207 (23) A M 237

(p) *Maktum* v *Imam* (1873) 10 B H C 291 *Dost Muhammad* v *Said Begam* (1894) 20 All 81 *Hari* v *Ganpatrao* (1883) 7 Bom 272 *Jagan Nath* v *B Husain* (1907) All W N 27 *Maung Nyo* v *Maung Po* (1923) 1 Rang 303, 70 I C 612 (23) A R 239

Rule III —Where the right claimed in the subsequent suit is *different* from that in the former suit, and it is claimed under a *different title*, the subsequent suit is not barred as res judicata

Illustrations

1 *A* sues *B for possession* of certain lands alleged to have come to his share on a *partition* of joint family property with *B* The defence is that the family property has not yet been divided, and the suit is dismissed on a finding to that effect A subsequent suit by *A* against *B* for *partition* of the family property is not barred *Shivram* v *Narayan* (1881) 5 Bom 27, *Konerrav* v *Gurrav* (1881) 5 Bom 589, *Nilo* v *Govind* (1886) 10 Bom 24, contra, *Bheeka* v *Bhuggoo* (1878) 3 Cal 23, which was dissented from in *Ummatha* v *Cheria* (1882) 4 Mad 308

2 *A*, alleging that *B* held certain lands from him under a lease and that the lease had expired sues *B* to recover Rs 500 for *use and occupation* of the land The defence is that the lease is a subsisting lease, and the suit is dismissed on a finding to that effect A subsequent suit by *A* to recover Rs 500 as *rent* payable under the lease is not barred *Watson* v *Dhonendra* (1878) 3 Cal 6

[*Note the peculiar character of the cases cited above* —In ill (1), *A* first suing on the basis of a partition, the Court finding that there was no partition, and *A* subsequently suing for partition, in ill (2), *A* first suing on the basis that the lease has expired, the Court finding that the lease has not expired, and *A* subsequently suing on the basis that the lease is a subsisting lease For other cases of a similar nature, see foot note (*q*)]

3 A suit by *A* against *B* in 1869 to recover a talukdari estate is dismissed on a finding that the estate had become the absolute property of *B* under a conditional sale made by *A* to *B* in 1853 *A* then sues *B* in 1875 for redemption of the same property, alleging that he had mortgaged the property as absolute owner thereof to *B* in 1854 The suit is not barred It may be difficult to reconcile the position of *B* as mortgagee in 1854 with his position as absolute owner in 1853 But if it be established that *A* was mortgagor in 1854 why should he be debarred of his right [of redemption] merely because at a certain date [i e in 1853] he may have had no right to the property at all? *Amanat Bibi* v *Imdad Husain* (1888) 15 Cal 800, 15 I A 106 *Baldhaddar* v *Ram Lal* (1904) 26 All 501

4 *A* sues *B* for redemption of a mortgage alleged to have been executed in 1856 of 50 cawnies of land *B* denies the genuineness of the mortgage and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853 and that the 14 and the remaining 33 were sold to him by *A* in 1855 The mortgage is not proved and the suit is dismissed *A* then sues *B* to redeem the 14 cawnies on the footing of the mortgage of 1853 The suit is not barred *Ramaswami* v *Vythinatha* (1903) 26 Mad 760, *Veerana* v *Muthu kumara* (1924) 27 Mad 102, *Parambath* v *Puthengattil* (1905) 28 Mad 406, *Thrikaik it* v *Thiruthiyal* (1906) 29 Mad 153, *Mahabir* v *Purbhoo Nath* (1907) 12 C W N 292, *Ram Sahai* v *Ahmadi Begam* (1911) 33 All 302, 9 I C 53

5 *A*, alleging that the mortgaged certain lands to *B* with possession, sues *B* for *redemption*, the suit being brought by him as *mortgagor* *A* fails to prove the alleged mortgage, and the suit is dismissed *A* then sues *B* for *possession* of the same lands, now claiming as *owner* thereof The suit is not barred *Mahomed Ibrahim* v *Sheik Hamja* (1911) 35 Bom 507, 12 I C 387

(*q*) *Shridhar* v *Narayan* (1874) 11 B H C 224 *Varathayyangar* v *Krishnasham* (1887) 10 Mad 102, *Amer* v *Nathu* (1888) 8 All 306, *Zimat un Nissa* v *Fajin* (1905) 27 All 142

11. For other cases under this rule, see foot note (r)

Rule IV —*It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit* (s)

Application of the above rules to suits on mortgage —If a mortgagee, in a suit for redemption against him by the mortgagor, *omits to obtain an order for sale* of the mortgaged property on failure of payment by the mortgagor of the mortgage debt within the time allowed for redemption, he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within the time aforesaid The mortgagee ' might and ought to have claimed the right of sale in the suit for redemption brought against him (t)

A prior mortgagee, who is made a party to a suit brought by a subsequent mortgagee on his mortgage, is not bound to set up his claim under his prior mortgage unless his mortgage is impugned or unless it is sought to be postponed to the subsequent mortgage If the prior mortgage is not attacked or sought to be postponed to the subsequent mortgage, the prior mortgagee is outside the controversy of the suit, and he is entitled to bring a suit for sale on his own mortgage even though he may not have appeared in the suit that was brought by the subsequent mortgagee As regards a subsequent mortgagee, the rule is that if he is made a party to a suit on a mortgage prior to his own he *ought to claim his right to redeem the prior mortgage*, and if he omits to do so, he cannot afterwards sue for redemption of the mortgage he omitted to plead in that suit (u).

In this connection we may mention a point which was left open by their Lordships of the Privy Council in *Sri Gopal v Pirthi Singh* (r) cited above, namely, whether a mortgagee who has *several mortgages* on the *same* property can treat them as separate causes of action, or whether he must bring one suit on all of them This point arose in a recent case before the High Court of Bombay, where it was held that if a mortgagee who has two mortgages upon the same property sues upon the mortgage of the later date, and the property is sold without reference to the prior mortgage he cannot afterwards sue on the prior mortgage not because the several mortgages constitute but one cause of action within the meaning O 2, r 2 but because of the general principles of the law of mortgage and of res judicata (w) Similarly it has been held by the High Court of Madras that if the mortgagee brings a suit on the prior mortgage without mentioning his subsequent mortgage, and the property is sold he cannot afterwards sue to enforce the subsequent mortgage against the property (x) The contrary has been held by the High Court of Calcutta (y) The ground of the Bombay and Madras decisions seems to be that the mortgagee in such a case must be deemed to be a party to the first suit as a prior or subsequent mortgagee according as the first suit is on the subsequent or prior mortgage and that the case therefore is similar to the one where the prior or subsequent mortgagee being joined as a party does not set up his claim under the mortgage But where a mortgagee who has two mortgages upon the same property

(r) *Thandavan v Valliamma* (1892) 15 Mad 336 [illegible]

51 [illegible]

(t) *Malojи v Sayaji* (1889) 13 Bom 567

(u) *Radha Kishun v Khurshed Hossein* (1920) [illegible]

Ibrahim v Ambika Pershad (1912) 39 Cal 527 39 I A 68 14 I C 496 *Gaya Lar v Bhagwanta* (1912) 34 All 599 16 I C 8, *Krishna v Amirul* (1914) 19 C W N 942 945 26 I C 673 [prior mortgage admitted]

(v) (1902) 24 All 429 29 I A 118

(w) *Dhondo v Bhikaji* (1915) 39 Bom 138 27 I C 1005 *Dalachand v Khema* (1921) 45 Bom 55, 59 I C 347

(x) *Nattu v Annangara* (1907) 30 Mad 353 dissenting from *Sundar Singh v Bholu* (1898) 20 All 322

(y) *Gobind v Harihar* (1911) 38 Cal 60, 7 I C 330 *Nidu v Asirbad* (1920) 25 Cal W N 129, 60 I C 809

sues on the mortgage of the later date *reserving* his rights under the prior mortgage, and the property is put to sale *subject to the prior mortgage*, there is nothing to preclude him from subsequently suing upon the prior mortgage (z)

In suits for redemption, foreclosure or sale, there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption, foreclosure or sale, as the case may be (a) A mortgagor, therefore, who has obtained a decree for redemption against a mortgagee in possession, and paid what was due according to the decree, and obtained possession, cannot subsequently sue for profits realized by the mortgagee for a period prior to the delivery of possession Such profits "might and ought" to have been taken into account at the time of passing the decree (b) Similarly, where a suit is brought by a mortgagor under s 62 of the Transfer of Property Act to recover possession of the mortgaged property, the mortgage being a usufructuary one, and a deposit is made by him in Court under s 83 of the Act of the amount due to the mortgagee, and a decree is passed for possession, the mortgagor cannot subsequently sue for profits realized by the mortgagee from the date of the deposit to the date of the delivery of possession (c) In both these cases it may be said that there was but one cause of action, and the subsequent suit was therefore barred by the provisions of O 2, r 2 [Code of 1882, s 43]

See notes, "Finality of decree in redemption suits," on p 64 below.

Subject-matter of suit.—It is not necessary for Explanation IV to be applicable that both the issue and the subject matter of the two suits must be the same It is enough if the matters in issue are the same, otherwise in suits for arrears of rent there could be no res judicata at all, for the subject matters of successive suits for arrears of rent are necessarily different (d) See notes on p 33 above

Issue of law—Issues are of three kinds (1) issues of fact, (2) issues of law, and (3) mixed issues of law and fact An issue of fact may be res judicata Note the opening words of the section, "No Court shall try any suit or *issue*" An issue of mixed law and fact stands on the same footing as an issue of fact, and it may also be res judicata (e)

An issue of law, it has been held, may or may not be res judicata It is res judicata if the cause of action in the subsequent suit is the same as that in the former suit, as was the case in the undermentioned cases (f) But it cannot be res judicata if the cause of action in the subsequent suit is different from that in the former suit as was the case in the undermentioned cases (g) Cases of recurring liability, such as rent, maintenance, etc belong to the latter class

Illustrations

1. X sells certain property to A At the time of sale the property was in the possession of B who claimed it adversely to X A sues B in the High Court of Calcutta to recover possession of the property under the deed of sale from X An issue is raised

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(z) *Subramania* v *Balasubramania* (1915) 38 Mad 927, 30 I C 317, *Dhondo* v *Bhikaji* (1915) 39 Bom 138, 145, 27 I C 1005 *Jagannath* v *Mohra Kuar* (1916) 2 Pat L J 118 39 I C 76

[illegible] ...39) 16 ...atraya

[illegible] ...ll 36 Bom 223, 382,

[illegible] ...98) 35 ... C W N 253, 259 85 I C 1[illegible]3 (1925) A C 427

(e) *Bishun Priya* v *Bhaba Sundari* (1901) 28 Cal 318, *Koyyana* v *Doosy* (1906) 29 Mad 225

(f) *Gowri Koer* v *Audh Koer* (1884) 10 Cal [illegible]

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For other cases under this rule see foot note (r)

Rule IV—*It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit* (s)

Application of the above rules to suits on mortgage—If a mortgagee, in a suit for redemption against him by the mortgagor, *omits to obtain an order for sale* of the mortgaged property on failure of payment by the mortgagor of the mortgage debt within the time allowed for redemption, he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within the time aforesaid The mortgagee might and ought to have claimed the right of sale in the suit for redemption brought against him (t)

A prior mortgagee, who is made a party to a suit brought by a subsequent mortgagee on his mortgage is not bound to set up his claim under his prior mortgage unless his mortgage is impugned or unless it is sought to be postponed to the subsequent mortgage If the prior mortgage is not attacked or sought to be postponed to the subsequent mortgage, the prior mortgagee is outside the controversy of the suit and he is entitled to bring a suit for sale on his own mortgage even though he may not have appeared in the suit that was brought by the subsequent mortgagee As regards a subsequent mortgagee, the rule is that if he is made a party to a suit on a mortgage prior to his own he *ought to claim his right to redeem the prior mortgage* and if he omits to do so he cannot afterwards sue for redemption of the mortgage he omitted to plead in that suit (u).

In this connection we may mention a point which was left open by their Lordships of the Privy Council in *Sri Gopal v Pirthi Singh* (v) cited above namely whether a mortgagee who has *several mortgages* on the *same* property can treat them as separate causes of action, or whether he must bring one suit on all of them This point arose in a recent case before the High Court of Bombay, where it was held that if a mortgagee who has two mortgages upon the same property sues upon the mortgage of the later date and the property is sold without reference to the prior mortgage he cannot afterwards sue on the prior mortgage not because the several mortgages constitute but one cause of action within the meaning O 2, r 2 but because of the general principles of the law of mortgage and of res judicata (w) Similarly it has been held by the High Court of Madras that if the mortgagee brings a suit on the prior mortgage without mentioning his subsequent mortgage, and the property is sold he cannot afterwards sue to enforce the subsequent mortgage against the property (x) The contrary has been held by the High Court of Calcutta (y) The ground of the Bombay and Madras decisions seems to be that the mortgagee in such a case must be deemed to be a party to the first suit as a prior or subsequent mortgagee according as the first suit is on the subsequent or prior mortgage and that the case therefore is similar to the one where the prior or subsequent mortgagee being joined as a party does not set up his claim under the mortgage But where a mortgagee who has two mortgages upon the same property

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(r) *Thandavan v Valliamma* (1892) 15 Mad 336 *Sarkum v Rahaman* (1897) 24 Cal 83 *Nathu v Budhu* (1894) 18 Bom 537 *Naro v Ram Chandra* (1889) 13 Bom 326 *Sheo Ratan v Sheo Sahai* (1884) 6 All 358 *Bai Diwali v Umedbhai* (1916) 40 Bom 614 36 I C 564 *Vishal Singh v Hira* (1913) P R no 87 p 208 18 I C 787

(s) *Kura v Madho* (1915) P R no 63 p 292 31 I C 159

(t) *Maloji v Sagaji* (1889) 13 Bom 567

(u) *Radha Kishun v Khurshed Hossein* (1920) 47 I A 11 47 Cal 662 55 I C 959 (1st mortgage not attacked), *Sri Gopal v Pirthi Singh* (1902) 24 All 429 29 I A 118 *Gopal v Benarasi* (1904) 31 Cal 453 *Ajudhia v Inayut Ullah* (1913) 35 All 111, 18 I C 21 (prior debt admitted) *Mahomed Ibrahim v Ambika Pershad* (1912) 39 Cal 527 39 I A 68 14 I C 496 *Gajadhar v Bhagwanta* (1912) 34 All 590 16 I C 8 *Krishna v Amirul* (1914) 19 C W N 942 945 26 I C 673 (prior mortgage admitted)

(v) (1902) 24 All 429 29 I A 118

(w) *Dhondo v Bhikaji* (1915) 39 Bom 139 27 I C 1003 *Dalachand v Khema* (1921) 45 Bom 55, 59 I C 347

(x) *Vallu v Annangara* (1907) 30 Mad 353 dissenting from *Sundar Singh v Bholu* (1898) 20 All 322

(y) *Gobind v Harshar* (1911) 38 Cal 60, 7 I C 330, *Sidu v Ansbad* (1920) 25 Cal W N 123, 60 I C 809

and by Das, J , in *Ramlal* v. *Deodhari Rai* (*l*) To get over the difficulties that arise from this extreme view, some judges have suggested a distinction between a decision on an abstract question of law, such as a question of limitation, and a decision on a concrete question, such as the construction of a document entered into between the parties to a suit, the latter question being treated as one to which the rule of res judicata applied, and the former as one to which the principle of *stare decisis* applied (*m*) As to stare decisis it is to be noted that the principle cannot be invoked when the terms of a statute are clear In *Tricomdas* v *Gopinath* (*n*), their Lordships of the Privy Council said. " When the terms of a statute or ordinance are clear their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment *Pate* v *Pate* (*o*) " In *Pate* v *Pate*, their Lordships overruled a decision of the Supreme Court of Ceylon which had followed a current of decisions for forty four years

CONDITION II: EXPLANATION VI HEREIN.

The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

Same parties.—*A* sues *B* for rent. The defence is that *C*, and not *A*, is the landlord *A* fails to prove his title, and the suit is dismissed *A* then sues *B* and *C* for a declaration of his title to the property The suit is not barred, for the parties to the two suits are not the same, *C* not having been a party to the former suit (*p*)

Res judicata be between co-defendants.—As a matter may be res judicata between a plaintiff and a defendant, so it may be res judicata as between co plaintiffs or as between co defendants First, as to res judicata between co defendants if in a suit by *A* against *B* and *C*, there is a matter directly and substantially in issue between *B* and *C*, *and* an adjudication upon that matter is *necessary* to the determination of the suit, the adjudication may operate as res judicata in a subsequent suit between *B* and *C* in which either of them is plaintiff and the other defendant (*q*) In other words, " if a plaintiff cannot get at his right without trying and deciding a ca e between co defendants, the Court will try and decide the case, and the co defendants will be bound But if the relief given to the plaintiff does not require or involve a decision of any case between co defendants, the co defendants will not be bound as between each other by any proceeding which may be necessary only to the decree which the plaintiff obtains" (*r*) These are the limits within which the doctrine of res judicata should be applied as between co defendants (*s*)

A Hindu, *H*, dies leaving two daughters *D*1 and *D*2 and a nephew *N* *D*1 sues *D*2 and *N* to recover certain property under an oral will of *H* *D*2 claims the property under a will in writing executed by *H* *N* claims the property as undivided nephew of *H*. The Court finds that *H* and *N* were divided, that the will in writing is the valid will,

(*l*) (1923) 2 Pat 771, 773 74 I C 781 ('24) A P 265

(*m*) (1921) 45 Bom 1260 1277 1278 64 I C [illegible] I 63 [illegible] C 156 [illegible] 26 Cal 4[illegible] 452

(*q*) *Ramchandra* v *Narayan* (1887) 11 Bom 216 *Maguiram* v *Mehdi Hossein* (1904) 31 Cal 95 *Chajju* v *Umrao* (1900) 22 All 386, *Lalambhat* v *Narayanbhat* (1901) 25 Bom 74 *Bapu* v *Bhavani* (1898) 22 Bom 215 *Muhammad* v *Viswanath* (1903) 26 Mad 337 *Kandiyil* v *Zamorin of Calicut* (1906) 29 Mad 515 *Yusuf* v *Durji* (1907) 30 Mad 447 *Gurdeo Singh* v *Chandrikah Singh* (1909) 36 Cal 193 1 I C 913, *Hari Annaji* v *Vasudeo* (1914) 38 Bom 438 23 I C 944 *Gangaram* v *Vasudeo* (1923) 47 Bom 534 73 I C 912 ('23) A B 203 *Rajendra* v *Biswarup* [illegible] *Koba* [illegible] L J [illegible] *Zahur* [illegible] A 85 [illegible]

(*r*) *Cottingham* v *Earl of Shrewsbury* (1843) 3 Hare 627, 638

(*s*) *Falirchand* v *Nagindas* (1916) 40 Bom 210, 216, 33 I C 423

11. and dismisses *D*1's suit. Subsequently *D*2 sues *N* to recover the property under the written will *N* contends that he and *H* were joint, and that he became entitled to the property by right of survivorship The question whether *H* and *N* were joint is res judicata That question was directly and substantially in issue in the first suit, and it was necessary to decide it in that suit to adjudicate upon *D*1's claim, and it was decided against *N* (*t*) Another type of cases in which a question between co defendants may become res judicata is where a suit is brought against two or more defendants, and a will has to be construed by the Court to adjudicate upon the plaintiff's claim which is founded on the will In such cases the decision with regard to the construction of the will on the rival contentions of the defendants may be res judicata in a subsequent suit by some or one of them against the rest (*u*)

Res judicata as between co-plaintiffs—Next, as to res judicata between co plaintiffs As a matter may be res judicata between co defendants, so it may be res judicata between co plaintiffs, subject to the same conditions that apply to the case of co defendants (*v*)

Parties in subsequent suit claiming under parties in former suit—If the first suit is between *A* and *B*, and the second between *A* and *C*, the decision in the first suit cannot operate as res judicata in the second unless *C claims under B* If *C* does not claim under *B*, he cannot be bound by any decision in a suit between *A* and *B* The dismissal, therefore, of an ejectment suit brought by a *lessee* against a trespasser is no bar to a subsequent suit for ejectment by the *lessor* against the same person, for a lessor cannot be said to *claim under* his lessee (*w*)

If the first suit is between *A* and *B*, and the second between *C* and *D*, the decision in the first suit cannot operate as res judicata in the second unless *C* claims either under *A* or *B*, and *D* claims under the other of them, that is to say, if *C* claims under *A*, *D* must be claiming under *B*, and if *C* claims under *B*, *D* must be claiming under *A* It is clear that if *both C* and *D* claim under *A* alone, nothing that is decided in the suit between *A* and *B* will operate as res judicata in the subsequent suit between *C* and *D*, for neither of them claims under *B* The result is the same if *both C* and *D* claim under *B* alone In other words, the plea of res judicata cannot prevail if *all* the parties in the subsequent suit claim under *one* party only in the former suit (*x*)

The Official Assignee represents the whole body of creditors But he may for certain purposes represent the insolvent It is only in the latter case that the Official Assignee can be said to claim under the insolvent and to litigate under the same title *A* obtains a decree against *B* In execution of the decree a house standing in *B*'s name is attached. *C*, *B*'s brother, claims the property as his own, but his claim is rejected by the executing Court Subsequently *B* is adjudicated an insolvent, and his estate vests in the Official Assignee The Official Assignee advertises the house for sale *C* sues the Official Assignee for a declaration that the house belongs to him and for an injunction restraining him from selling the house The decision in the execution proceedings is not res judicata against *C*. The Official Assignee in *C*'s suit represents *B*'s creditors, and not *B*, and he cannot be said to be claiming under *B* (*y*)

A purchaser *at a revenue sale* does not "claim under" the defaulting proprietor therefore a decree against the defaulting proprietor cannot constitute res judicata as against the purchaser (*z*).

A purchaser at a sale *in execution of a decree* acquires only the right, title and interest of the judgment debtor in the land sold Hence it has been held that an adjudication

[illegible]

(*z*) Gadadhar v. Radhacharan (1907) 34 Cal 868

as to the *area* of the land in a previous suit between the judgment debtor and his landlord is binding on the auction purchaser (a)

The title by which the parties in the subsequent suit claim must have arisen "subsequently" to the commencement of the former suit—In order that a decision in a suit between *A* and *B* may operate as res judicata in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising *subsequently* to the commencement of the first suit Thus a purchaser, mortgagee, or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor or donor commenced *after* the date of the purchase, mortgage or gift (b)

See notes below under the head "Condition III Litigating under the same title"

Representative suit.—Explanation VI—This section deals with representative suits, that is, suits instituted by or against a person in his representative, as distinguished from individual character Suits brought or defended by one or more persons on behalf of themselves and others with the leave of the Court under O 1, r 8, are common instances of this type Explanation VI provides that where persons litigate *bonâ fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to "claim under" the person so litigating It refers to cases in which a decision in a suit may operate as res judicata against persons *not expressly named* as parties to the suit, as where a suit is instituted by *A* and *B* on behalf of themselves "and others", or where it is instituted against *A* and *B* on behalf of themselves "and others" The conditions under which the decision in such a suit may constitute res judicata against the parties not expressly named in the suit are—

(1) that there must be a *right claimed* by one or more persons *in common* for themselves and others not expressly named in the suit, and

(2) that the parties not expressly named in the suit must be *interested in such right* (c)

Illustrations

(1) A decree in a suit against certain members of a sect alleged to be wrongdoers in their *individual* capacity cannot operate as res judicata in a subsequent suit against the other members of the sect *Sadagopa Chariar* v *Krishnamoorthy Rao* (1907) 30 Mad 185 34 I A 93 [The wrong complained of in the former suit was that the defendants carried an idol in procession through certain streets and that such processions were in violation of the plaintiff's rights The suit was against the defendants in their *individual* capacity, and not as representing the sect to which they belonged]

(2) *A*, alleging that he is the proprietor of a village, sues *B*, *C*, and *D* for ejectment. The defence is that *A* is not the proprietor at all, that a *part* of the village belongs to *B*, *C* and *D*, and *the rest* to *X*, *Y* and *Z* The Court finds that *A* is not the proprietor, and *A*'s suit is dismissed *A* then sues *X*, *Y* and *Z*, and also *B*, *C* and *D*, for a declaration, that he is the proprietor of the village and for possession. The question of *A*'s title to the village is res judicata so as to bar the suit against *B*, *C* and *D*, who were parties to the former suit, but it is not res judicata so as to bar the suit against *X*, *Y* and *Z who were not parties to the former suit* It cannot be said that *B*, *C* and *D* litigated in the

(a) *Kali Dayal* v *Umesh Prasad* (1922) 1 Pat 174 67 I C 286, (22) A P 63
(b) *Sita Ram* v *Amir* (1886) 8 All 324 *Joy*

S. 11. former suit in respect of a private right *claimed in common* for themselves and *X*, *Y* and *Z*, for what *B*, *C* and *D* did in the former suit was that they set up their own right to *a part of the property and alleged that another part* belonged to *X*, *Y* and *Z*. *Jaimangal Deo* v. *Bed Saran* (1911) 33 All 493, 9 I C 819

(3) *A* and *B as two of the members of the Mahomedan community* bring a suit against *C* for a declaration that a certain mosque and a garden appertaining to the mosque are wakf property The plaintiffs fail to prove that the property is wakf property, and the suit is dismissed After some years a suit is brought by nine other members of the same community against the same defendant *C* for the same relief The suit is barred as res judicata *Muhammad* v *Sumitra* (1914) 36 All 424, 24 I C 97

The right referred to in this Explanation may either be a public right or a private right The words "public right" have been added into this Explanation in view of the provisions of s 91 below The right to have a public nuisance abated is a public right But the right of pasturage claimed by custom by the inhabitants of a village over a tract of land, or to take water from a spring or well, is a private right (*d*)

In some of the cases that arose under the Code of *1882* the opinion was expressed that the present Explanation, so far as it relates to *private* rights, must be confined to cases where leave to sue has been obtained under s 30 of that Code [now O 1, r 8 (1)] (*e*) But the Explanation, it is submitted, is not confined to such cases, and applies also where no such leave is obtained (*f*) Suits by a Hindu widow or by a reversioner in her or his representative character are commonest instances of this type

Shebait, karnavan, trustee, administrator, etc —If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision in the former suit will bind the parties in the subsequent suit. Thus a trustee of a *devasum* a *karnum*, a holder of *watan* lands, an administrator of the estate of a deceased person, a *shebait*, a holder of *saranjam* lands, represents each his successor therefore, a decree against him will bind his successor (*g*) Similarly a decree against a *benamidar* binds the real owner (*h*) On the same principle a decree against the *karnavan* of a *tarwad* in his representative capacity binds the members of the *tarwad* (*i*)

Hindu widow and reversioners —A decree passed against a Hindu widow as representing the estate of her deceased husband in respect of a debt or other transaction binding on the estate is binding upon the reversioners (*j*), "*unless*," as was observed by their Lordships of the Privy Council in the *Shivaganga case*, "it could be shown that there had not been a fair trial of the right on that suit—or in other words, unless that decree could have been successfully impeached on some special ground (*k*) The reason of this qualification is that, though a Hindu widow *represents* the estate of the reversioners for some purposes, it is her duty not only to represent the estate, but also to *protect* it (*l*)

(*d*) *Kalieekunkur* v *Gopal Chunder* (1881) 6 Cal 49

(*e*) *Thanakoti* v *Muniappa* (1895) 8 Mad 496, 499, *Srinivasa* v *Jagharu* (1900) 23 Mad 28, *Baijit Lal* v *Lulal Lal* (1897) 24 Cal 385 *Somasundara* v *Kulandaivelu* (1905) 28 Mad 457 463

(*f*) *Gopalacharyulu* v *Subbamma* (1920) 43 Mad 457, 55 I C 984

(*g*) *Madhavan* v *Kesharan* (1888) 11 Mad 191 [trustee], *Venkayya* v *Suramma* (1889) 1– *Anusuyabai* (1916) 40 Bom 606 36 I C 505 [saranjam lands]

(*h*) *Gurnarayan* v *Sheo Lal Singh* (1919) 46 I A 1, 9-10 46 Cal 566 575, 49 I C 1 *Nand Kishore* v *Ahmad* (1896) 18 All 69, *Tarje* v

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(*k*) *Katama Natchiar* v *Srimut Rajah* (1863) 9 M I A 543, 609, *Chaudhri Fateh Singh* v *Balwant Singh* (1915) 42 I A 165 40 All 593, 45 I C 553

(*l*) *Nugendrochunder* v *Sreemutty Kaminee Dossee* (1867) 11 M I A 241, 267

The observations of their Lordships in the *Shivaganga case* were construed to mean in a large majority of cases that a decree passed against a Hindu widow or other limited heir did not bind the reversioners unless the decree was passed in a suit *contested to the end*, and that neither a consent decree nor a decree on an award, however *bona fide* the compromise or reference might be, bound the reversioners But this view has now been definitely rejected by the Privy Council as it involves very extreme consequences, one of them being that a Hindu widow must fight the case up to the Privy Council, and another that her opponent can never suggest a compromise, because he would know that any compromise would be upset It has accordingly been held that a widow has power to compromise a suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided the compromise was entered into by her *bona fide* for the benefit of the estate which she represents and not for her personal advantage (*m*) But a decree passed against a Hindu widow not in her representative but personal character does not bind the reversioners (*n*) Similarly a decree passed against the legal personal representative of a Hindu widow in respect of her husband s estate cannot bind a reversioner, for the representative of a widow does not represent the estate of the husband (*o*)

There is no authority for the proposition that a Hindu widow, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant although the merits of a suit by or against her are tried and the trial is fair and honest The mere fact, therefore, that she is personally estopped from denying the material facts of the case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph, namely that where the estate of a deceased Hindu has vested in his widow or other limited heir, a decree fairly and properly obtained against her, after a trial upon the merits is binding on the reversionary heirs Thus where a Hindu widow instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid, and the suit was dismissed on the ground that the widow was estopped by her conduct from denying the validity of the adoption and it was further found upon the facts that the adoption was valid it was held in a suit brought by the reversionary heir after the widow s death for a declaration that the adoption was invalid that the reversionary heir was bound by the decision in the first suit as res judicata (*p*)

The dismissal of a suit brought by a widow on the ground that it was barred by the provisions of s 47 below does not operate as res judicata so as to bar a subsequent suit by the reversioners (*q*) A reversioner is entitled to bring a suit for a declaration that an alienation made by a Hindu widow is not binding on the reversion Such a suit is a representative suit on behalf of all the reversioners A decree fairly and properly obtained against the reversioner in such a suit binds not only him, but the whole body of reversioners presumptive and contingent on the one hand and the alienee or his representative on the other (*r*)

Decree in a representative suit —See O 1, r 8, ' Decree in a representative suit "

[illegible]

award]

(*n*) *Subbi* v *Ramkrishna* (1919) 42 Bom 69 43 I C 239 *Kallu* v *Faiyaz* (1908) 30 All 394

(*o*) *Kailash* v *Girija* (1917) 39 Cal 925 14 I C 293

(*p*) *Chaudhri Risal Singh* v *Balwant Singh* (1918) 45 I A 168 40 All 593 48 I C 553 *Nachikalai* v *Ayyakannu* (19) 43 Mad L J 95 70 I C 387 (22) A M 233

(*q*) *Ganesh* v *Lakshmibai* (1921) 46 Bom 726 67 I C 209

S. 11.

Res judicata in suits under O. 21, r. 63.—See notes to O 21, r 63, "Res judicata"

Judgment in rem.—It will have been seen from what has preceded that a judgment in a suit is binding only upon the parties to the suit and their privies "As a general principle, a transaction between two parties in judicial proceedings ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous" (s) There are, however, certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies A judgment that is binding upon the parties and their privies only is called a judgment *in personam* A judgment which binds all the world is called a judgment *in rem* Judgments *in rem* are outside the scope of the present section They are dealt with in the Indian Evidence Act, s 41

Decree against minor—A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult but it is open to the minor to impeach such a decree by a suit in cases where the next friend or guardian for the suit has been guilty of fraud or gross negligence in allowing the decree to be passed against him (t) Any act or omission on the part of the guardian ad litem which in the result has wrought prejudice to the minor's interest is gross negligence (tt) An omission on the part of a guardian ad litem to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of res judicata does not constitute negligence (u)

A decree passed against a minor not properly represented is a nullity But it has been held that if a suit is brought on the minor's behalf to set aside a sale in execution of such decree, but the plea that the minor was not properly represented in the suit in which the decree was passed is not then taken, it cannot be taken in a subsequent suit to set aside the decree and sale by reason of the rule contained in Explanation IV to the section (v)

CONDITION III.

"Litigating under the same title."

The third condition of res judicata is that the parties in the subsequent suit must have litigated under the "same title" in the previously decided suit The expression "same title" means the same capacity "A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, *and, in fact, is a different person*" (w) Thus where a suit is brought by a person to recover possession from a stranger, of *math* property claiming it as the *heir* of a deceased *mohunt*, but he does not produce any certificate of succession to establish his *heirship* and the suit is thereupon dismissed, the dismissal is no bar to a suit by him *as manager of the math on behalf of the math* (x) Similarly the dismissal of a suit brought by a son against his father for maintenance claimed *under an agreement* is no bar to a suit by him against the father for a declaration that he is entitled to maintenance out of certain lands in the hands of the father *held under a sanad* from Government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family (y).

(x) *Babajirao* v. *Laxmandas* (1904) 28 Bom 215, Distinguished *Hargowan* v *Mulji* (1910) 34 Bom 416, 4 I C 241

(y) *Ahmad* v. *Nihal ud Din* (1883) 9 Cal 945 10 I A 45

A mortgagee in possession, does not lose the character of *mortgagee* and become *a trespasser* because he refuses to deliver up possession of the mortgaged property to the mortgagor on deposit being made by the latter in Court of the amount payable on the mortgage. *A* executes a usufructuary mortgage of his property to *B*, and places *B* in possession thereof. At the proper time *A* tenders the mortgage debt, Rs. 500, to *B* and asks to be restored to possession. *B* refuses to accept the tender on the ground that more is due to him and to deliver up possession of the property to *A*. *A* sues *B* for redemption, and deposits Rs. 500 in Court. The Court finds that the tender was proper, and directs *B* to deliver up possession to *A*. After entering into possession, *A* sues *B* to recover mesne profits from *B* from the date of the deposit in Court to the date of the recovery of possession. The suit is barred, for *A* "might and ought" to have claimed the mesne profits in the first suit. The suit is between the same parties litigating "under the same title," that is, as mortgagor and mortgagee. The mortgage is not extinguished after the tender and deposit, and *B* does not become a *trespasser* after that date. It cannot therefore be said that the suit against *B* for mesne profits is against him as a *trespasser*, and not as a mortgagee (z).

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the later litigant occupies by succession the same position as the former litigant. There may be a succession by the ordinary rules of inheritance or succession by some very special rules as in the case of Saranjam estates or Vatan estates. The words of the section do not make any distinction between different forms of succession. A decree, therefore, against a Saranjamdar may operate as res judicata against his heir and successor (a), so also a decree against a Vatandar (b).

See notes above, p. 51 "Representative suit," first para.

CONDITION IV: EXPLANATION II HEREIN.

"Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

Court of competent jurisdiction.—In order that a decision in a former suit may operate as res judicata in a subsequent suit, it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent *suit*. Mere competency to try the *issue* raised in the subsequent suit is not enough. As stated by their Lordships of the Privy Council in *Gokul Mandar* v. *Pudmanund* (c), "a decree in a previous suit cannot be pleaded as res judicata in a subsequent suit unless the judge by whom it was made had jurisdiction to try and decide, *not only the particular matter in issue, but also the subsequent suit itself* in which the issue is subsequently raised. In this respect the enactment goes beyond s. 13 of the previous Act 10 of 1877, and also, as appears to their Lordships, beyond the law laid down by the judges in the *Duchess of Kingstone's case*" (d). The words in s. 13 of the Code of 1877 were, "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a *Court of competent jurisdiction*, in a former suit between the same parties, or between parties under whom," etc. Sec. 2 of the Code of 1859 was in similar terms. In s. 13 of the Code of 1882, the words "Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised," which also occur in the present section, were substituted for the words, 'Court of competent jurisdiction,' clearly restricting the operation of the principle of res judicata.

(z) *Rukhminibai* v. *Venkatesh* (1907) 31 Bom. 527; *Satyabadi* v. *Harabati* (1907) 34 Cal. 223; *Ram Din* v. *Bhoop Singh* (1908) 30 All. 225.

(a) *Madhavrao* v. *Anusuyabai* (1916) 40 Bom. 36 I. C. 505.

(b) *Radhabai* v. *Anantrao* (1885) 9 Bom. 198.

(c) (1902) 29 I. A. 196, 202, 29 Cal. 707, 715; foll. in *Shibo Rout* v. *Baban Rout* (1908) 35 Cal. 353, 359.

(d) (1776) 2 Smith's Leading Cases, p. 731.

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The Court which decided the former suit may be a Court of 'exclusive' jurisdiction, or a Court of 'concurrent' jurisdiction, or a Court of "limited" jurisdiction.

Where the Court which decided the former suit is a Court of "exclusive" jurisdiction.—If a matter directly and substantially in issue in a former suit has been adjudicated upon by a Court of *exclusive* jurisdiction, the adjudication will bar the trial of the same matter in a subsequent suit. Thus Courts of Revenue have jurisdiction in respect of certain matters to the entire *exclusion* of Civil Courts, and the decision of a Revenue Court on such matter cannot be questioned in a civil Court (e).

Where the Court which decided the former suit was not a Court of jurisdiction concurrent with that of the Court in which the subsequent suit is brought.—In such a case the Court which decided the former suit cannot be a Court 'competent to try the subsequent suit' within the meaning of this section (f).

Where the Court which decided the former suit was a Court of concurrent jurisdiction.—In such a case the Court which decided the former suit may or may not have been competent to try the subsequent suit. If it was, the decision would operate as res judicata, but not otherwise.

Summarising the above, we may say that in order that a decision in a former suit may operate as res judicata, the Court which decided that suit must have been either—

1. a Court of *exclusive* jurisdiction, or
2. a Court of *concurrent* jurisdiction, competent to try the subsequent suit.

The following are the principal rules as to concurrent jurisdiction :—

(1) *The jurisdiction of the two Courts must be concurrent as regards the pecuniary limit as well as the subject matter* (g). *First as to pecuniary limit.*—The jurisdiction of the Court which decided the former suit and that of the Court in which the subsequent suit is brought must be concurrent as regards the *pecuniary limit*. A sues B in Court X to recover *interest* due on a bond for Rs. 12,000. For the defence it is alleged that the amount actually lent by A was Rs. 4,000 and that A was not entitled to interest on more than Rs. 4,000. The Court finds that the amount actually lent was Rs. 4,000 and awards A interest on that sum only. Court X is a Court of which the jurisdiction is limited to suits of which the value *does not exceed Rs. 5,000*. A then sues B in a High Court to recover the *principal* sum of Rs. 12,000, alleging that that was the actual amount lent by him to B. B contends that the actual amount advanced was Rs. 4,000, and that the question as to whether Rs. 12,000 was lent or Rs. 4,000 is res judicata. The question is not res judicata, for the jurisdiction of Court X being limited to Rs. 5,000, it was not a Court competent to try the subsequent suit in which the amount claimed is Rs. 12,000. The point to be noted is that the first Court must have been a court competent to try and decide *not only the particular matter in issue*, but also *the subsequent suit* in which the issue is subsequently raised (h). It must, however, be noted that the Courts will not countenance what is but a mere device to evade the provisions of this section. Thus where A brought two suits in a Provincial Small Cause Court for compensation in each suit for loss of one packet, and the suits were dismissed, and he subsequently brought a suit in the Munsif's Court joining together the claims in the respect of both the parcels so as to bring the valuation above the Rs. 500 limit, it was held that the suit was barred on the principle of res judicata (i).

(e) *Kishore Singh* v. *Bahadur Singh* (1919) 41 All. 97, 48 I. C. 470; *Lalju* v. *Mahipal* (1919) 41 All. 203, 49 I. C. 118; *Ram Das* v. *Dubri Koeri* (1922) 44 All. 7[illegible] ([illegible]) A. A. 336.

(f) *Edun* v. *Mechun* 8 W. R. 175, 179; *Misir* v. *Sheo Baksh* (1883) 9 Cal. 433, 445, 9 I. A. 197.

(g) *Misir* v. *Sheo Baksh* (1883) 9 I. A. 197, 204, 9 Cal. 439.

(h) *Misir* v. *Sheo Baksh* (1883) 9 Cal. 439, 9 I. A. 197; *Gokul Mandar* v. *Pudmanund* (1902) 29 I. A. 196, 202, 29 Cal. 707; *Ramdayal* v. *Junkidas* (1900) 24 Bom. 456; *Gurusami* v. *Sabapathy* (1906) 29 Mad. 65; *Sheikh Hasan* v. *Ram Kumar Singh* (1894) 16 All. 183; *Venkat* v. *Onkar* (19[illegible]) [illegible] 605, 61 I. C. 2[illegible]6.

(i) *Mangan Lal* v. *E. I. Ry. Co.* (19[illegible]) [illegible] All. L. J. 745, 83 I. C. 9[illegible]9, ([illegible]21) A. A. 81[illegible]. See also *Bhupendranath* v. *Forbes* (19[illegible]) [illegible] Cal. 7[illegible] as explained in *Shibo Rout* v. *Baban Rout* (1908) 35 Cal. 353, 357.

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Secondly, as to subject matter—The jurisdiction of the two Courts must be concurrent as regards subject matter Thus certain Courts have no jurisdiction to adjudicate upon questions of *title*, though that question may be gone into *incidentally* to decide the principal question A finding on a question of *title* by such Courts cannot operate as res judicata in a subsequent suit on *title* This generally happens in the following cases —

(a) *Where the first Court is a "Probate Court" and the second Court a Civil Court* —*A* and *B*, each claiming to be the heir of *X*, apply to a High Court, in the exercise of its *testamentary jurisdiction*, for letters of administration of the estate of *X* The Court finds that *A* is the heir of *X*, and grants letters to him *B* then sues *A* in the same Court in the exercise of its *original jurisdiction* for a declaration that he, and not *A*, is the heir of *X* The suit is not barred for a Probate Court has no jurisdiction to finally adjudicate upon questions of *title* (*j*) It must not, however, be supposed that a decision of a Probate Court can in no case operate as res judicata in any subsequent proceeding in a Civil Court Thus if *A*, alleging to be the executor of *B*'s will, applies for probate of the will, and *C*, *B*'s widow, opposes the application, and probate is refused on the ground that the will is not proved, *A* will be precluded, in a subsequent suit by *C* against him to recover her husband's property from him, from contending that he is the husband's executor and is entitled as such to retain possession of the property Though the judgment of the Probate Court refusing probate to *A* does not operate in such a case as a judgment *in rem*, it operates as res judicata between *A* and *C* under s 83 of the Probate and Administration Act (V of 1881) and s 11 of the Code (*k*) Similarly a decision of the Probate Court that the testator executed the will in question as a free agent and not under undue influence precludes the party against whom the decision is given from reopening it in a suit in a Civil Court (*l*) Likewise a finding in a proceeding for letters of administration that one of the two rival claimants is not the legitimate daughter of the deceased is res judicata in a subsequent suit by her that she was the legitimate daughter and as such his rightful heir (*m*) As to cases governed by the Succession Certificate Act 7 of 1889 see s 25 of the Act and the undermentioned case (*n*) See also Indian Evidence Act, s 41

(b) *Where the first Court is a Munsiff's Court and the second Court a District Court* —*A* sues *B* for rent in a Munsiff's Court The defence is that *C* and not *A* is the landlord The Court finds that *A* is not the landlord and the suit is dismissed *A* then sues *B* in a District Court for a declaration of *title* to the land The suit is not barred, for a Munsiff's Court has no jurisdiction to adjudicate upon questions of title (*o*)

Similarly, a decision in a suit for damages instituted in a Provincial Small Cause Court [a Court not competent to try a suit on title] does not operate as res judicata in a subsequent suit for establishment of title (*p*) A decision in a suit for rent in a Provincial Small Cause Court [a Court not competent to try a suit for possession] does not operate as res judicata in a subsequent suit for possession (*q*)

[illegible]

See however *Sheoparsan* v *Ramnandan* (1916) 43 I A 91 98 99 43 Cal 694 705-706 33 I C 914

(*k*) *Kalyanchand* v *Sitabai* (1914) 38 Bom 309 23 (1914) I A 15

(*l*) *B* [illegible] 13 p 6[illegible]

(*m*) *Maung Hmat* v *Ma Hla* [illegible] (1923) 1 Rang 258 76 I C 494 (23) A R 257

(*n*) *M[illegible] Das* v *Ach[illegible] Das* (1924) 5 Lah 105 (24) A L 493

(*o*) *[illegible]un Bahadur* v *Lucho Koer* (1885) 11 Cal 301 12 I A 23

(*p*) *Dulare Lal* v *Ha[illegible] Lal* (1914) 1[illegible] All L J 853 26 I C 56 It is otherwise where the first suit is tried as a regular suit *Ram Faqir* v *Bindeshri Singh* (1919) 41 All 54 47 I C 837

(*q*) *Rukm[illegible]* v *Rayaji* (1924) 48 Bom 541 83 I C 47[illegible] (24) A B 454

. 11. (c) *Where the first Court is a "Revenue Court" and the second Court is a "Civil Court"*—A decision of a Revenue Court on a question of *title* is no bar to the trial of the same question by the ordinary Civil Courts, unless the Revenue Court is empowered by the Legislature to determine questions of title so as to constitute it *pro tanto* a Civil Court (r) The reason is that Courts of Revenue are generally Courts of jurisdiction limited to adjudicate upon questions of rent, tenure, etc (s) There are, however, *some matters of which the decision by a Revenue Court is expressly declared by the Act* constituting the Court to have the force of a decree in a *civil* suit (t), and some as to which it is declared that the decision *shall be final (u)* In such cases, the decision of a Revenue Court will operate as res judicata so as to bar the trial of the same matter in a Civil Court. See notes, "Where the Court which decided the former suit was a Court of exclusive jurisdiction," on p 56 above For other cases see foot note (v)

(2) *Where the first Court is a "Criminal Court" and the second Court is a 'Civil Court"*—*Criminal proceedings are not a "suit," hence no finding of a Criminal Court* can be res judicata in a subsequent suit It has thus held that a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of the act charged against the accused (w) The finding, therefore, of a Criminal Court that *A* assaulted or abducted *B*, is not res judicata in a suit for *damages* against *A* for assault or abduction (x)

It has been held by the High Court of Bombay that the judgment of a Civil Court may in a proper case be admissible in evidence in a criminal proceeding between the same parties. Thus where *A* charged *B* with criminal breach of trust in respect of certain items, and it appeared that all those items had been dealt with by the Civil Court and the contentions of the accused with reference to all of them had been found to be correct by that Court, it was held that the judgment of the Civil Court was admissible in evidence in the criminal proceeding against the accused (y)

(3) *To determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the "former" suit, and not to its jurisdiction at the date of the 'subsequent" suit* (z)—The leading case on the subject is *Gopi Nath v Bhugwat* (a) In that case a suit was brought in the year 1860 to recover certain property of which the value at that time was less than Rs. 1,000, and therefore the proper Court to try it was that of the Munsiff A second suit was afterwards brought in the year 1880 between the same parties in the Court of the Subordinate Judge to recover the *same property*, which had then risen in value and become worth more than Rs. 1,000. The matter directly and substantially in issue in both the suits was the same, and the question arose whether the decision of the Munsiff in the first suit operated as res judicata in the second suit. It was contended that as the Munsiff could not have tried the second suit in consequence of the value of

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Kalka Prasad v Manmohan Lal (1916) 38 All 302, 310 33 I C 66

(u) *Mahendra v Girish Chandra* (1915) 3 Pat L J 379 46 I C 125

the property being more than Rs 1,000, his decision could not have the effect of res judicata But it was held that the decision operated as res judicata, for if the second suit were instituted in the year 1860, that is, *at the time when the first suit was brought*, the Munsiff s Court would have been quite competent to try it Mitter J said The reasonable construction of the words in a Court of jurisdiction competent to try such subsequent suit seems to us to be that it must refer to the jurisdiction of the Court *at the time when the first suit was brought* that is to say if the Court which tried the first suit was competent to try the subsequent suit if *then* brought, the decision of such Court would be conclusive under s 13 [of the Code of 1882] although on a subsequent date by a rise in the value of such property or from any other cause the said Court ceased to be a proper Court so far as pecuniary jurisdiction is concerned to take cognizance of a suit relating to that property The High Court of Madras has also held the same way (*b*) But it has been held by the latter Court that the augmentation of a pecuniary claim by accrual of interest is not similar to a rise in the market value of a property, and that though in the latter case the decision in the prior suit may operate as res judicata in the subsequent suit it cannot in the former case (*c*)

(4) *It is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal* (*d*) *or of the executing Court* (*e*)—A suit is instituted in a Munsiff s Court An appeal from the decree in that suit is preferred to a District Court A subsequent suit relating to the same matter in issue is brought also in a District Court The decision in the first suit cannot operate as res judicata in the subsequent suit for though the District Court that heard the appeal may have jurisdiction to try the subsequent suit the Munsiff s Court that is the Court which decided the former suit is not a Court of jurisdiction competent to try the subsequent suit

(5) *A Court does not cease to be a Court of jurisdiction competent to try the subsequent suit if its inability to entertain it arises not from incompetence but from the existence of another Court with a preferential jurisdiction* (*f*)—Thus a finding by a Munsif in a suit for possession under s 9 of the Specific Relief Act 1877 instituted in his Court that the plaintiff was wrongfully dispossessed by the defendant is res judicata on the issue as to wrongful dispossession in a subsequent suit brought by the same plaintiff against the same defendant for damages for wrongful dispossession in a Court of Small Causes It cannot be said that the Munsif who tried the first suit was not competent to try the subsequent suit for damages

(6) *A decision on a matter directly and substantially in issue in a suit tried by a Revenue Court may operate as res judicata in a subsequent suit brought in the same Court, though the character of the suits may be such that in the one case an appeal lies to the Commissioner, and in the other to a District Court*—The fact that in the two suits appeals may lie to different Courts does not affect the application of the rule of res judicata (*g*)

(*b*) *Venkatachalam* v *Ajamperumal* (1919) 4? Mad ?0? 53 I C 33

(*e*) *Official Assignee of Madras* v *Ayyu Dikshithar* (19?5) 48 Mad L J 530 533 88 I C 85 (?? A M 698

(*f*) *Ghulappa* v *Raghavendra* (1904) 28 Bom 38 *Raja Simhadri* v *Ramachundrudu* (190?) 27 Mad 63 *Bodku* v *Mohan Singh* (1917) 39 All 717 4? I C 862.

(*g*) *Beni Madho* v *Indar Sahai* (1910) 32 All 67 3 I C ?07

1\. **Explanation II**—This explanation is new Under the Code of 1882 it was held by the High Courts of Bombay (*h*) and Madras (*i*) that a decision in a suit in which no second appeal was allowed by law could not operate as res judicata in a subsequent suit in which such appeal was allowed. Hence it was held that a decision in a suit of the nature cognizable in Provincial Courts of Small Causes could not operate as res judicata where the amount or value of the subject matter of the suit did not exceed Rs 500, as no second appeal could lie in such suit (See s 586 of the Code of 1882, now s 102) On the other hand, it was held by the High Court of Calcutta that a decision in a suit could operate as res judicata, notwithstanding that no second appeal was allowed by law in that suit (*j*) *Explanation II* is intended to affirm the view taken by the High Court of Calcutta that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision (*k*)

Judgment of Court not competent to deliver it—A judgment delivered by a Court not competent to deliver it cannot operate as res judicata [Evidence Act 1872 s 44] For this purpose there is no distinction, so far as Chartered High Courts are concerned between cases where a Court has no jurisdiction at all to try a suit and cases where it cannot exercise jurisdiction unless leave to sue has been obtained under cl 12 of the Charter Therefore a judgment delivered by a Chartered High Court in a suit which it has no jurisdiction to try unless leave to sue has been obtained cannot operate as res judicata if leave to sue was not obtained (*l*)

Judgment obtained by fraud or collusion—A judgment obtained by fraud or collusion (*m*) cannot operate as res judicata [Evidence Act 1872 s 44] "Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice Lord Coke says it avoids all judicial acts ecclesiastical or temporal" (*n*) Where a decree is impeached on the ground of fraud the fraud alleged must be actual positive fraud a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of the decree by that contrivance The mere fact that a decree has been obtained by perjured and false evidence is no ground for setting it aside on the ground of fraud (*o*)

Summary of the above—The rules of res judicata hitherto considered may be best summarized by citing the following passage from the judgment in the *Duchess of Kingstone's Case*

From the variety of cases relative to judgments being given in evidence in civil suits these two deductions seem to follow as generally true *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court, *secondly*, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court, for a different purpose

(*h*) *Gorarl v. Dhondbarar* (1891) 15 Bom 104
(*i*) *Iravasi v. Nachammal* (1906) 29 Mad 195
(*j*) *Rai Charan Ghose v. Kumud Mohun* (1898) 25 Cal 571, *Bhagwanbutti v. Forbes* (1901) 28 Cal 78
(*k*) *Ram Kuar v. Bindeshri Singh* (1919) 41 All 518, 47 I C 817
(*l*) *Abdul Kadir v. Doolanbibi* (1913) 37 Bom 501, 20 I C 570
(*m*) See *Bansilal v. Dhapo* (1902) 24 All 242
(*n*) *Duchess of Kingstone's case*, 2 Smith's L C

But neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

CONDITION V : EXPLANATION V HEREIN.

The matter directly and substantially in issue in the subsequent suit must have been "heard and finally decided" by the Court in the first suit.

Heard and finally decided.—The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter res judicata. It is further necessary, amongst other conditions, that the matter must have been "heard and finally decided" in the former suit. This does not mean that there should be an *actual* finding on the issue in question; it is enough if the decree necessarily involves a finding of the issue (p). It has thus been held that an issue may be res judicata where the judgment of the appellate Court shows that the issue was treated as material, and was decided, although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (q).

In dealing with questions under the present head it is important to note—

(1) that if a decree is specific, and is at variance with a statement in the judgment, regard must be had to the decree, and not to the statement in the judgment (r);

(2) that neither an *obiter dictum* nor a mere expression of opinion in a judgment has the effect of res judicata (s),

(3) that when a Court merely for the purpose of preventing a remand records its finding on an issue not necessary for the decision of the case, it does not operate as res judicata (t).

See notes "Examination of pleadings and judgment," on p. 32 above.

A matter will be said to have been "heard and finally decided," notwithstanding that the former suit was disposed of—

(i) ex parte (u), or

(ii) by dismissal under O. 17, r. 3 [Code of 1882, s. 158] (v), or

(iii) by a decree on an award (w), or

(iv) by oath tendered under s. 8 of the Indian Oaths Act, 1873 (x).

If the plaintiff fails to adduce evidence at the hearing, and the suit is dismissed, it is none the less "heard and finally decided" (y).

The decision in the former suit must have been one on the merits.

In order that a matter may be said to have been heard and finally decided, the decision [illegible]

(p) [illegible] (1874) 12 B. L. R. 301 [illegible] (1895) [illegible] Bom. 80 [illegible] (1910) [illegible] 952.

(q) [illegible] (1924) [illegible] 80 I. C. 827 (1924) A. [illegible] 141.

49 [illegible] 1872, s. 108].

(r) [illegible] (1924) 47 Mad. [illegible] 82 I. C. 455 (1924) A. M. 833.

(s) [illegible] (1889) 16 Cal. [illegible]

(t) [illegible] 10 Mad. 27; [illegible] Saheb v. [illegible] 13 Mad. 510.

(u) [illegible] (1897) 21 Bom. [illegible]

(v) [illegible] v. Moidin (1901) 24 Mad. [illegible] (1913) [illegible] Mad. 227 [illegible] I. C. 835.

(w) [illegible] v. Collector of [illegible] M. I. A. 160; Kartick v. [illegible] 12 Cal. 563.

11. in the former suit must have been one on the merits. Hence it could not be said of a matter that it was "heard and finally decided," if the former suit was dismissed—

(i) for want of jurisdiction (z), or

(ii) for default of plaintiff's appearance under O 9, r 8 (a), [but a fresh suit on the *same* cause of action may be barred under O 9, r 9], or

(iii) on the ground of nonjoinder of parties (b), or misjoinder of parties (c), or multifariousness (d), or on the ground that the suit was badly framed (e), or on the ground of a technical mistake (f), or

(iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree (g), or

(v) for failure to furnish security for costs under O 25, r 2 [Code of 1882, s 381] (h), or

(vi) on the ground of improper valuation (i), or for failure to pay additional court fees on a plaint which was under valued (j)

See notes "Liberty to bring a fresh suit," on p 66 below

The decision in the former suit must have been necessary to the determination of that suit —A matter directly and substantially in issue cannot be said to have been "heard and *finally* decided," unless the finding on the issue was *necessary to the determination of the suit* A finding on an issue cannot be said to be necessary to the decision of a suit unless the decision *was based upon* that finding And a decision cannot be said to have been based upon a finding unless an *appeal can lie* against that finding The reason is that "everything that should have the authority of res judicata is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of res judicata" (k) This leads to the following rules —

RULE I —*If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as res judicata against him in a subsequent suit, for the defendant cannot appeal from a finding on any such issue, the decree being wholly in his favour* (l) [see ills (1) and (3)], *but every issue decided against the plaintiff may operate as res judicata against him in a subsequent suit, for the plaintiff can appeal from a finding on such issue, the decree being against him* (m) [see ill (3)] The Allahabad High Court has expressed the opinion that the second branch of this rule does not apply to cases where the Court after disposing of the suit against the plaintiff on a *preliminary* point proceeds to

(z) *Lakshman* v *Ramchandra* (1881) 5 Bom 48, 7 I A 18 *Putali* v *Tulja* (1879) 3 Bom 223 *Abdul Kadir* v *Doolanbibi* (1913) 37 Bom 563 20 I C 530 See also Evidence Act, 1872, s 44

[illegible]

(e) *Deodhari* v *Lala Seosaran* (1876) 3 Cal L R 395

(f) *Janakdulari* v *Ambica Prasad* (1917) 2 Pat L J 313 39 I C 126

(g) *Pethaperumal* v *Murugandi* (1895) 18 Mad 466

(h) *Hariram* v *Lalbai* (1902) 26 Bom 637

(i) *Dullabh* v *Narayan* (1865) 4 Bom H C A C 110

[illegible]

A M 469

(m) *Peary* v *Ambica* (1897) 24 Cal 900, *Venkataraju* v *Pimanamma* (1915) 38 Mad 158 21 I C 258 *Babu Lal* v *Hari Bakhsh* (1918) P R No 13 p 60, 41 I C 479

record its finding against the plaintiff on other issues, in such a case, according to that Court, the findings on the other issues do not operate as res judicata against the plaintiff in a subsequent suit (n) [See notes to s 96, "Who may appeal"]

Illustrations

(1) In a suit by *A* against *B* for ejectment, *B* contends (1) that no notice to quit was given, and (2) that the land being *majhes* land, he is not liable to be evicted at all The suit is dismissed on a finding that no notice to quit was given The Court, however, also finds that the land is not *majhes* land, but this finding is not recorded in the decree *A* then sues *B* to evict him from the land after giving notice to *B* *B* contends that the land is *majhes* land, and that he is not liable to be evicted Does the finding in the first suit that the land was not *majhes* land operate as res judicata so as to preclude *B* from raising the same contention in the subsequent suit? No, for *A* s suit having been dismissed, *B could not have appealed* from the finding that the land was not *majhes* land The Court having found in the first suit that *A* had not given notice to quit it was *not necessary* to the determination of the suit whether the land was *majhes* land or not The decree against *A* in the first suit *was not based* upon the finding that the land was not *majhes* land, on the other hand, it was made *in spite of that finding*, *Thakur Magundeo* v *Thakur Mahadeo* (1891) 18 Cal 647, *Nundo* v *Bidhoo* (1886) 13 Cal 17

Suppose that in the case put above, *B* had not raised the defence that the land was *majhes* land in the first suit Would he be precluded from raising that defence in the second suit on the ground that he *might and ought* to have raised that defence in the first suit? No, the reason being that when a point of defence that has been actually raised and disallowed cannot operate as res judicata against a defendant, it certainly cannot operate as such when it has not been raised in fact, though it *might and ought* to have been raised (o)

(2) *A* sues *B* for possession of certain lands after the expiry of a lease granted by him to *B* *B* pleads (1) an occupancy right, and (2) that the suit is premature as he [*B*] had a right of renewal The trial judge finds that there was no occupancy right, but that the suit was premature and the suit is dismissed *A* files an appeal to the High Court *B* files a cross objection to the finding against him namely that he had no occupancy right The High Court affirms the decree on the ground that the suit was premature and upon the cross objection affirms the finding that B had no occupancy right After some years *A*, after giving notice to *B* again sues *B* for possession *B* again pleads an occupancy right *A* contends that the finding of the High Court in the previous suit that *B* had no occupancy right is res judicata *Held* by the Judicial Committee, that the finding is not res judicata, the reason being that *B* having succeeded on the plea that the suit was premature had no occasion to go further as to the finding against him *Midnapur Zamindari Co, Ltd* v *Naresh Narayan Roy* (1921) 48 I A 49, 48 Cal 660, 65 I C 833 The decision to the contrary in *Mota* v *Vithal* (p) is not good law

(3) In a suit by *A* against *B* for damages for not removing certain offensive matter from *A* s land, *B* contends (1) that no notice was given as required by the Bengal Municipal Act, and (2) that he was not bound to remove the filth from *A* s land. The suit is dismissed upon two grounds (1) want of notice under the Act, (2) that *B* was not bound to remove the filth *A* then sues *B* for damages for non removal of the filth over a subsequent period after giving notice to *B* *B* contends that he is not liable to remove the filth, and that the question of his liability is res judicata by reason of its having been decided against *A* in the first suit *A* contends that the question is not res judicata for

(n) *Shib Charan* v *Raghu* (1895) 17 All 174 195

(o) *Abdullakhan* v *Khanmia* (1908) 32 Bom 315

(p) (1916) 40 Bom 662 36 I C 74

1. the Court having decided in the former suit that the suit must fail for want of notice, it was not necessary for the Court to decide the issue as to *B*'s liability to remove the filth *Held* by the Calcutta High Court that the question is res judicata, and *A* can not raise it again in the second suit *Peary* v *Ambica* (1897) 24 Cal 900 The Allahabad High Court would seem to be of a different opinion *Shib Charan* v *Raghu* (1895) 17 All 174, 195 The latter view, it is submitted, is correct

RULE II —*If the plaintiff's suit is decreed in its entirety, no issue decided against the plaintiff can be res judicata, for the plaintiff cannot appeal from a finding on any such issue, the decree being wholly in his favour, but every issue decided against the defendant is res judicata for the defendant can appeal from a finding on such issue, the decree being against him*

Illustration

A, alleging that he is the adopted son of *X*, sues *B* to recover certain property granted to him by *X* under a deed and forming part of the estate of Y The Court finds that *A* is not the adopted son of *X* but that he is entitled to the property under the *deed* and a decree is passed for *A* The finding that *A* is not the adopted son of *X* will not operate as res judicata in a subsequent suit between *A* and *B* in which the question of adoption is again put in issue for the decree being in favour of *A* *A* could not have appealed from that finding The Court having found that *A* was entitled to the property under the *deed* the finding on the question of *adoption was not necessary* to the determination of the suit The decree far from being based on the finding as to adoption, was made in spite of it *Rango* v *Mudiyeppa* (1899) 23 Bom 29[illegible]

"Finality" of decree in redemption suits —The question that arises under this head is whether a mortgagor who has brought a suit for redemption and obtained a decree nisi under the provisions of the Transfer of Property Act, 1882, which neither the mortgagor nor the mortgagee has applied to be made absolute, can after execution of the decree is time barred bring a fresh suit for redemption, or whether such suit is barred by s 11 or s 47 of the Code The High Court of Allahabad has held that if the decree does not expressly contain an order for foreclosure or extinction of the mortgagor's equity of redemption on default of payment within the prescribed time, the mortgagor may bring a second suit for redemption, but not if the decree does contain such an order (*q*) A similar view has been taken by the High Courts of Bombay (*r*) and Lahore (*s*) On the other hand it has been held by the High Court of Madras that a second suit for redemption will be barred even if the decree does not contain an order for foreclosure on default of payment Hence it has been held by that Court that a decree nisi for redemption which provides that on default of payment the mortgaged property should be sold is a bar to a second suit, though no final order for sale was applied for by the mortgagee (*t*) The ground of the Allahabad, Bombay and Lahore decisions is that a mortgagor has an unfettered right to redeem unless that right has been extinguished by act of the parties or by an order of the Court The High Court of Madras, while conceding that the *right to redeem is not extinguished*, says that the *suit for redemption is barred under this section*, the matter in issue in both the suits being

(*q*) *Sita Ram* v *Madho Lal* (1902) 24 All 44 [illegible]

[illegible]

(*r*) *Ramji* v *Pandharinath* (1919) 43 Bom 334 49 I C 631 (F B) (in default property to be sold—not barred) *Kushaba* v *Babaji* (1922) 46 Bom 348 64 I C 1004 (22) A B 127 (in default mortgagor d barred from all rights to redeem—barred) *Ramchandra* v *Pal him* [illegible] 72 I C 315 (23)

the same According to the Bombay rulings, the matter in issue in the two suits is not the same The High Court of Calcutta has held the same way as the Madras High Court (u)

It has been held by the High Court of Bombay that where a mortgagee obtains a preliminary decree for sale, but does not apply for an order absolute for sale within the period prescribed by the decree, nor is any step taken by the mortgagor to redeem the property, the mortgagor is not precluded from bringing a suit for redemption of the mortgage (v) According to the Madras High Court, he is precluded by the provisions of the present section from bringing such a suit (w) See notes, "Application of the above rules to suits on mortgage,' on p 46 above

Where a decree is appealed from, it is the appellate decree that must be looked to to determine the question of res judicata, and not the decree appealed from.—A decision *liable to appeal* may be "final" within the meaning of this section *until* the appeal is preferred But once the appeal is filed the decision loses its character of 'finality," and what was once res judicata again becomes *res sub judice* (matter under judicial inquiry) The appeal destroys the finality of the decision, the decree of the lower Court is superseded by the decree of the Appellate Court, and it is the latter decree that should be looked to, to determine the question of res judicata (x)

A sues *B* for damages for cutting and removing certain trees on his land. The suit is dismissed on the grounds (1) that the land did not belong to *A*, and (2) that *B* did not cut the trees *A* appeals from the decree on both these grounds, but the appeal is dismissed on the ground that *A* had failed to prove that *B* had cut the trees Note that the appellate Court does not decide the question of *A*'s title *A* then sues *B* for *possession* of the land, claiming that the land belongs to him *B* contends that the suit is barred as res judicata it having been found by the first Court in the former suit that the land did not belong to *A* The suit is not barred, for the question of *A*'s title became *res sub judice* when the appeal was preferred, and it did not become res judicata as the appellate Court *did not adjudicate* upon that question But a judgment of an appellate Court will operate as res judicata as regards all findings of the lower Court which though not referred to in it are necessary to make the appellate decree possible only on such findings (y) An issue again, is *res judicata* where the judgment of the appellate Court shows that the issue was treated as material, and was decided, although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (z)

Consent decree and estoppel.—The present section does not apply in terms to consent decrees, for it cannot be said in the case of such decree that the matters in issue between the parties have been heard and finally decided ' within the meaning of this section (a) A consent decree, however, has to all intents and purposes, the same effect as res judicata as a decree passed *in invitum* (b) It raises an estoppel as

(u) *Sira v Nundo* (1891) 18 Cal 139

(v) *Rama v Bhagchand* (1915) 39 Bom 41 27 I C 249

(w) *Ranga v Narayana* (1915) 39 Mad 896 32 I C 30

(x) [illegible] I A 412 [illegible] (1882) [illegible] L [illegible] 14 I [illegible]

(y) *Narayanan v Kannammai* (1905) 28 Mad 338 *Gokul v Shrimal* (1904) 6 Bom L R 288 *Muthammal v Secretary of State for India* (1916) 39 Mad 1202 1206 26 I C 817

(z) *Midnapur Zamindary Co, Ltd v Naresh Narayan Roy* (1924) 51 I A 293 51 Cal 631 80 I C 827 (24) A PC 144 *Nawab v Panjaba* (1927) 4 Lah L J 442

[illegible] effect as res judicata ?

(b) *Bhaishanker v Morarji* (1911) 36 Bom 283 286 12 I C 535 *In re South American and Mexican Co* [1895] 1 Ch 37

S. 11. much as a decree passed *in invitum* (*c*) So long, therefore, as a consent decree stands, it is not open to either party thereto to give the go by to it, even if it contains clauses that are bad in law (*d*) A consent decree, however, is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties (*e*) But unless all the parties agree, an application cannot be made to the Court of first instance in the original suit to set aside the judgment or decree (*f*) except, apparently, in the case of an interlocutory order (*g*) See notes to s. 96, "*Procedure for setting aside consent decree*"

Explanation V: Relief claimed but not expressly granted—If a relief is claimed in a suit, but is not expressly granted in the decree, it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be res judicata Thus where in a suit by a mortgagee against his mortgagor (1) for a money decree, and, in default of payment, (2) for sale of the mortgaged property, the mortgagee was content to take a money decree only, it was held that a subsequent suit by him, on failure of the mortgagor to satisfy the decree, to have the amount of the mortgage debt paid to him by the sale of the property was barred as res judicata The relief as to *sale* having been claimed by the mortgagee but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit (*h*)

Liberty to bring a fresh suit—Where a former suit between the same parties in the same Court and for the same relief results in a decree of dismissal but the judgment leaves it open to the plaintiff to bring a fresh suit and leaves open untouched and undecided all matters affecting the rights of the parties the decree does not constitute res judicata as such matters cannot be said to have been heard and finally decided within the meaning of this section (*i*) But if the Court has in the particular circumstances of a case no power to reserve liberty to a party to bring a fresh suit, the subsequent suit may be barred as res judicata notwithstanding the liberty to bring a fresh suit *Fateh Singh* v *Jagannath Baksh* (*j*) recently decided by the Judicial Committee, is a case directly on this point *In that case the plaintiffs brought a suit to set aside a gift made by a Hindu widow out* of her husband's estate they alleged that they were presumptive heirs The widow died pending the suit After her death the plaintiffs applied to amend the plaint by setting up a family custom of inheritance Upon that application failing, and the plaintiffs admitting that apart from the alleged custom they could not succeed, the trial Court dismissed the suit, but gave them liberty to file a fresh suit for possession. Subsequently the plaintiffs brought another suit to recover from parties to the former suit a share in the property basing their claim upon family custom It was held that the suit was barred by res judicata since the custom was a matter which might and ought to have been set up in the former suit, and, further, that the trial Court having dismissed the suit, it had no power under O 23, r 1 (1), to give liberty to bring a fresh suit

This Explanation does not apply, unless the "relief" claimed was (1) *substantial relief*, and (2) it was such as it is obligatory on a Court to grant —

1 *The relief claimed must have been substantial, not auxiliary*—A sues B (1) to recover her share in the estate of D, claiming the same as D's widow, and (2) for a declara-

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(*e*) *Huddersfield Banking Co* v *Henry Lister and Son* [1895] 2 Ch 273 *Great North West* ... 114 ... 488 ... 811,

(*h*) *Shibu* v *Chandra Mohan* (1906) 33 Cal 849, *Piari Lal* v *Nand Ram* (1909) 31 All 10 1 1 ... 561

tion that she was lawfully married to *D*, a fact which *B* had denied A decree is made by consent awarding Rs 55,000 to *A* in full satisfaction of her claim against the estate of *D* The decree does not contain any declaration as to *A*'s marriage with *D* This circumstance will not bar a subsequent suit by *A* as *D*'s *widow*, against *B*, to recover her share in the estate of a deceased relative, for the relief claimed in the former suit in respect of the legality of marriage was not claimed as a "specific" or "substantial" relief, but it was "auxiliary" to the principal relief as to her share in the estate of *D* (*k*)

(2) *The relief claimed must have been one which the Court is bound to grant, and not one which it is discretionary with the Court to grant* —Cases under this head relate principally to mesne profits It was enacted by sec 244 of the Code of 1882 that, "nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree" That clause has been omitted in the present Code and under O 20, r 12, mesne profits subsequent to the date of the suit are to be ascertained and provided for in the final decree

A sues *B* for possession and for mesne profits both prior and subsequent to the suit A decree is passed in *A*'s favour for possession The decree is silent as to mesne profits

In the case put above there is no doubt, as to mesne profits *prior* to the date of the suit, that the plaintiff having claimed a relief in respect thereof and the relief not having been granted by the decree, the matter is res judicata, and *A* cannot institute a fresh suit for such mesne profits (*l*)

As to mesne profits *subsequent* to the date of the suit it was held in cases under the Code of 1882 that it being discretionary with the Court to grant such relief the fact of the decree being silent as to such mesne profits did not operate as a bar to a fresh suit for such profits (*m*) In cases under the present Code it has been held by the High Courts of Madras (*n*) and Allahabad (*o*), that where in a suit for possession and for past and future mesne profits the Court gives a decree for mesne profits up to the date of the suit and says nothing about subsequent mesne profits, a fresh suit to recover subsequent mesne profits is not barred under the present Code any more than under the Code of 1882 In the Madras case Wallis, C J said "The word relief in the Explanation means relief arising out of a cause of action which had accrued at the date of the suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen but which the Court was nevertheless expressly empowered to grant The Explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect I do not find any sufficient indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX, rule 12 The change introduced by the new rule is that the award of mesne profits in all cases is to be b preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution This change does not appear to me to affect the construction of Explanation V to section 11, nor do I think is affected by the omission in section 47 of the new Code of the proviso to the corresponding section 244 of the old Code" On the other hand, it has been held by the High Court of Bombay (*p*), that where future mesne profits are claimed in a suit but the decree is silent as to such mesne profits, a fresh suit for such mesne profits is barred under Explanation V to this section, the reason given being that the omission of the clause which appeared

S. 11. in section 244 of the old Code indicated that a separate suit should not be allowed for such mesne profits

Orders in execution proceedings.—This section provides that a matter directly and substantially in issue *in a former suit* may be res judicata in a subsequent suit. But the section is not exhaustive of the circumstances in which an issue is res judicata. Thus an issue decided at an earlier stage of a suit may be res judicata in further and subsequent proceedings *in the same suit*, and it is so not by virtue of the provisions of this section—for the section is confined to issues *in a former suit*—but upon general principles of law analogous to those of res judicata [see notes, "Section not exhaustive," on p. 30 above.] The leading case on the subject is *Ram Kirpal v. Rup Kuari* (q), decided by the Judicial Committee in 1883. The principle of that decision is that s. 11 is not exhaustive, and that the principle of res judicata still remains apart from the limited provisions of the Code. Prior to that decision it was held by the Courts in India that sec. 13 of the Code of 1882 (corresponding with the present section) was not applicable to execution proceedings. The Judicial Committee held that though the section in terms did not apply to execution proceedings the principle of res judicata applied to such proceedings. *The question in that case was whether a decision* in the course of execution proceedings in a suit that the decree according to its true construction awarded future mesne profits operated as res judicata so as to preclude the Court from trying the question over again at a subsequent stage of the proceedings. The High Court of Allahabad held that it did not. Their Lordships of the Privy Council held that it did. Their Lordships said :—

"The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceedings in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. *The binding force of such a judgment depends not upon sec. 13, Act X of 1877* [s. 11 of the present Code], *but upon general principles of law. If it were not binding there would be no end to litigation* . . . The parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did [that is, that the decree awarded future mesne profits]; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them."

The ratio decidendi of *Ram Kirpal's case* is that if a particular construction is put on a decree in proceedings on a former application for execution, it is not competent to the Court to treat that construction as erroneous and put another construction on it at a subsequent stage of the execution proceedings (r). *It has similarly been held by* the Judicial Committee in *Mungul Pershad v. Grija Kant* (s), that a decision on an application for execution after hearing both the parties that the application *is not barred by* the law of limitation, though erroneous, is binding on the parties in subsequent proceedings in execution. Their Lordships said: "The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it. . . . Admitting for the sake of argument, but only for the sake of argument, that the decree was barred when the . . . application was made, still his order, though erroneous, was valid, not having been reversed." It has similarly been held that a decision that an application for execution *is barred* by

(q) (1883) 11 I. A. 37, 6 All. 269.
(r) *Beni Ram v. Nanhu Mal* (1885) 11 I. A. 181, 7 All. 102; *Venkatanarasimha v. Papammah* (1896) 19 Mad. 54.
(s) (1882) 8 I. A. 123, 8 Cal. 51; *Raja Ramnad v. Velusami Tevar* (1921) 48 I. A. 45, 40 Mad. L. J. 197, 59 I. C. 880; *Sheoraj v. Kameshar* (1902) 24 All. 282. *Delhi and London Bank v. Orchard* (1877) 4 I. A. 127, 3 Cal. 47, is not inconsistent with the later decisions. See Mr. Leith's reply as reported in 3 Cal. on p. 52.

limitation, though erroneous, is conclusive between the parties, and the question cannot be re tried on a subsequent application for execution (t)

The principle laid down in *Ram Kirpal's case* referred to above is that when a question has been raised in an execution proceeding and decided, the decision, even if erroneous, is binding on the parties, and the same question cannot be re tried in a subsequent proceeding in execution, in other words, that the principle of res judicata is applicable to proceedings in execution This principle has been followed by the High Courts of India (u) But this principle cannot be applied unless the parties to the subsequent proceeding were also parties to the former proceeding (v), and had litigated under the *same title* (u) Nor can it be applied unless the former application was heard and decided Hence an order allowing an application for execution to be struck off "for the present" (x), or allowing it to be withdrawn, with liberty to present a fresh application (y), is no bar to a fresh application for execution Similarly where an application for execution under O 21, r 32 is dismissed on the ground that the decree holder had not afforded the judgment debtor an opportunity of obeying it, a second application for execution after such opportunity had been afforded, is not barred as res judicata (z) Further, the decision on the former application must have been *necessary* for the determination of the application Thus if *A* applies for execution, and *B* pleads limitation, and neither party appearing on the date fixed for the hearing of the objection, *A*'s application is dismissed and *B*'s objection is disallowed, *B* is not precluded from raising the plea of limitation on a fresh application for execution made by *A*, the reason being that *A*'s application being dismissed for default, it was not necessary for the Court to decide the question of limitation (a)

Where a decree holder applies for execution, and the judgment debtor being entitled and having an opportunity to raise a plea in bar of execution, *e g*, a plea of limitation, fails to do so, and an order is made on the application, the principle of Explanation IV applies, and the judgment debtor is precluded from raising that plea at a subsequent stage in the execution proceedings Thus when *A* applies for execution of a decree against *B*, and an order is made directing execution to issue, *B* cannot in a subsequent application for execution raise the plea that the *first* application for execution was barred by limitation (b) In one case the Allahabad Court held that the principle of Explanation IV does not apply to a case where a judgment debtor does not object to the amount erroneously set forth in the application for execution and that he is entitled to raise the objection at a later stage of the execution proceedings (c) But that decision may be put on the ground that the Court had inherent power to rectify the error The undermentioned cases (d) contain observations to the effect that Explanation IV should not be extended to execution proceedings and that an order made in execution proceedings should not have the force of res judicata unless the point raised in the sub

Court]

(v) *Chinnambal* v *Parvathi* (1892) 15 Mad 477 479

(w) *Courtioni* v *Jugul Chandra* (1890) 17 Cal 57 63

(x) *Thakur Pershad* v *Sheikh Fakir-ullah* (1895) 22 I A 44 17 All 106

(y) *Hari* v *Yamunabai* (1899) 23 Bom 35

(z) *Kishore Bun Mohunt* v *Kromnno Coomar* (1894) 21 I A 89 21 Cal 784

(a) *Bholanath* v *Prafulla* (1901) 28 Cal 122 *Kashinath* v *Ramchandra* (1883) 7 Bom 408

(b) *Nanda Lal* v *Raghunandan* (1885) 7 All 282,

(u) [illegible] v *Jamshad* (19[illegible]) 1 Pat 593 599-600 67 I C 656 (2) A I 289 *Courmont* v *Jugal Chandra* (1890) 17 Cal 57 63

Ss. 11, 12.

sequent proceedings was *actually* raised in the former proceedings and *decided* But these observations are obiter And so are the observations in a Madras case that Explanation V cannot apply to proceedings in execution (*e*)

Ex parte orders —An ex parte order in execution proceedings passed after issue of notice and after the Court is satisfied that the notice was served is on general principles binding as res judicata (*f*) But the order will not have the force of res judicata unless the notice clearly specifies the nature of the claim (*g*)

Consent orders —An order made by consent of parties in an execution proceeding is just as binding on the parties as an order after a contentious trial (*h*)

Applications for amendment of decree.—Though an application for amendment of a decree is not a "suit" within the meaning of this section yet if such an application is heard and finally decided it will debar a subsequent application for the same purpose upon general principles of law analogous to those of res judicata (*i*)

Applications for review —Where an application is made for a review of judgment, and the application is refused, it does not operate as res judicata so as to bar a subsequent *suit* for the same relief and on the same grounds as those put forward in the application for review Neither s 11 nor any doctrine of constructive res judicata can rightly be applied to such a case (*j*)

Estoppel against a statute —It is a general principle of law that there can be no estoppel against a statute (*k*) It has accordingly been held by the High Court of Calcutta that where a decree in a rent suit included illegal cesses in the item of rent it was open to the defendant in a subsequent suit for rent to object to the rate of rent on the ground that it included illegal cesses though the objection was not taken in the former suit (*l*) The Bombay High Court has held that the plea of res judicata can prevail even where the result of giving effect to it is to sanction what is illegal in the sense of bein prohibited by statute Thus where *A* mortgaged to *B* with possession a portion of a bhag of which alienation is prohibited by the Bombay Bhagdari Act 5 of 1862, and on the same day *B* granted a lease of the land to *A*, and *B* subsequently obtained an ex parte decree for arrears of rent against *A* it was held that *A* was precluded in a subsequent suit for rent from pleading that the land was inalienable (*m*)

12. [*New.*] Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies

Bar to further suit

Rules precluding institution of a further suit in respect of the same cause of action —This section is new and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules The following is a list of the Rules that bar a fresh suit in respect of the same cause of action —

O 2, r 2—Omission to sue in respect of part of a claim

O 9, r 9—Decree against plaintiff by default bars a fresh suit

O 22, r 9—Abatement of suit bars a fresh suit

O 23, r 1—Withdrawal of suit without leave of Court bars a fresh suit

(1911) 39 Cal

3) 40 Cal 541

(*i*) *Narayana* v *Gopal Krishna* (1905) 28 Mad 3 5 *Sheik Fultin* v *Ramchandra* (1887) 11 Bom 537 *Chidambaram* v *Thaivanai* (1923) 46 Mad 708 74 I C 155 (24) A M 1

(*h*) *Kalidas* v *Prasanna* (1920) 47 Cal 446 454 55 I C 180 See also *Coventry* v *Tulshi* (1904) 31 Cal 822

(*k*) *Shridhar* v *Babaji* (1914) 38 Bom 709 714 23 I C 134

(*l*) See *Shib Chandra* v *Lakhi Priya* (1924) Cal L J 507 510 85 I C 123 (25) A C 4..

(*m*) *Chhaganlal* v *Lal Harkha* (1909) 33 Bom 479 2 I C 530 See also *Kashinath* v *Dhondshet* (1916) 40 Bom 6 5 677 37 I C 2..

13. [S. 14] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except— **S. 13.**

When foreign judgment not conclusive

(a) where it has not been pronounced by a Court of competent jurisdiction,

(b) where it has not been given on the merits of the case,

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice,

(e) where it has been obtained by fraud,

(f) where it sustains a claim founded on a breach of any law in force in British India

Alterations in the section.—Clause (a) is new Other alterations are merely verbal

Foreign judgment—The expression foreign judgment is defined in s 2 as meaning the judgment of a foreign Court that is a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the section In matters of foreign judgments the Courts here are guided by very much the same principles as those adopted by the Courts of England ( ) An act of State is not a *judgment* and it cannot therefore have the effect of *res judicata* Thus it has been held that an order of the Political Agent of Mewar and the Maharana of Udepore deposing a high priest from his *gadi* is not a foreign *judgment*, but merely an act of State, and it cannot therefore operate as *res judicata* (o)

How a foreign judgment may be enforced in British India—A judgment of a Court of British India can only be enforced by proceedings in execution A foreign judgment however may be enforced by *proceedings in execution* in certain specified cases only (s 44) In other cases a foreign judgment can only be enforced by a *suit* upon the judgment That is to say if A has obtained a decree against *B* for Rs 5 000 in a French Court at Pondicherry and if *B* has got no property in Pondicherry to satisfy the decree but has got property in Bombay A may bring a suit against *B* in Bombay to recover the amount of the *judgment* The suit must be brought within six years from the date of the judgment (p) and if a decree is passed in favour of A he may proceed to execute it by attachment and sale of *B*'s property in Bombay

(n) [illegible] *Mahomed* (1897) 20 Mad 112 114

(o) *Shriman Goswami Girdharlalji v Goswami Shri Girdharlalji* (1893) 17 Bom 6[illegible]

(p) Limitation Act (1908) art 117

S. 13. It was at one time doubtful whether a suit would lie in British India upon the *judgment* of a Court of a *Native State* in India, or whether the plaintiff should sue upon the *original cause of action*. On the one hand, it was held by the Madras High Court that a suit did lie in British India upon the judgment of a Court of a Native State (q). On the other hand, it was held by the Bombay High Court that such a suit did not lie (r). According to the Bombay Court, the suit ought to be brought *de novo* on the *original cause of action*, as distinguished from the *judgment*, to enable the Court to decide the case *on its merits*. The ground of the Bombay decision was that a Court which tries a suit upon a foreign judgment cannot institute an inquiry into the merits of the original suit, and hence it would result in grave miscarriage of justice if a suit were allowed to be brought on the judgment of tribunals of Native States where judicial inquiries were not ordinarily conducted with intelligence and integrity. To remove this doubt, and to obviate the danger contemplated by the Bombay Court, a clause was added into section 14 of the Code of 1882, which made it quite clear that a suit could be instituted in British India on the judgment of a Court of a *Native State* or of any other foreign Court in Asia or Africa (s). But it was at the same time provided by the said clause that a British Indian Court in which a suit might be brought on the judgment of a Court of a *Native State* or any other foreign Court in Asia or Africa *should not be precluded from inquiry into the merits of the case* in which the judgment sued upon was passed (t). The danger of miscarriage of justice referred to by the Bombay Court was thus effectively provided for. There was no such danger, however, in the case of the judgment of a foreign Court in Europe or America, and hence it was that the said clause was confined to judgments of foreign Courts in Asia and Africa including judgments of Courts of Native States in India. That clause has now been omitted for the simple reason that it is not possible to maintain the distinction above referred to in the case of all Asiatic Courts, for there are some Asiatic Courts, for instance, the Courts of Japan, that are entitled to be treated on the same footing as European Courts. The result is that a suit will lie upon a foreign judgment of any Court in Asia or Africa, and such a suit now stands upon the same footing as a suit brought on the judgment of a foreign Court in Europe or America.

Though a foreign judgment may be enforced by a suit in British India, it is not to be supposed that British Indian Courts are bound in all cases to take cognizance of the suit, and they may refuse to entertain it on grounds of expediency (u).

Operation of the section.—The operation of the section may be illustrated by the following cases:—

(a) *A* sues *B* in a foreign Court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in British India on the original cause of action, *unless* the decision is inoperative by *reason of one or more of the circumstances specified* in the section (t). If a decree is passed in favour of *A* in the foreign Court, and *A* sues *B* on the judgment in British India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign Court *unless* the decision of the foreign Court is inoperative on any one of the six grounds specified in the section.

(b) *A* obtained a decree against *B* in the Cochin Court, and applied for execution of the decree in the High Court of Bombay. [Decrees of the Cochin Court may be executed in British India under s. 44.] It was proved that *A* obtained the decree at Cochin by concealment of essential facts and by fraud [see cl. (e) of the section]. It was held that execution of the decree should be refused (w).

(q) *Sama Rayar v. Annamalai* (1884) 7 Mad 164.
(r) *Himmat Lall v. Shivajirao* (1884) 8 Bom 593.
(s) *Gurdyal Singh v. Raja of Faridkot* (1895) 22 Cal 222, 237, 21 I A 171.
(t) *Mayaram v. Parji* (1900) 24 Bom 86.
(u) *Murugesa v. Annamalai* (1900) 23 Mad 458.
(v) *Bababhai v. Narharbhai* (1889) 13 Bom 224.
(w) *Rajmusa v. Purmanand* (1891) 15 Bom 215.

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A British Indian Court will not give effect to a foreign judgment pronounced by a Court without jurisdiction.—The leading case on the subject is *Gurdyal v. Raja of Faridkot* (x). In that case *A* sued *B* in the Court of the Native State of Faridkot, claiming Rs. 60,000, being the amount alleged to have been misappropriated by *B* while in *A*'s service at Faridkot. *B* did not appear at the hearing, and a decree was passed ex parte against him. *B* was a native of another Native State Jhind. In 1869 he left Jhind, and went to Faridkot to take up service under *A*. In 1874 he left *A*'s service, and returned to Jhind. The suit was brought against him in 1879. *At the date of the suit B neither resided in Faridkot nor was he a domiciled subject of the Faridkot State, nor did he owe allegiance to that State.* Such being the case, the Faridkot State had no jurisdiction on general principles of International Law, to entertain the suit against *B* in respect of the claim, which it should be noted was a mere *personal* claim as distinguished from a claim *relating to land or movables* (y). The decree of the Faridkot Court was therefore an absolute nullity. *A* then sued *B* in a British Indian Court on the judgment of the Faridkot Court. The Court of first instance dismissed the suit on the ground that the Faridkot Court had no jurisdiction to entertain the suit. This decision was upheld by their Lordships of the Privy Council. The mere fact that the alleged *embezzlement* took place at Faridkot was not sufficient to give jurisdiction to the Faridkot Court. The result would be the same, if the suit were for damages for breach of a *contract* entered into by *B* with *A* at Faridkot (z). In other words a foreign Court cannot assume jurisdiction in cases where the claim is a *personal* one merely because the *cause of action* arose within its jurisdiction. But if *B* was *residing* at Faridkot at the date of the suit, the Faridkot Court would have had complete jurisdiction. In the case of *personal* claims it is *residence* alone that gives jurisdiction in a suit against a foreigner (a). The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same Sovereign. Thus a decree passed by the Ceylon Court [which is a foreign Court within the meaning of s. 2] in a suit on a *contract* against a native of British India who was not at the time of the action residing in Ceylon is a nullity so that it cannot be enforced by a suit in a Court of British India (b).

Suppose now that in the above case there was an Act in force passed by the Faridkot Legislature empowering the Courts of Faridkot to entertain suits in cases where the *cause of action* had arisen in Faridkot though the defendant was a foreigner neither residing in Faridkot nor owing any allegiance or obedience to the Faridkot State. Could effect be then given to the judgment of the Faridkot Court in a suit brought upon the judgment in a Court in British India? It has been held that no effect could be given to the judgment even under those circumstances because no one State can by its legislation confer jurisdiction upon its Courts to entertain a suit in respect of a *personal* claim against foreigners who at the date of the suit neither resided in that State nor owed any allegiance or obedience to that State (c). But British Indian subjects owe allegiance to the Sovereign of Great Britain and the *British Parliament* may therefore by legislation confer jurisdiction upon the Courts of England, as it has in fact done, against British Indian subjects in British India (d). Hence where an *ex parte* decree is passed by the Queen's Bench Division of the High Court of Justice of England (a foreign Court) against a British Indian subject residing in British India in an action founded on *breach of a*

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(b) *Sha ... Atha ... v. David* (1900) 32 Mad. 463, 3 I. C. 190.

(c) *Chr... v. Delanney* (1899) 26 Cal. 931; *Hinde v. ...onnath* (1882) 4 Mad. 359.

(d) Or. ... (e)

13. *contract* committed within the jurisdiction of that Court, the decree is not a nullity, and effect may be given to it in a suit on the judgment instituted in British India (*e*)

In the last mentioned case, as also in the case of the Raja of Faridkot, the decree passed against the defendant by the foreign Court was an ex parte decree, that is to say, the defendant did not appear before the foreign Court, and the decree was passed in his absence But what if the defendant had appeared and defended the suit in the foreign Court? This question is considered in the following paragraph

Submission to jurisdiction of foreign Court —Where a suit is instituted in British India on the judgment of a foreign Court, effect will be given to the judgment, though that Court *had no jurisdiction* over the defendant *if* the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction (*f*) But if he *protests against* the jurisdiction and the suit is then proceeded with against him the judgment is a nullity, and no effect will be given to it in a suit brought on the judgment The protest against jurisdiction must be made at an early stage of the proceedings, hence where no objection to the jurisdiction was made until the case had reached the stage of appeal it was held that it amounted to submission to jurisdiction (*g*) Nice questions sometimes arise as to what amounts to submission to jurisdiction *A defendant who employs a pleader in a suit against him in a foreign* Court will not be said to have submitted himself to the jurisdiction of that Court if the pleader states at the hearing that he had no instructions from his client (*h*) But a defendant who objects to jurisdiction though under protest and also pleads on the merits thereby taking the chance of getting a decree in his favour will be deemed to have submitted himself to the jurisdiction of the Court (*i*) But submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceedings in such a case the judgment of the foreign tribunal is not binding on the party Whether submission was for the purpose of saving property or voluntary is a pure question of fact (*j*)

Agreement to submit to foreign jurisdiction —Where there is an *express* agreement to submit to the jurisdiction of a foreign Court a judgment pronounced by such Court binds the parties and effect will be given to such judgment in British Indian Courts (*k*)

The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising in connection with the partnership shall be submitted to and therefore *lie* within the jurisdiction of the Courts of that country (*l*)

Carrying on business in a foreign country through an agent —Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving the agent a power of attorney containing very wide powers including the right to institute or defend suits relating to any matters connected with their business or otherwise (*m*)

Possession of immovable property in a foreign country —The possession of immovable property *in a foreign country gives the Courts of that country jurisdiction to deal with the property itself* (*n*), but not jurisdiction *in personam* over the possessor, even in regard to obligations connected with that property (*o*)

[illegible] *Appasami* (1888) 2 Mad 407, *Harris v Taylor* [1915] 2 K B 580

(*j*) *Veeraraghava Ayyar v Muga Sait* (1916) 39 Mad 24 28 I C 287

[illegible]

3 Macq 99

(*o*) *Emanuel v Symon* [1908] 1 K B 302

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Irregularities not affecting jurisdiction.—In cases where a foreign Court has jurisdiction, or where the defendant has submitted himself to the jurisdiction of a foreign Court, the judgment of such Court is not vitiated by irregularities which do not affect the jurisdiction of the Court even when they are such as would, in the view of the foreign Court, render the judgment there a nullity (*p*)

Foreign judgment against a foreign firm.—*A*, *B*, and *C* carry on business at Singapore in partnership in the name of *X Y* *D*, a creditor of the firm, brings an action against the *firm* in the supreme Court of Singapore, but *A* alone is served with the writ of summons *B* and *C* are British Indian subjects, and they did not reside at Singapore at the date of the suit or at any other time A decree is passesd against the *firm* by the Singapore Court A suit is then brought by *D* in British India on the judgment of the Singapore Court against *A*, *B*, and *C* for a *personal decree* against them No personal decree can be passed against *B* and *C* as they were not served, though a personal decree may be passed against *A* (*q*) Compare O 21, r 50

Foreign judgment on a decree of a British Indian Court—The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree in British India (*r*)

Clause (b)—In order that a foreign judgment may operate as *res judicata* it is necessary that it must have been *given on the merits* of the case, [see notes to s 11, Heard and finally decided," p 61 above] whether it be the judgment of a foreign Court in Europe or America or of a foreign Court in Asia or Africa If the foreign judgment is not given on the merits of the case, the plaintiff must prove his case independently of the judgment (*s*) Where in an action in the King s Bench Division of the High Court of Justice in England to recover a liquidated amount, the defendant having failed to comply with an order to answer interrogatories his defence was struck out and judgment was entered for the amount claimed for the plaintiff [O 11, r 21 below] and the plaintiff subsequently instituted a suit on the judgment in the Madras High Court, it was held that the judgment sued on was one which had not been given on the merits of the case" within the meaning of this clause, and that the suit was not maintainable (*t*) Similarly a judgment on an award obtained in England *by default* cannot be sued on in India, since it is not a judgment on the merits of the case (*u*) But a wrong view as to the burden of proof or as to the legal liability of a party does not render a foreign judgment one not given on the merits of the case within the meaning of this clause (*v*) Where the writ of summons in an action in the High Court of Justice in England was accepted by the defendant s solicitor and an appearance was entered by the solicitor on behalf of the defendant a judgment passed against the defendant in his absence could not be said not to have been given on the merits of the case within the meaning of this clause, the defendant having been called away from England to India suddenly owing to the war (*w*)

Clause (c)—The mistake must be *apparent on the face* of the proceedings In England it has been held that a mere mistake as to English law will not vitiate a foreign judgment, even though the mistake may appear on the face of the proceedings (*x*)

Clause (d)—The expression natural justice ' in this clause refers rather to the form of procedure than to the merits of the particular case The mere fact that a foreign

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(*p*) *Chidaru v Marimuthu* (1907) 30 Mad 292 *Jeferton v Hughes* [1899] 1 ch 781

(*q*) *Sth b Thamba v Hamid* (1913) 36 Mad 414 12 I C 1008

(*u*) *Oppenheim & Co v Mahomed Haneef* (19 2) 49 I A 174 45 Mad 496 74 I C 616 (2-) A I C 1 0 The contrary has been held by the Madras Court in *Janoo v Mahamad* (1924) 47 Mad 877 82 I C 425 (25) A M 155

(*v*) *Rama Shenoi v Hallgma* (1918) 41 Mad 205 45 I C 703

(*w*) *Cole v Harper* (1919) 41 All 521, 50 I C 780

(*x*) *Godard v Gray* (1870) L R 6 Q B 139

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judgment is wrong in law does not make it one opposed to 'natural justice' There must be something in the procedure anterior to the judgment which is repugnant to natural justice (y) Thus a foreign judgment obtained *without notice* of the suit to the defendant is contrary to natural justice, and a suit on such judgment is not maintainable in a British Indian Court (z) But notice served on an agent empowered to sue and defend suits in the foreign Court is sufficient (a) As to sufficiency of notice if the foreign Court has held service of the notice to be sufficient, it must be taken to be correct in the absence of any evidence to the contrary (b)

Limitation —Whereas in the case of a suit on a contract limitation merely bars the remedy, but does not extinguish the right the judgment of a foreign Court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made (c)

Where the Court of a foreign country holds, applying its own law that a suit is not time barred, it cannot be said that it has refused to recognize the law of British India because the suit was time barred according to that law (d)

Presumption as to foreign judgments

14 [S 13 Exp VI] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction

See s 13 cl (a)

PLACE OF SUING

Court in which suits to be instituted

15 [S 15] Every suit shall be instituted in the Court of the lowest grade competent to try it

Scope and object of the section —The object of the section in requiring a suitor to bring his suit in the Court of the lowest grade competent to try it is that Courts of higher grades shall not be overcrowded with suits. This section is a rule of *procedure, not of jurisdiction* and whilst it lays down that a suit shall be instituted in the Court of the lowest grade it *does not oust the jurisdiction* of the Courts of higher grades which they possess under the Acts constituting them (e) Although therefore, as a *matter of procedure* a suit below a certain value ought to be instituted in the Court of the Munsif, the Subordinate Judge has still *jurisdiction* to try it (f). As a matter of procedure, however, he ought not to entertain the suit but should return the plaint to the plaintiff to be presented to the Munsif as provided by O 7, r 10 [Code of 1882, s 57] (g) This is explained more fully below

(y) *[illegible] v Hallagna* (1919) 41 Mad 20[illegible] 155 [illegible] 45 I C 703 [illegible] (1879) 2 Mad 400 [illegible]

[illegible] I C 425 (25) A [illegible]

(h) 47 Mad 877 82 I C 42[illegible] ('25) A M

Jurisdiction.—The word 'competent' used in this section has reference to the jurisdiction of a Court. Jurisdiction means the extent of the authority of a Court to administer justice. Thus a Presidency Small Cause Court has no jurisdiction to try suits in which the amount or value of the subject matter exceeds Rs. 2,000; this is said to be the jurisdiction of a Court as regards its *pecuniary* limits. Nor can it try suits for the specific performance of a contract, or for an injunction, or for a dissolution of partnership. This is said to be the jurisdiction of a Court as regards the *subject matter* of a suit.

The jurisdiction of a Court may again be *original* or *appellate*. In the exercise of its *original* jurisdiction, a Court entertains original suits; in the exercise of its *appellate* jurisdiction, it entertains appeals from decrees passed in original suits. The High Courts of Allahabad, Patna, Lahore and Rangoon, have no *original* jurisdiction.

Court of lowest grade competent to try a suit.—We have in British India a large number of Courts. The High Courts of Madras, Calcutta, Bombay, Allahabad, Patna, Lahore and Rangoon, have been established each by a Royal Charter. Other Courts in India have been constituted by Acts of the Governor General of India in Council, and they are of various grades with different pecuniary limits of jurisdiction.

In each of the three presidency towns, we have a High Court and a Small Cause Court. As regards High Courts, they are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs. 100 (*h*). The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs. 2,000 (*i*). From the above it is clear that both a High Court and a Small Cause Court *are competent* to try a suit, say for Rs. 500, for damages for breach of a contract. But of these two Courts it is the Small Cause Court that is the "Court of the lowest grade" in a presidency town competent to try the suit. The suit, therefore, shall be instituted in the Small Cause Court as required by the present section. This does not mean that the High Court has no jurisdiction to entertain the suit. It *has* jurisdiction to try the suit, but in order that the High Court may not be overcrowded with suits, the Legislature has established Small Cause Courts, and the present section requires that suits which a Small Cause Court is competent to try shall be brought in that Court. We say "suits which a Small Cause Court is competent to try," for there are certain suits which a Small Cause Court is not competent to try, such as suits for the recovery or partition of immovable property, or for the foreclosure or redemption of a mortgage of immovable property or suits for injunction or for specific performance (*j*). In presidency towns these suits must be brought in the High Court, though the value of the suit may be *under* Rs. 100.

Outside the presidency towns, we have in each province a number of Courts of different grades which may be divided into three classes as shown in the following table:—

	Bombay Presidency Act 14 of 1869	Madras Presidency. Act 3 of 1873	Bengal, N. W. P., and Assam Act 12 of 1887
1	District Courts	District Courts	District Courts
2	Courts of Subordinate Judges of the first class	Subordinate Judges Courts	Subordinate Judges' Courts
3	Courts of Subordinate Judges of the second class	District Munsifs' Courts	Munsifs' Courts

(*h*) Cl. 12 of the Charter, Appendix II.
(*i*) Presidency Small Cause Courts Act, 1882, s. 18.
(*j*) *Ib.*, s. 19.

S. 15. The jurisdiction of District Judges and Subordinate Judges, except Subordinate Judges of the second class in the Bombay Presidency, extends to all original suits, what ever may be the value of the suit But a District Court is a Court of superior grade to a Subordinate Judge's Court, for a District Court is the principal Court of original civil jurisdiction in the district, and it is also the Court of appeal from decrees and orders in certain suits passed by other Courts in the district including Courts of Subordinate Judges The jurisdiction of a Subordinate Judge of the second class in the Bombay Presidency extends to all original suits of which the value does not exceed Rs 5,000 The jurisdiction of a District Munsif in the Madras Presidency extends to all original suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs 2,500 The jurisdiction of a Munsif in Bengal, North Western Provinces, and Assam extends to all original suits of which the value does not exceed Rs 1 000

From the above it is clear that both a Subordinate Judge and a Munsif *have juris diction* to try a suit, say, to recover Rs 500, for arrears of rent But of these two Courts it is the Munsif s Court hat is the Court of the lowest grade competent to try the suit The suit therefore shall be instituted in the Munsif s Court as required by the present sec ion

As to Civil Courts in the Central Provinces, see Act 16 of 1885 in Oudh Act 13 o 1879, in Jhansi, Act 18 of 1867 As to Provincial Small Cause Courts see Act 9 of 1887

Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade—Suppose that a suit which under the provisions of this section ought to have been instituted in a Munsif s Court is brought in the Court of a Subordinate Judge, and the Subordinate Judge instead of returning the plaint under O 7 r 10 tries the suit notwithstanding objection taken by the defen dant, and that a decree is passed against the defendant Is the decree a nullity ? No for the Subordinate Judge *has* jurisdiction to try the suit It is a case of *irregularity* not affecting the jurisdiction of the Court within the meaning of s 99 below (*l*) As to the case where a suit is by reason of *over valuation* brought in a Court of higher grade, see below notes, Over valuation and under valuation

Where a suit which ought to have been instituted in a Court of higher grade is instituted in a Court of lower grade—In such a case the Court of lower grade ought to return the plaint to the plaintiff to be presented to the Court of higher grade [O 7, r 10] If this is not done, and the suit is heard by the Court of lower grade, the decree will be set aside in appeal as one passed without jurisdiction This is a case of *want of jurisdiction* as distinguished from a mere *irregularity* within the meaning of s 99 below (*l*) As to the case where a suit is by reason of *under valuation* brought in a Court of lower grade, see notes below ' Over valuation and *under valuation* '

Principles regulating pecuniary jurisdiction—It is the *plaintiff s valuation in his plaint* which fixes the jurisdiction of the Court, and not the amount which may be found and *decreed* by the Court (*m*) But jurisdiction may be destroyed, if the plaint is so amended as to exceed the pecuniary limits of the Court in which the suit is instituted (*n*) There is a difference of opinion, however, as to whether jurisdiction is ousted if interest or mesne profits claimed in a suit when ascertained and added to the value of the suit exceed the pecuniary limits of the jurisdiction of the Court in which

1887
(*l*) See *Matra Mondal* v *Hari* (1890) 17 Cal 155 160, a case of over valuation, but decid d

[illegible]
(*n*) *Chand* v *Kombi* (1886) 9 Mad 208

the suit is instituted See notes to s 6, "Pecuniary jurisdiction in passing decrees," and notes to s 96, "Forum of appeal.

Over-valuation and under-valuation.—Although it is the value put by the *plaintiff* on his suit that *prima facie* determines jurisdiction, it does not follow that a plaintiff is at liberty to assign any arbitrary value on the suit and thus be free to choose the Courts in which he should bring the suit (*o*) Cases do occur in which a plaintiff sometimes over values his suit and sometimes under values it The over valuation or under valuation may be erroneous, or it may be done intentionally by the plaintiff for the purpose of bringing his suit in a Court different from that in which it should have been brought had the suit been properly valued. If the over valuation or under valuation is patent on the face of the plaint, it is the duty of the Court to which the plaint is presented to return it to the plaintiff to be presented to the proper Court under O 7, r 10 If the over valuation or under valuation is not patent on the face of the plaint, but the defendant contends that the suit has been over valued or under valued, the plaintiff may be required to satisfy the Court that the suit has been properly valued if there are *prima facie* grounds for believing that the suit has not been properly valued (*p*), but not otherwise (*q*)

Suppose that a suit has been over valued or under valued, so that it is brought in a Court whose grade is higher or lower than that of the Court which would have been competent to try it if the suit were properly valued Is the decree liable to be set aside or reversed by the appellate Court? No, not unless (1) the objection as to jurisdiction by reason of over valuation or under valuation was taken by the defendant in the Court of first instance at or before the hearing at which issues were framed, or (2) the over valuation or under valuation is found by the appellate Court to have prejudicially affected the disposal of the suit on the merits (*r*) It has been so enacted by the Suits Valuation Act, 1887, s 11 It does not make any difference that the over valuation or under valuation was erroneous or intentional (*s*) On this point the law was somewhat different before the passing of the Suits Valuation Act

It has been held by the High Court of Calcutta that where a suit is under valued, with the result that the *appeal* from the decree in the suit is heard and decided by a District Court instead of by a High Court, the decree of the District Court is one passed by a Court without jurisdiction and it is therefore a nullity This happens in cases where a suit of which the true value exceeds Rs 5,000 is valued at less than Rs 5 000 *A* brings a suit against *B* for possession of immovable property in the Court of a Subordinate Judge The real value of the suit exceeds Rs 5 000, but the suit is valued at Rs 2,100 only A decree is passed in the suit for *A* *B* files an appeal in the District Court, but the appeal is dismissed According to the Calcutta decisions the decree of the District Court is a nullity as being one passed without jurisdiction The reason given is that the true value of the suit being more than Rs 5 000, the proper *forum* of appeal, if the suit had been properly valued, would have been the High Court, and not the District Court, and that the result of the under valuation was that the jurisdiction of the High Court as the Court of Appeal was ousted (*t*). See notes to s 21, Objection to jurisdiction, when to be raised

Where the subject-matter of a suit does not admit of being satisfactorily valued—There are several suits in which the subject matter is not capable of being estimated at a money value, *e g*, suits for restitution of conjugal rights suits

(*o*) *Boidya Nath* v *Makhan Lal* (1890) 17 Cal 680 683 *Dayaram* v *Cor Hanlis* (1906) 31 Bom 73 78 *Raj Krishna* v *Bipin* (1912) 40 Cal. 245 249 17 I C 162

(*p*) *Appa Rao* v *Sobhanadri* (1891) 24 Mad 158 *Hamidunnissa* v *Gopal* (1897) 24 Cal 661 667.

(*q*) *Koli Pujari* v *Manjaya* (1898) 21 Mad 271

(*r*) *Sheo Deni* v *Tilai* (1893) 15 All 378, 380, *Raman* v *Secretary of State* (1901) 24 Mad 427 *Jose Antonio* v *Francisco* (1910) 35 Bom 24 7 I C 950

(*s*) *Hamidunnissa* v *Gopal* (1897) 24 Cal 661 *Krishnasami* v *Kanakasabai* (1891) 14 Mad 183

(*t*) *Rajlakshmi* v *Katyayani* (1911) 38 Cal 639, 666 668 12 I C 464

S. 16. Court of Bombay Hence it is that the section commences with the words "subject to the pecuniary or *other limitations* prescribed by any law" The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Courts within whose jurisdiction the property is situate

Clause (c): suit for foreclosure, sale or redemption—*A* mortgages certain immoveable property to *B* to secure payment of money lent to him by *B* Here *A* is the mortgagor and *B* is the mortgagee If *A* does not repay the loan on the due date, *B* may institute a suit against *A* for *sale* of the mortgaged property, so that the mortgage debt may be paid out of the sale proceeds of the property, or he may sue for *foreclosure* of the mortgage The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may be found due to the mortgagee within a time specified by the Court (generally six months), the mortgagor shall be absolutely debarred of all right to redeem the property (*d*) If *A* offers payment of the mortgage debt to *B*, but *B* disputes the amount and refuses to reconvey *A* may sue *B* for *redemption* of the mortgage, and the Court will pass a decree ordering an account to be taken of what will be due to *B*, and directing that upon *A* paying to *B* the amount so due, *B* shall reconvey the property to *A* (*e*) Suits for foreclosure sale or redemption must be instituted in the Court within the local limits of whose jurisdiction the mortgaged property is situate

Clause (d): suits for the determination of any other right to or interest in immoveable property—There is no definition of immoveable property in the Code Immoveable property is defined in the General Clauses Act, 1897, s 3, cl (25) as including land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth Trees standing on land are immoveable property (*f*) But once the trees are severed from the land, they become moveable property Growing crops are moveable property (see s 2, cl 13) Immoveable property, we have said includes benefits to arise out of land Rent that *has already accrued due* is moveable property for it is a benefit that *has arisen* out of land but rent that *is to accrue due* is immoveable property, for it is a benefit *to arise* out of land Hence a suit for *arrears* of rent is governed not by the provisions of this section but by those of s 20 and it may be instituted in any one of the Courts specified in that section, although in such suit the plaintiff s *title* to the property of which the rent is claimed may incidentally come in question (*g*) But a suit for a *declaration* of the plaintiff s right to rent where such right is desired comes under cl (d) of the present section, and must be instituted in the Court within the local limits of whose jurisdiction the property is situate (*h*) A suit to recover a share of the *sale proceeds* of land that *have already been realized* is a suit for money governed by the provisions of s 20 (*i*) But a suit by a vendor of land for the recovery of *unpaid purchase money* against a buyer who *refuses to complete the purchase*, is a suit " for the determination of any right to or interest in immoveable property within the meaning of cl (d) (*j*) A suit by a mortgagee to recover the mortgage debt from the mortgagor *personally* is a suit for debt governed by the provisions of s 20, but if in addition to the claim against the mortgagor personally the mortgagee seeks to recover the mortgage debt by *sale* of the mortgaged property, the suit will come under cl (c) of the present section (*k*) A suit for maintenance is governed by the provisions of s 20, but if in addition to the claim for maintenance the plaintiff claims that she is entitled to a *charge on immoveable property* in the hands of

(*d*) Transfer of Property Act, 1882 ss 86 87 now O 34 rr 2 3
(*e*) Transfer of Property Act, ss 92 93 now O 34 rr 7 8
(*f*) *Sakharam* v *Vishram* (1895) 19 Bom 207
(*g*) *Chintaman* v *Madhavrao* (1869) 6 B H C, A C 29 570

the defendant, the case is one within cl (d) of this section (l) A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within cl (d) merely because part of the partnership assets consists of a factory (m)

Income and mesne profits of land situate outside British India —A suit will lie in a Court of British India to establish a right to a share in income derived from grants of land situated outside British India, but received by the defendant within the local limits of a British Indian Court (n) Similarly a suit to recover mesne profits of land situate outside British India, of which the defendant was in wrongful possession but of which he subsequently delivered possession to the plaintiff, may be instituted in a Court in British India (o) Both these cases, it is conceived, fall under s 20 below

Clause (e): wrong to immoveable property —This refers to torts affecting immoveable property, such as trespass (p), nuisance infringement of easements, etc

Proviso to the section —The last paragraph of the section provides that suits to obtain relief respecting, or compensation for wrong to immovable property, may be instituted *at the plaintiff s option* either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided—

(1) the property is held by or on behalf of the defendant ,

(2) the relief sought can be *entirely* obtained through the personal obedience of the defendant (q), and

(3) the property is situate in, *and not beyond*, British India (r)

Equity acts in personam —We have in this proviso an application though in a highly modified form, of the maxim *Equity acts in personam* When it is said that *Equity acts in personam* what is meant is that the Court of Equity in England (now the Chancery Division of the High Court of Justice) has jurisdiction to entertain certain suits [suits in cls (a), (b) and (e) of the present section being entirely excluded] respecting immovable property, though the property may be situate *abroad* if the relief sought can be obtained through the *personal* obedience of the defendant The *personal* obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the Court or carries on business within those limits For in the one case the *person* of the defendant being within the jurisdiction and in the other his *personal* property, if he does not comply with the judgment the Court may *arrest the defendant* and commit him to jail or *attach his goods* until he complies with the judgment of the Court (s) But if neither the person of the defendant nor his personal property is within the jurisdiction the Court will not entertain a suit to obtain relief respecting immovable property situate beyond its jurisdiction, for the Court cannot in that event execute its decree either *in rem* or *in personam* and a Court will not entertain a suit if it cannot enforce its own decree (t)

Suits in personam —Suits in respect of which the Court of Equity in England exercises jurisdiction *in personam* are called suits *in personam* The essential feature of suits *in personam* is that the land in respect of which the suit is brought is situate *abroad*, but the person of the defendant or his personal property is *within the jurisdiction* of the Court in which the suit is brought The land being situate abroad, the

(l) *Sitabai* v *Laxmibai* (1916) 40 Bom 337 32 I C 985

(m) *Durga Das* v *Jai Narain* (1917) 41 All 513 50 I C 156 ('27) A B 183

(n) *Kashinath* v *Anant* (1900) 24 Bom 407

(o) *Mahadeo* v *Ramchandra* (1922) 46 Bom 108 68 I C 510

(p) *Crisp* v *Watson* (1893) 20 Cal 689

(q) Westlake s Private International Law p 58

(r) *Krishnaji* v *Gajanan* (1909) 33 Bom 373 2 I C 489

(s) *Penn* v *Lord Baltimore* (1750) 1 Ves Sen 444

(t) See *Trimbak* v *Lakshman* (1896) 20 Bom 495

Ss. 19, 20.

jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts

Illustrations

(a) *A*, residing in Delhi beats *B* in Calcutta *B* may sue *A* either in Calcutta or in Delhi

(b) *A* residing in Delhi publishes in Calcutta statements defamatory of *B* *B* may sue *A* either in Calcutta or in Delhi

Torts committed beyond British India —*This section contemplates torts committed in British India Cases of torts committed beyond the limits of British India fall it is submitted within s 20 and a Court in British India has jurisdiction to entertain a suit for damages for such tort provided the defendant resides within the local limits of the jurisdiction of the Court at the time of the suit (k)*

Other suits to be instituted where defendants reside or cause of action arises

20. [S 17] Subject to the limitations aforesaid every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(*a*) the defendant, or each of the defendants where there are more than one at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain or

(*b*) any of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution, or

(*c*) the cause of action, wholly or in part, arises

Explanation I —Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence

Explanation II —A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place

(k) See *Govindan Nair v Achutha Menon* (1916) 39 Mad 433 439 23 I C 394

Illustrations

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi *B*, by his agent Calcutta, buys goods of *A* and requests *A* to deliver them to the East India Railway mpany *A* delivers the goods accordingly in Calcutta *A* may sue *B* for the price of goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* ries on business

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi *A*, *B* and *C* being together Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it *A* *A* may sue *B* and *C* at Benares, where the cause of action arose He may also e them at Calcutta, where *B* resides, or at Delhi, where *C* resides, but in each of these ses, if the non resident defendant objects, the suit cannot proceed without the leave the Court

Alterations in the section.—The words " wholly or in part in cl (c) are w Explanation III to s 17 of the Code of 1882, which related to causes of action case of contracts, has been omitted in view of the addition of the words ' wholly or part " in cl (c) See notes below " Cause of action in suits on contracts "

Chartered High Courts—This section does not apply to Chartered High ourts in the exercise of their original civil jurisdiction (see s 120)

Scope of the section—The provisions of this section are to be read subject to he provisions of sections 16 and 19 (*l*) At common law, actions are transitory, such as ctions on tort or contract, or local, such as actions of ejectment from land Section 6 deals with local actions Sections 19 and 20 deal with transitory actions If we ivide actions into real, personal, and mixed, we may say that section 16 deals with real nd mixed actions Mixed actions stand midway between real and personal actions uits for compensation for wrong to immoveable property are an example of this kind. Real actions, that is, actions against the *res* or property, must be brought in the *forum ei sitae*, that is, the place where the property is situate, and so must mixed actions But personal actions may be brought in any place where the defendant can be found and hence they are called *transitory* actions as distinguished from *local* actions

The present section provides that suits falling under it may be brought *at the plaintiff s option* (1) either where the cause of action arises or (2) where the defendant resides, or carries on business, or personally works for gain (*m*)

"Actually and voluntarily resides"—Except in the cases mentioned in s 16, the mere residence of a person within the local limits of a Court gives that Court jurisdiction to entertain a suit against him Thus one partner may sue another partner for dissolution of partnership in the Court at Bulsar if the latter resided in Bulsar at the date of the suit, although the partnership commenced and was carried on in a foreign territory (*n*). Clause 12 of the Charter provides that suits other than those for land may be brought in the Chartered High Courts if the defendant at the time of the commencement of the suit "*dwells* or *carries on business* or *personally works for gain*" within the local limits of the ordinary original jurisdiction of those Courts There is no distinction between "residing" and "dwelling" used in its ordinary signification (*o*) The word 'reside" is used in other parts of the Code sometimes in a narrower and sometimes in a more extended meaning, see s 136, O 3, r 2, and O 25, r 1 But there does not appear to be any difference between "residing within the meaning of ss 16, 19 and 20 of the Code and

(*l*) *Ja lur Rahim* v *Dwarka Nath* (1903) 30 Cal 453

(*m*) *Latnagiri* v *Syed Lara* (1896) 19 Mad 477

(*n*) *Ismailji* v *Ismail* (1921) 45 Bom 1228 63 I C 955, *Kunja* v *Maindra* (1922) 27 C W N 542, 77 I C 23 ('23) A C 619 [not]

(*o*) *Mahomed* v *Lalfin* (1879) 3 Bom 227 229, *Cowasji* v *Coverdandas* (1890) 14 Bom 541, 547

S. 20. "dwell" within the meaning of cl 12 of the Charter We therefore proceed to note the decisions bearing on the term dwell

"Dwell" within the meaning of cl 12 of the Charter—The dwelling or residence contemplated by clause 12 must be of a more or less permanent character It must be of such a nature as to show that the High Court in which a defendant is sued is his natural *forum* (p) Hence it follows that where a party has got a permanent place of dwelling in one place he cannot be said to dwell at a place where he has lodged for a temporary purpose only *e g* to defend a suit brought against him (q) or for a change while on leave (r) Every person is deemed in law to have a dwelling or place of residence and where a person has no permanent place of residence he will be deemed to "dwell where he is actually staying at the time Thus where a defendant who was Political Agent at Kolhapur left Kolhapur *en route* for England on a year s furlough after having sold off his furniture and other effects at Kolhapur, where he lived in a house belonging to Government and stayed in Bombay for three days before sailing for England it was held that he dwelled in Bombay so as to give jurisdiction to the High Court in a suit instituted against him during his stay in Bombay (s) And in a Calcutta case a racing man who had come to Calcutta for a month for racing was held to dwell in Calcutta he having no other residence at the time when the suit was instituted against him (t)

A person may have more than one permanent place of residence at the same time In such a case he will be deemed to dwell in any one of the places where he is actually staying for the time being and he may be sued in that place In *Orle v Skin er* (u) the defendant who had a dwelling place at Mussoorie was held under the circumstances of the case to have another dwelling place at Bilaspur Similarly where a defendant spent his time alternately in Calcutta and the mufassal it was held that he could be sued in Calcutta where he was residing at the time (v) But a person who has been living and carrying on business in Bombay for twenty years cannot be said to be residing at Ahmedabad because he has a family house at Ahmedabad which he visits occasionally in such a case Ahmedabad cannot be said to be one of his places of residence (w) Where an *Acharya* (Hindu head priest) who had his permanent place of residence at Nathdwar came to Bombay in April 1889 at the invitation of his devotees it being his first visit to Bombay since his installation on the *gadi* in 1875 and while in Bombay exchanged visits with his followers and stayed in a house purchased by him in 1888 it was held in a suit brought against him in Bombay in May 1889 that he did not dwell in Bombay it not having been shown that he had purchased the house for a Bombay residence intending to come to Bombay from time to time and live in it (x) Where a person who was domiciled and resided in Mysore left his house in charge of a servant and hired a house in Madras to which he brought his wife and family and apprenticed himself for a year to a Vakil in Madras it was held in a suit brought against him in Madras some months after his residence there that inasmuch as he had taken up his abode in Madras meaning to remain there for several months and was actually living there when the suit was instituted, he dwelled in Madras within the meaning of cl 12 of the Charter (y)

"Carries on business"—These words also occur in cl 12 of the Charter and the decisions under that clause will apply equally to cases arising under ss 16 19 and 20 For a person to be said to carry on business at a place it is not necessary that he

(p) *Gosrumi v Goverdhanlalji* (1890) 14 Bom 541, 55[illegible] s c in app (1894) 18 Bom 290 and in app to P C (1894) 18 Bom [illegible]94 But see 29 Mad [illegible]30 [illegible] an l 33 I A 1[illegible]9 139
(q) *Emsttoll v Kuld* (1864) [illegible] Hyde 119
(r) *Kavasji v Wallace* (1863) 1 B H C 113
(s) *Fernandez v Wray* (1901) 2[illegible] Bom 1 6
(t) *Morris v Baumgarten* (18[illegible]) Coryton 152
(u) (1881) 3 All 91 [illegible] I A 106
(v) [illegible] *had ney v Kalli* (1864) Coryton 24
(w) *Ugar Chand v Suraj mal* (190[illegible]) Bom L R 60[illegible] *Gurandita Mal v Ram Das* (1916) 1 R no 112 p 343 35 I C 6
(x) *Costa v Goverdhanlalji* (1890) 14 Bom [illegible]41
(y) *Srinivasa v Venkata* (1911) 34 Mad [illegible]7 38 I A 1[illegible]9 11 I C 4[illegible] In app from 29 Mad 23[illegible]

S. 20.

should have an office or a regular place of business there Thus a person residing in the mufassal who goes once or twice a week from the mufussal to a friend's house in Calcutta, and does business there, will be said to "carry on business" in Calcutta (z) Nor is it necessary that the business should be conducted by him *personally* (a) It may be carried on by an *agent* employed by him, but it is necessary in that event that the following three conditions should concur, namely,—

(1) The agent must be a *special agent* who attends *exclusively to* the business of the principal, and carries it on in the name of the principal, and not a *general agent* who does business for any one that pays him Thus a trader in the mufassal, who habitually sends grain to Madras for sale by a firm of commission agents whose business it is to sell goods *for others* on commission, cannot be said to "carry on business" in Madras (b) So a firm in England, carrying on buisness in the name *A B & Co*, which employs upon the usual terms a Bombay firm carrying on business *in the name of C D & Co*, to act as the English firm's commission agents in Bombay, does not "carry on business" in Bombay, so as to render itself liable to be sued in Bombay (c)

(2) The person acting as agent must be an *agent in the strict sense of the term* The manager of a joint Hindu family is not an "agent" within the meaning of this condition (d)

(3) To constitute "carrying on business" at a certain place, the *essential* part of the business must take place in that place Therefore, a retail dealer in the mufassal who gains his livelihood by the profit upon sales of his goods in the mufassal cannot be said to "carry on business" in Bombay, merely because he has an agent in Bombay to receive his goods from Europe, and to make purchases for him in Bombay and to forward the same to him up country In order that such a dealer may be said to "carry on business" in Bombay, it must also be shown that the agent made *sales* on behalf of the dealer in Bombay (e)

Business —A Hindu priest, who receives presents and offerings from his followers in Bombay, and keeps an account thereof, cannot be said to "carry on business in Bombay, though the offerings may be on so large a scale as to oblige him to employ servants to collect and keep an account of them The expression 'carry on business' is intended to relate to business in which a man may contract debts and ought to be liable to be sued by persons having business transactions with him (f) It has also been held that Zamindari business is not business of the kind contemplated by s. 20 (g) or by s 16 or s 19

"Personally works for gain."—The Government of this country cannot be said to 'work for gain,' for whatever income is obtained by it is held for the benefit of the Indian Exchequer (h)

"Acquiesce"—Under the Code of 1882 it was held that if a defendant, who did not reside within the local limits of the Court in which the suit was brought, did not apply for a stay of proceedings under section 20 of that Code, he should be deemed to have "acquiesced" within the meaning of clause (b) (i) But section 20 of the Code of 1882 has been omitted from this Code, there being sufficient provision made for transfers under section 22 of this Code It would, therefore, seem that a defendant, who does not apply for a transfer under section 22 will be deemed to have "acquiesced" within the meaning of clause (b) of the present section

(z) *Creech... v Collins* (1864) 2 Hyde 79
(a) *Mu ha... v Allan* (1882) 4 Mad 209
(b) *Chinnammal v Tuli kannatimmal* (1906) 6 M H C 146
(c) *Khimji v Forbes* (1871) 8 B H C 102
(d) *Annamalai v Murugasa* (1903) 26 Mad 544 30 I A 220
( ) *Eramji v Hormasji* (1865) 1 B H C 220
(f) *Gotram* [illegible]
[illegible] *Krishnasami* (1883) 6 Mad 344 *Ramappa v Ganpat* (1905) 30 Bom 81

S. 20.

Leave of Court.—The leave to sue referred to in clause (b) may be given even after the institution of the suit (j)

Cause of action—"Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree (k) It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit (l) It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour (m) The cause of action must be *antecedent* to the institution of the suit (n)

Cause of action in suits on contracts—In a suit for damages for breach of contract, the cause of action consists of the *making* of the contract and of its *breach* at the place where it ought to be performed (o) Hence in the case of a contract, the *whole* cause of action would be said to have arisen at a particular place, say Poona, if the contract was made in Poona and the breach also took place at Poona But if the contract was made in Belgaum and the breach took place at Poona (where it was to be performed), or if it was made in Poona and the breach took place in Belgaum (where it was to be performed), part of the cause of action would be said to have arisen in Belgaum and part in Poona If the *whole* cause of action arose in Poona a suit on the contract could be brought in the Court at Poona If part only of the cause of action arose in Poona and part in Belgaum the suit may be instituted in the Poona Court or in the Belgaum Court (p) [see cl (c)] [In cases governed by cl 12 of the Charter, where the cause of action has arisen only *in part* within the local limits of the original jurisdiction of the High Court the suit may be brought in that Court with the *leave* of the Court obtained *before* the institution of the suit No such leave is necessary under cl (c) of this section]

As regards the *making* of a contract, a contract will be presumed to have been made at the place where, on the face of it, it purports to have been made, though it may have been actually made elsewhere Thus a promissory note dated at Bellary will be presumed to have been made at Bellary, though it may have been actually signed at another place (q) When a contract is concluded by postal communication, it will be deemed to have been made at the place where the letter of acceptance is posted (r) And where the acceptance of a proposal consists of the performance of the condition of the proposal, the contract will be deemed to have been made at the place where the condition is performed (s) *A*, residing at Karwar, sends a sum of money to his agent in Bombay with instructions to him to pay it to *B*, a resident of Bombay, if *B* undertook to purchase goods for him in Bombay and ship them to him at Karwar *B* agrees to buy and ship the goods and receives payment, but he does not ship the goods *A* sues *B* at Karwar to recover the amount paid to *B* The Court at Karwar has no jurisdiction to entertain

(j) *Narayan* v *Secretary of State* (1906) 30 Bom 570
(k) *Read* v *Brown* (1888) L R 22 Q B D 128 131, *Murti* v *Bholi Ram* (1893) 16 All 165 (F B)
(l) *Dhunjishaw* v *Fforde* (1887) 11 Bom 649 *Musa* v *Manilal* (1905) 29 Bom 368 *Raghoonath* v *Gobindnarain* (1895) 22 Cal 451

the suit, for the whole cause of action arose in Bombay The contract was *made* in Bombay, for the undertaking was given and the money was received by *B* in Bombay The place of *performance* was also Bombay for the goods were to be purchased in Bombay and to be shipped from that place (*t*)

As regards *breach* of a contract, it is to be noted that where a place is named in the contract for its performance, the suit may be brought in the Court within the local limits of whose jurisdiction the contract was to be performed or performance thereof completed Where no place of performance is named in the contract the intention of the parties must guide the Court in determining the place of performance (*u*) The mere fact that the creditor is described in a promissory note as residing at K does not make K the place of payment so as to give jurisdiction to the Court at K (*v*) Further, if any money is or becomes payable by one party to a contract to another in performance of a contract and the money is not paid the suit may be brought in the Court of the place where the money was expressly or impliedly payable (*w*) Thus where *A* and *B* entered into an agreement at Rutlam to carry on business in partnership at Muttra and after the business was carried on for some time the partnership was dissolved and a sum of Rs 1 00 000 was found due by *B* to *A* on taking the accounts at Muttra it was held by *their Lordships of the Privy Council that A was entitled to sue B at Muttra that* being the place where the balance was struck and the amount became due and payable (*x*) In a suit on a contract of insurance made in Rangoon and providing for payment of insurance money in Rangoon the cause of action arises in Rangoon and not at the place where the property insured is damaged or destroyed (*y*) In the case of a contract f o b Bombay, the place of performance is Bombay (*yy*)

If goods are sold according to sample in Bombay and they are paid for in Bombay, but under the contract they are to be delivered at Allahabad the buyer may sue the seller in the Allahabad Court for recovering back the price of the goods if they are not according to the sample The question in such a case is whether the place of delivery is an essential part of the contract (*z*) Where *A* at Kasganj ordered dyes from *B* at Delhi with instructions to despatch them by value payable parcel post and *A* paid for and took delivery of the goods at Kasganj and on opening the parcel found that it contained clay it was held that a part of the cause of action arose at Kasganj and that *A* was entitled to sue *B* for damages in the Court at Kasganj (*a*) In *Motilal* v *Surajmal* (*b*) *A* a merchant in Bombay ordered goods from time to time from *B* who acted as his *pucca adatia* at Phulgaon *A* sued *B* in Bombay for the amount due to him at foot of the account between him and *B* It was held by Tyabji J that (1) as instructions were sent by *A* to *B* from Bombay (2) as accounts were rendered to *A* at Bombay and (3) as demand was made for payment of the amount due from Bombay the payment of money was to be in Bombay and a material part of the cause of action arose in Bombay *But where A sued B at Madras for services rendered to B at Hyderabad* where also the contract was made, alleging that after the work had been done *B* promised to pay in Madras it was held that as there was no consideration for the promise to pay in Madras,

(*t*) *Dal bhai* v *D ogo* (1894) 18 Bom 43

( ) *Dl unj sha* v *Fforde* (188) 11 Bom 649 *M han mad* v *M han mad* (1916) 1 R to p 3 31 I C 698

(*v*) *Pa an* v *C j al cl ari* (1908) 31 Mad 3

( ) *Jai S gh* v *Ka I r Bakhsh* (19 1) 3 Lat I I 499 69 I C 4 4 *Ve kata* v *Natara a* (19 4) 46 Mad I J 3 1 84 I C 691 (4) A M 80 See also *Firm Da ate* v *Firm I l a* (19 0) Lah I J 5 5

(*x*) *I chmee Ch nd* v *Zorar r M l* (1860) 8 M I A 291 [a case under Bengal Reg of 1 03] *I rragh C Co* v *Jursl ota* (1881) 4 Mad 3

pore]

(*a*) *P m Lal* v *Bholi Na h* (19 0) 40 All 319 59 I C 369

(*b*) (1906) 30 Bom 167 dissented from in *T la P n* v *I lal I m* (19 4) 43 All 465 80 I C 601 (24) A A 530

S. 20. there was no *contract* in law to pay in Madras, and therefore there was no breach of the contract in Madras so as to entitle *A* to sue *B* in Madras (c)

A suit on a promissory note which is neither made nor payable in Bombay cannot be brought in the High Court of Bombay, though the note was passed for the balance of accounts in respect of transactions effected in Bombay (d) It has been held by the High Court of Calcutta, that where *D* draws a hundi at Benares on his firm at Bombay in favour of B P & Co, a firm at Calcutta, and the hundi is then endorsed by B P & Co to *P* at Calcutta part of the cause of action arises at Calcutta where the endorsement is made, and *P* may sue *D* in the Calcutta High Court after obtaining leave to sue under clause 12 of the Charter (e) The High Court of Madras, however, has held that when a firm outside Madras draws hundis on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the hundi Negotiation of the hundi is only a provisional method of realizing money from persons who are willing to accept the hundi for a small profit and to take the trouble of recovering the money from the drawee If the hundi is dishonoured the endorsee will have recourse to the payee who had endorsed it over to him So that the receiving of the money from an endorsee cannot be treated as payment towards the contract The payment becomes complete only when the drawee actually makes payment in Madras Where such payment is made against goods the drawee may sue the drawer (seller) in Madras to recover money overpaid on the hundis as part of the cause of action arises in Madras (f) The High Court of Calcutta has held that if *P* agrees to accept and pay in Calcutta for the accommodation of *D* in Cawnpore a hundi drawn by *A* at Delhi in favour of *B* at Delhi and *P* accepts and pays the hundi in Calcutta part of the cause of action arises in Calcutta and *P* may sue *D* to recover the amount paid by him in the Calcutta Court (g)

The debtor must find his creditor —In the Common Law the rules as to money payments is that if no place is named for payment the debtor is bound to find the creditor provided the creditor is within the realm (g2) If this rule applies in India, then if no place is fixed for payment the place where the creditor is is the place for payment, and the *cause of action* would to that extent arise at the place where the creditor is, the theory being that in such a case there is an *implied promise* to pay at the place where the creditor is There is a conflict of opinion whether the said rule of Common Law applies in India, or whether, if no place is named for payment, the rule as to the place of payment is to be determined by the provisions of sec 49 of the Contract Act 1872 In a large number of cases it has been held that the rule of Common Law does not apply in British India (g3) In a Bombay case it was assumed that the rule applied in India (g4) In a recent Allahabad case it was held that the Common Law rule applied in the ordinary case of buyer and seller and the ordinary case of principal and agent, but not to a commission agent whose business it is to buy and sell goods on behalf of any person willing to employ him as such (g5).

Before leaving this subject it may be observed that the corresponding section of the Code of 1882 contained an Explanation being Explanation III, which ran as follows

(c) *Seshagiri Row v Nawab Askur Jung* (1907) 30 Mad 438 See also *Kamisetti v Katha* (1904) 27 Mad 355

(d) *Sewdram v Bajrangdat* (1916) 40 Bom 473 32 I C 918

(e) *Raghoonath v Gobindnarain* (1895) 22 Cal 451

(f) *Ponnusami v Damodar* (1924) 47 Mad 403 79 I C 800 (24) A M 464

(g) *Ramchandar v Ganapatram* (1920) 47 Cal 583 59 I C 539

(g2) *Bansilal v Ghulam* (1925) 53 I A 58 63 53 Cal 88 93

(g3) *Puttappa v Gimbrappa* (1903) 7 Bom L R 993 *Kadarmal v Surajmal* (1907) 9 Bom L R 901 903 910 *Ramar v Gopalachari* (1908) 31 Mad 223

(g4) *Motilal v Surajmal* (1906) 30 Bom 167 171 See also *Dhunjisha v Fforde* (1887) 11 Bom 649 658

(g5) *Tika Ram v Daulat Ram* (1924) 46 All 465 467 468

Explanation III —In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places namely —

(i) The place where the contract was made,

(ii) the place where the contract was to be performed or performance thereof completed,

(iii) the place where, in performance of the contract, any money to which the suit relates was expressly or impliedly payable

That Explanation was added into the old section in the year 1888 to remove a doubt as to whether a suit on a contract could be instituted in the Court within the local limits of whose jurisdiction the cause of action arose only *in part* The doubt arose from the fact that that section provided for the institution of a suit in the Court within the local limits of whose jurisdiction the cause of action arose, and it was not clear whether the expression cause of action meant the whole cause of action or included also a part of the cause of action Explanation III made it clear that a suit on a contract could be instituted in a Court within the local limits of whose jurisdiction the cause of action arose either *wholly* or *in part* As Explanation III was confined to suits on contracts only, the question arose whether a suit other than one on a contract could be instituted in a Court within the local limits of whose jurisdiction the cause of action arose *in part only* and it was held that as in the case of suits arising out of contract so in the case of other suits, it was enough to give a Court jurisdiction over the suit if the cause of action arose in part only within the local limits of the Court (*h*) The addition of the words wholly or in part in cl (c) of the present section after the words cause of action makes it quite clear that a suit *whether it arises out of contract or not* may be instituted in a Court within the local limits of whose jurisdiction the cause of action arose *wholly or in part* (*i*) It also rendered Explanation III unnecessary, and the same has accordingly been omitted But decisions bearing on that Explanation are still good law and they have been retained in the present commentary

Cause of action in other suits —A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides, or it may be brought in the Court of the place where the wife resides (*j*) A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the Court at Lahore or it may be brought in the Court at Allahabad (*k*) A suit for damages for infringement of a trade mark may be brought in the Court of place where the defendant resides or in the Court of the place where the defendant publishes advertisements constituting infringement of the trade mark (*l*) A suit for damages for conversion may be brought in the Court of the place where the conversion originally took place (*m*).

Place of suing where decree sought to be set aside on ground of fraud. —The question whether a suit can be instituted in one District for setting aside a decree passed by a Court in another District has been the subject of many decisions The result of the actual decisions ignoring what are merely *obiter dicta* may be stated thus. A suit to set aside a decree obtained by fraud in Court X, where nothing is done beyond transferring the decree for execution to Court Y, can only be maintained in Court X, that is, the Court which passed the decree (*n*) Where, however a decree passed by Court X is transferred for execution to Court Y, *and* the decree holder makes an applica

(*h*) See *Banke Behari Lal* v *Pokhe Ram* (1903) 25 All 48

(*i*) *Salig Ram* v *Chaha Mal* (1912) 34 All 49 53 11 I C 712

(*j*) *Lalbagar* v *Bai Suraj* (1894) 18 Bom. 316 As to suits under the Indian Divorce Act 1869 see *Nusserwanjee* v *Elenora* (1913) 38 Bom 125 at p 148 20 I C 492

(*k*) *Sarat Chandra* v *Forman* (1890) 12 All 213

(*l*) *Kheshtra Pal* v *Pancham Singh* (1915) 37 All 446 29 I C 987

(*m*) *Kartick Churn* v *Gopalkisto* (1877) 3 Cal 264

(*n*) *Umrao Singh* v *Hardeo* (1907) 29 All 418

S. 20. tion to Court Y for execution of the decree (*o*) or property belonging to the judgment debtor is attached by Court Y (*p*), or the judgment debtor is arrested by Court Y in execution and released on giving security (*q*), the judgment debtor may institute a suit in Court X for a declaration that the decree was obtained by fraud, and for an injunction restraining the decree holder from executing the decree Similarly if property belonging to the judgment debtor is sold by Court Y in execution, he may sue the decree holder in Court Y for a similar declaration and for setting aside the sale and for possession (*r*) The reason is that in all these cases the cause of action arise *in part* within the jurisdiction of Court Y But where the decree holder has done nothing beyond getting the decree transferred for execution to Court Y, in other words, he has not even made an application to Court Y for execution, the judgment debtor, as stated above, cannot institute a suit in Court X for setting aside the decree, not even if he includes a relief for injunction in the plaint (*s*)

Suits against corporations : Explanation II.—Irrespective of the Companies Act, the domicile of a trading company is fixed by the situation of its principal place of business (*t*), that is to say its chief office, where the central management and control are actually to be found (*u*) In the case of a company registered under the Companies Act the controlling power is as a fact, generally exercised at the registered office, and that office is, therefore, not only for the purposes of the Act but for other purposes, the principal place of business (*v*) This is not however necessarily the case (*u*), and the question whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined upon a scrutiny of the course of business and trading (*x*)

Suit against non-resident foreigners—We now proceed to consider the applicability of the section where the defendant is a foreigner that is, a non British subject residing out of British India If a foreigner resides, or *himself* carries on business, *or personally* works for gain in British India it is clear that he is amenable to the jurisdiction of British Indian Courts But what if a foreigner does not reside, or does not *himself* carry on business or *personally* work for gain, in British India, and

(1) the *cause of action* arises within the local limits of a British Indian Court, or

(2) the cause of action also does not arise within the local limits of a British Indian Court (i e, it arises in a foreign country) but, he carries on business *through his agent* within the local limits of a British Indian Court?

As to case (1), it is settled that a non resident foreigner, who is a subject of a protected Native State, may be sued in the Court of British India, if the *cause of action* arises within the jurisdiction of such Court (*y*) Thus if *A*, a subject of the Native State of Sangli, and resident therein borrows money from *B* at Belgaum, *B* may sue *A* for recovery of the money in the Belgaum Court, for the cause of action arises at Belgaum

(*o*) *Banke Behari v Pokhe Ram* (1903) 25 All

W N 559

(*s*) See 33 All 564 at p 567 24 I C 978

(*t*) *Jones v Scottish Accident Insurance Co* (1886) 17 Q B D 421

(*u*) *Ibid*, *De Beers Consolidated Mines Ltd v Howe* [1906] A C 455 458

(*v*) *Watkins v Scottish Imperial Insurance Co* (1889) 23 Q B D 285

(*w*) *Keynsham Blue Lias Co v Barker* (1863) 2 H & C 729

(*x*) *De Beers Consolidated Mines Ltd v Howe*

As to case (2), it was held by the High Court of Bombay in one case that where no part of the cause of action arose in Bombay, that Court had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business *through an agent* in Bombay (z) But that decision was disapproved in the later case of *Girdhar* v *Kassigar* (z2) The point arose in a later case before the Privy Council, but it was left open (a) The Madras High Court has held that the expression ' carrying on business ' in cl 12 of the Letters Patent includes carrying on business through an agent in British India by foreigners living outside jurisdiction (a2)

21. [*New.*] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

Objections to jurisdiction

This section is new It proceeds on the lines of the Suits Valuation Act, 1887, s 11 It applies to Chartered High Courts, though ss 16, 17 and 20 do not; see s 120 below

Jurisdiction—The present section relates to ' objections to jurisdiction ' [see marginal note to the section] By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted and may be extended or restricted by the like means If no restriction or limit is imposed the jurisdiction is said to be unlimited (b) A limitation may be (1) as to the subject matter, (2) as to person (3) as to the pecuniary value of the suit or (4) as to place or it may partake of two or more of these characteristics (c) We shall deal with each of these in order

(1) *Subject matter*—As to subject matter it may be observed that a Presidency Small Cause Court has no jurisdiction to entertain certain suits, such as suits for the recovery or partition of immoveable property suits for the foreclosure or redemption of a mortgage of immoveable property suits for compensation for defamation, suits for dissolution of partnership etc, see the Presidency Small Cause Courts Act 15 of 1882, s 19 These and certain other suits are also excepted from the cognisance of a Provincial Small Cause Court, see Provincial Small Cause Courts Act 9 of 1887, s 15 If a Presidency Small Cause Court or a Provincial Small Cause Court entertains a suit which is excluded from its cognisance, its decree is a nullity See also Bombay Civil Courts Act 14 of 1869, s 28 A, and Bengal, N W P, and Assam Civil Courts Act 12 of 1887, s 23

(2) *Person*—As to this it may be stated that a defendant who is not subject to the jurisdiction of a Court may submit himself to its jurisdiction See notes to s 13, " Submission to jurisdiction of foreign Court," on p 74 above, and notes to s 86

471 dissenting from 1[?] Bom 507 and following 17 [illegible] 662

(b) Halsbury v 1 9 art 10 p 13 *Hriday Nath* v *Ramchandra* (1921) 48 Cal 138 146-148, 58 I C 806

(c) See *Vishnu* v *Krishnarao* (1887) 11 Bom 153-170

S. 21. (3) *Pecuniary value* —A suit may be over valued and instituted in a Court of a higher grade or it may be under valued and instituted in a Court of a lower grade As to these cases it is now provided by the Suits Valuation Act 7 of 1887, s 11, that an objection as to over valuation or under valuation shall not be entertained by an Appellate or Revisional Court unless, (1) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, *or* (2) the Appellate or Revisional Court is satisfied that the over valuation or under valuation has prejudicially affected the disposal of the suit on its merits (e)

(4) *Place of suing* —Ss 16 to 20 of the Code relate to place of suing See notes below, " Place of suing

Consent and waiver — Where by reason of any limitation imposed upon the authority of a Court, a Court is *without jurisdiction* to entertain any particular action or matter, either the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled Where a limited Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing (f) But where a Court has jurisdiction over the particular subject matter of the action or the particular parties and there is a mere *irregularity in the exercise of jurisdiction* the decree passed by that Court as to that matter is not a nullity The distinction between want of jurisdiction and irregular exercise of jurisdiction is of great importance The apparent conflict in reported cases is largely due to failure to keep this distinction clearly in view The leading case on the subject is *Ledgard v Bull* (g) decided by the Privy Council in 1886 In that case Lord Watson in delivering the judgment of the Board observed as follows —

> The District Judge was perfectly *competent to entertain* and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case a defendant may be barred, by his own conduct from objecting to irregularities in the institution of the suit [But] when the Judge has *no inherent jurisdiction* over the subject matter of a suit, the parties cannot, by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him But there are numerous authorities which establish that when in a case, which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit "

In *Ledgard v. Bull*, the suit was for damages and injunction for infringement of a patent and it was originally brought in a Subordinate Judge s Court, the latter Court not having jurisdiction to entertain such a suit

The principles laid down in *Ledgard v Bull* were reiterated by their Lordships of the Privy Council in *Meenakshi Naidu v Subramania Sastri* (h) That was a case in which [illegible] which no [illegible] decree of the High Court was a nullity [illegible] ups said " In the present case there was an inherent incompetency in the High Court to deal with the question brought before it and no consent could have conferred upon the High Court that jurisdiction which it never possessed "

[illegible]

(g) (1887) 13 I A 134 9 All 191 See also Vishnu v Krishnarao (1887) 11 Bom 153 159

(h) (1887) 14 I A 160 11 Mad 26, *Jeranchod v Dakore Temple Committee* (1925) 27 Bom L R 872 876

Objection as to jurisdiction when to be raised—The objection to the jurisdiction of a Court may be taken at any stage of the proceedings. Thus it may be taken for the first time in appeal, or in second appeal, or in revision (i), or after remand in second appeal (j), or on appeal to the Privy Council (k), provided the objection is patent on the face of the proceedings. See notes to s. 100, "Pleas which may be taken for the first time in special appeal," and notes to O. 41, r. 1, "Grounds of objection which may be taken for the first time in appeal." There are, however, two cases in which the objection as to jurisdiction will not be allowed by an appellate or revisional Court, namely, (1) in cases falling under s. 11 of the Suits Valuation Act, 1887, and (2) cases falling under the present section for which see notes below.

"Place of suing."—The present section provides that no objection as to the "place of suing" shall be allowed by any appellate or revisional Court unless (1) such objection was taken in the *Court of first instance* at the earliest possible opportunity, *and* (2) unless there has been a consequent failure of justice. The marginal note to the section is "objections to jurisdiction." The words used in the section are "objection to the place of suing." This much is clear that this section does not apply to all objections to jurisdiction, but only to such objections as relate to the "place of suing." The words "place of suing" are used in the heading prefixed to s. 15 as descriptive of the subject matter of the provisions in ss. 15 to 20, as to the Courts in which suits, including suits as to immoveable property, are to be instituted.

S. 20 provides in effect that suits other than suits for land may be brought in the Court of the place where the cause of action arose or the place where the defendant resides. The effect of the present section is that if a suit is brought in Court A under s. 20 on the sole ground that the defendant resides within the local limits of its jurisdiction, and the defendant does not object to the jurisdiction of the Court, and a decree is passed in the suit, he will be precluded from taking the objection as to jurisdiction in the appellate Court, and further he will not be entitled to set aside the decree in a separate suit on the ground that it is a nullity. The reason is that the provisions of the present section apply to the case (l).

Sections 16, 17 and 18 deal with suits relating to immoveable property. Suppose a suit relating to immoveable property, *e.g.*, a suit for a sale of mortgaged property is instituted in contravention of the provisions of *s. 16 or s. 17* and no objection is taken to the jurisdiction of the Court in which the suit is filed and a decree is passed in the suit for a sale of the property. There is no doubt that such a decree is a nullity. The point to be considered is whether the defendant not having objected to the jurisdiction of the Court, the present section saves the decree from being a nullity? This raises the broad question whether the present section governs cases of want of territorial jurisdiction. The decisions on the subject are not uniform. The difficulty has arisen partly owing to the deep rooted notion that a decree which is a nullity ought to be disregarded in all proceedings, whatever may be the nature of the proceedings, and partly owing to a ruling of the Privy Council in *Setrucherla v. Maharaja of Jeypur* (m) which turned upon

(l) *Venkatarama v. Santanna* (1919) 37 Mad. 349; *Ratti Ram v. Kundan Lal* (1914) Punj. Rec. No. 87 p. 316, 26 I. C. 543.
(m) (1919) 46 I. A. 151, 42 Mad. 813, 72 I. C. 314, (23) A. M. 351.

21. s 21 In that case a suit had been instituted in the Court of the Subordinate Judge of Vizagapatam on a mortgage of property which was partly situated in British India and partly in a Schedule District [see s 17] No objection was taken by the defendant to the jurisdiction of the Court The Court passed a decree for a sale of the mortgaged property The defendant appealed to the High Court of Madras The High Court held that the case was governed by s 21, and that the defendant not having objected to the jurisdiction of the trial Court, was precluded from taking that objection before the High Court, and they allowed the decrees of the Subordinate Judge to stand. The defendant appealed to the Privy Council On behalf of the plaintiff it was argued before the Privy Council that the defendant not having objected to the jurisdiction of the trial Court, he was precluded by the provisions of s. 21 from raising the objection in appeal On the other hand, it was argued for the defendant that s 21 did not apply to the case and it applied only where the right place of suing was *one subject to the Code* Their Lordships upheld the contention for the defendant and held that the decree was a nullity on the ground that by s 1 (3) of the Code the Code was excluded from the Scheduled Districts, and that the Subordinate Judge therefore had no jurisdiction at all under s 17 to entertain the suit so far as it claimed a sale of mortgaged land situated in the Scheduled District Referring to s 21 and to the view taken by the High Court of that section their Lordships said Their Lordships cannot agree with that view This is not an objection as to *the place of suing* it is an objection going to the *nullity* of the order on the ground of *want of jurisdiction* The order for sale is made under sections [O 34 rr 4 5] of the Code of Civil Procedure *which the Code itself says are not to apply to Scheduled Districts* It will be observed that the decision of the Judicial Committee is founded on the cardinal fact that the provisions of the Code do not apply to Scheduled Districts

Let us now take the case of a mortgage of land the whole of which is situated in British India and no part of it in a Scheduled District Suppose that the land is situated within the local limits of Court *A* but the suit is instituted in Court *B* and no objection is taken to the jurisdiction of Court *B*, and a decree is passed by Court *B* Or suppose that the land is situated within the local limits of Court *B* but the territorial jurisdiction of that Court is subsequently taken away by a Government Notification and transferred to another Court, and the suit is continued before Court *B* without any objection by the defendant, and a decree is passed in the suit Do the provisions of the present section apply to such cases and save the decree from being a nullity ? It has been held by a Full Bench of the High Court of Madras in *Zamindar of Ettiyapuram* v *Chidambaram* (n), that the decree is not a nullity and that the provisions of the present section apply to the case though Court *B* had no territorial jurisdiction in respect of the property (n)

Questions arising under this section —We now proceed to consider the present section a little more fully Suppose that in contravention of the provisions of s 16 a suit relating to immoveable property situated wholly in British India *e g*, a suit for a sale of mortgaged property is instituted in Court *A*, the land being situated outside

(n) (1920) 43 Mad 675 (F B) 58 I C 871 I C 145 where the suit was heard after remand by a Court other than that to which the suit was remanded the latter Court having been abolished in the meantime The High Court held that the decree was a nullity

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local limits of the jurisdiction of that Court, and no objection as to jurisdiction taken before that Court either at the earliest possible opportunity or at the settlement of issues :—

(1) Is it competent to Court A to deal with the objection as to jurisdiction, if the objection is raised before the final judgment is passed in the suit? It is submitted that it is ( ).

(2) Is it competent to the appellate or revisional Court to allow the objection if for the first time it is raised before that Court? The answer to this question is in the negative. The very terms of the present section exclude the objection, and it has been so held by the High Court of Madras (p).

(3) Can the objection be allowed if for the first time it is taken before the Court executing the decree, in other words, whether the present section is applicable to execution proceedings? It has been held by a Full Bench of the Madras High Court in *Zamindar of Ettayapuram* v. *Chidambaram* (q) referred to above, that the present section applies to execution proceedings and that the objection cannot be allowed by the Court executing the decree. In that case Wallis, C. J., said: "The effect of the section in my opinion is that objections which the appellate or revisional Court is thereby precluded from allowing *must be considered cured for all purposes* unless taken before the passing of the decree of the original Court. The ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision and if this is forbidden a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing." On the other hand, it has been held by a Full Bench of the Calcutta High Court in *Gora Chand* v. *Prafulla Kumar* (r) that where a decree presented for execution has been made by a Court which *apparently* had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. The Full Bench said: "Within these narrow limits the executing Court is authorised to question the validity of a decree."

(4) Is it competent to the judgment-debtor to challenge the *validity of the* decree in a separate suit? It has been held by the High Court of *Madras* that it is not (s). The High Court of Bombay has also held the same way (t). On the other hand it has been *held by the High Court* of Calcutta that it is (u). In the Calcutta case in which it was so held, the suit was instituted by a purchaser of the mortgaged property at a Court sale for a declaration that the decree was a nullity, and the decree was declared to be a nullity and the sale was set aside. The same High

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(s) *Chokkalinga* v. *Velayudha* (1924) 47 Mad L J 448, 87 I C 152, ('25) A M 117.

(t) *Payaram* v. *The Central Bank of India* [Suit No 393 of 1926].

(u) *Krishna* v. *Amarnath* (1923) 47 Cal 770, 56 I C 532.

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Court has also held that the plea that the decree is a nullity may also be taken by the judgment-debtor in defence in a suit against him for possession by the auction purchaser and that the Court may set aside the sale if the decree was a nullity (v)

It is submitted with respect that the present section creates an exception, as regards the place of suing, to the rule that where a Court has no jurisdiction to entertain a suit the decree is a nullity, and that the view taken by the Madras High Court is correct. It is true that a decree passed by a Court which is not a Court of competent jurisdiction cannot operate as res judicata under s 11. But s 21 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the "place of suing"

"Unless there has been a consequent failure of justice"—In order to ascertain whether there has been a "consequent failure of justice" within the meaning of this section, the appellate Court must go into the merits of the case and form an opinion upon the justice or otherwise of the decision of the first Court (v[2])

Execution by a Court having no jurisdiction to execute the decree—Suppose that a decree is passed by a Court of competent jurisdiction Suppose further that the decree is sent for execution to a Court that has no territorial jurisdiction over the immoveable property comprised in the decree, and the judgment debtor does not object to the jurisdiction of the executing Court, and the property is sold and the sale is confirmed by the Court Is it competent to the *judgment debtor* in a subsequent proceeding to object to the sale and contend that the sale was a nullity? It has been held by the High Court of Madras that it is not, the reason given being that the principle of the present section applies to the case Is it competent to a *subsequent purchaser* of the same property held in execution of another decree passed against the same judgment debtor in another suit to contend that the first sale was a nullity? It has been held by the same High Court that it is, the reason given being that in a case like this the estoppel of the judgment debtor does not operate against the purchaser (v[3])

It has also been held by the High Court of Madras that if in the course of execution of a decree for delivery of immoveable property the property is transferred from the jurisdiction of the executing Court *A* to that of Court *B*, and Court *A* nevertheless continues the execution proceedings and issues a warrant for delivery of the property, and the defendant does not object to the jurisdiction of Court *A*, the defendant is not entitled on appeal to raise the objection as to jurisdiction, the reason given being that the principle of the present section applies to the case (v[4])

(v) *Kunja* v *Manindra* (19..) 27 C W N 542 77 I C 253
(v[2]) *Lachhiram* v *Birji* (1921) 19 All L J 305 62 I C 399
(v[3]) *Veerappa* v *Ramasami* (1920) 43 Mad 135, 53 I C 579
(v[4]) *Manarikraman* v *Ananthanarayana* (1924) 46 Mad L J 550 79 I C 806 ('24) A M 457, *Zamindar of Ettiyapuram* v *Chidambaram* (1920) 43 Mad 675 687, 58 I C 871.

22. [S. 22.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed

Power to transfer suits which may be instituted in more than one Court

Power of Court to stay suit pending before it—Sections 22 24 deal with the power of the Court to transfer not with the power of the Court to stay But a Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court Whether the institution of a suit in a particular Court is an abuse of the process of the Court is a question of fact in each case *A* sued *B* in the Bombay High Court for damages for defamation alleged to be contained in the *Bombay Ga ette*, a daily journal published in Bombay *A* and *B* both reside at Wardha in the Central Provinces *B* applies for an order that the suit be stayed and the plaint returned to *A* in order that if *A* thought proper it may be presented to the Court at Wardha The grounds of the application are that neither he (*B*) nor the plaintiff (*A*) resides or carries on business in Bombay and that all his (*B* s) witnesses reside at Wardha These facts are not sufficient to support *B* s application for a stay of the suit in the Bombay Court (*w*)

After notice and at or before settlement of issues.—The words of this section are mandatory, and therefore notice must be given before the application is made, further, in a case where issues are settled the application must be made at or before such settlement (*x*)

Power of High Court to stay suit pending in another Court—See notes under the same heading to O 39, r 1

(*w*) *Geffert* v *P rickhand* (1889) 13 Bom 1 8 *H n I stan Assurance Ltd* v *Rai Mulraj* (1914) 27 Mad L J 645 27 I C 455 *Sh v Parshad* v *Kanhaya* (1910) P R no 167 p 444 54 I C 945 See also *Norton* v *Norton* (1908) 1 Ch 471

(*x*) *Gul b Chan l* v *Sher S ngh* (1917) 1 [illegible] 11 p 40 3 I C 616

Ss. 23, 24

To what Court application lies

23 [Ss 22, 23, 24] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

Note that s 20 of the Code of 1882 which provided for a stay of proceedings has been omitted as sufficient provision has been made for transfers under the present section

Two suits in two Courts under different High Courts—Where two suits between the same parties are pending in two Courts under two different High Courts either High Court may direct the suit pending in the Court subordinate to it to be transferred to the other Court (y)

General power of transfer and withdrawal

24 [S 25] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(*a*) transfer any suit appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(*b*) withdraw any suit, appeal or other proceeding *pending in any Court subordinate to it, and*

(*i*) try or dispose of the same, or

(*ii*) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(*iii*) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1), the Court which thereafter

(y) *Venkata Sa Barod v Malsud n Das* (1908) 35 Cal 541

tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Alterations in the section.—These have been noted in their appropriate place in the commentary below

Form.—For form of notice of application, see App H, form no 2

Jurisdiction.—An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been *in the first instance* brought in a Court that *has jurisdiction* to try it But if, after the transfer is made, the parties without objection join issue and go to trial *upon the merits*, the order of transfer cannot subsequently be impeached (z) The same rule applies to appeals (a) See notes to s 21

General power of transfer.—It is a well known maxim of law that the plaintiff is in all cases *dominus litis*, that is, the person to choose where his suit shall be brought provided that he chooses a *forum* which the law allows him to choose The transfer of a suit is an extraordinary matter, and the Court should not transfer a suit against the plaintiff's will without good cause The mere convenience of parties is not a good reason for a transfer of a suit to another Court (b), but it is a relevant consideration (c) In an Allahabad case an application was made by the defendants for a transfer of a suit on a mortgage from the Court of the Subordinate Judge of Benares to the Court of the Subordinate Judge of Allahabad on the ground that most of the properties mortgaged by the defendants to the plaintiff were situated in Allahabad and that most of their witnesses resided in Allahabad The Court held that those facts did not constitute a good cause for transferring the case and the application was refused (d) A similar application was, however, allowed by the same Court in a later case (e)

"After notice to the parties".—This section provides that when an application is made by any of the parties for the transfer of a case, the Court has to issue a notice to the other parties Where an order is made without issuing notice, the order, according to the Allahabad High Court, is one without jurisdiction, and must be set aside (f) On the other hand, it has been held by the High Court of Madras, that the provision as to notice is one of procedure and practice, and the requirements as to notice may be waived (g)

"At any stage".—Under the corresponding section of the Code of 1882, it was held by the High Courts of Bombay, Madras and Allahabad that a suit could be transferred or withdrawn at any stage, though it might be *part heard*, and even in the course

(z) *Ireland* v. *Pull* (1887) 9 All 191 13 I A [illegible]

(b) *Hulli Ram* v. *Harnaran Das* (1883) 5 All 60 *Subba Bibi* v. *Maqbul* (1916) 14 All L J 242 32 I C 613 *Inayatullah* v. *Nisar* (1922) 44 All 278 65 I C 782 (1922) A A 65

(d) 41 All 381 50 I C 308 *supra*

(e) 44 All 278 65 I C 782 (1922) A A 65 *supra*

(f) *Fatema* v. *Imdad Ali* (1920) 18 All L J 351 58 I C 500

(g) *Sankumani* v. *Ikoran* (1890) 13 Mad 211

S. 24. of *execution proceedings* (*h*) On the other hand, it was held by the High Court of Calcutta that no order of transfer could be made after the hearing had once commenced, and that the Court had no power to make an order of transfer in execution proceedings (*i*) The words "at any stage" have been added to make it clear that a suit can be transferred even after the hearing has commenced

"Pending before it"—Under the corresponding section of the Code of 1882 it was held that a District Judge had no power to transfer to a Subordinate Court a suit pending before himself (*j*) Under cl (a) of the present section the High Court and the District Court have the power conferred upon them to transfer a suit or appeal, though it may be pending before them

District Court.—District Court in this section means a Court of *unlimited* pecuniary jurisdiction. An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is *limited* to suits of a certain value (*k*)

Clause (a): "Court subordinate to it"—*A* obtains a decree in a suit filed by her in the Court of the Divisional Judge Nagpur Division, for dissolution of marriage under the Indian Divorce Act 4 of 1869 The decree is then confirmed by the High Court of Bombay *A* then applies for alimony to the High Court of Bombay The proper Court to entertain the application is not the High Court but the Nagpur Court Nor has the High Court power under this section to transfer the proceedings to the Nagpur Court, the latter Court not being a Court subordinate to the High Court within the meaning of sub s (1) (a) of this section (*l*)

Clause (a): "Suit."—It has been held by the High Court of Allahabad that the word suit includes proceedings in execution (*m*) But is not a proceeding in execution included in the expression any proceeding in the same clause?

Clause (b): "Other proceedings."—A District Court has power under this clause to withdraw to its own file proceedings in execution transmitted by it to a Subordinate Court (*n*)

Re-transfer.—Under the corresponding section of the Code of 1882 it was held that where a District Judge had once transferred a case to his own file from the file of a Subordinate Court, he could not afterwards re transfer the case to that Court (*o*) Under the present section he has such power see cl (b) sub cl. (iii)

Suit transferred or withdrawn from a Court of Small Causes—It has been held by the High Courts of Allahabad (*p*) Madras (*q*) and Patna (*r*), and latterly also by the High Courts of Bombay (*s*) and Calcutta (*t*), that the expression "Court of Small Causes" in sub sec (4) includes a Court vested with the powers of a Court of Small Causes The view taken at one time by the High Courts of Bombay (*u*) and Calcutta (*v*), namely, that Court of Small Causes means a Court of Small Causes constituted under the Provincial Small Cause Courts Act, 1887, and that it does not include

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(*j*) *Sakharam* v *Gangaram* (1889) 13 Bom 654
(*k*) *Haji Umar* v *Gustadji* (1910) 34 Bom 411 6 I C 518
(*l*) *Wallace* v *Wallace* (1916) 40 Bom 109 31 I C 331
(*m*) *Muhammad* v *Tikamchand* (19..) 4. All 5. 8. I C 748 (..) A.A 6
(*n*) *Yellappa* v *Subrahmanyam* (1916) 39 Mad 485 29 I C 119
(*o*) *Amir* v *Prahlad* (1902) 24 All 304 *Sanders* v *Kenney* (190.) 24 All 3.6

(*q*) *Sankararama* v *Padmanabha* (1915) 38 Mad 17 I C 4..

(*t*) *Madhusudan* v *Lehari Lal* (1918) 27 Cal L J 461 44 I C 881
(*u*) *Ramchandra* v *Ganesh* (1899) 23 Bom 382
(*v*) *Dulal* v *Ram Narain* (1904) 31 Cal 1057

a Court vested with the powers of a Court of Small Causes under another Act, is no longer law

As a result of the provisions of sub s (4), the procedure of the Court to which a suit is transferred from a Court of Small Causes is governed by the provisions of the Provincial Small Cause Courts Act (w) and further, no appeal lies from the decree of that Court in cases in which no appeal lies from decrees of a Court of Small Causes (x)

Transfer of suit from Presidency Small Cause Court to High Court—See notes to cl 13 of the Letters Patent

Power of Court to stay suit pending before it—See notes to s 22 under the same head

Power of High Court to stay suit pending in another Court.—See notes to O 39 r 1, under the same head

Power of Governor-General in Council to transfer suit

25 [Ss 20-21.] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case

The object of this section is to empower the Governor General in Council to transfer cases from one High Court to another under certain circumstances The section proceeds on the analogy of s 527 of the Code of Criminal Procedure 1898

Institution of Suits

Institution of suits.

26 [S 48] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Changes introduced by the section.—The words or in such other manner as may be prescribed are new See O 4 r 1

Summons and Discovery

Summons to defendant

27 [S 64] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed

(w) *Chhote Lal* v *Lakhmi Chand* (1918) 38 All 425 34 I C 113 See also *Ugrah Singh* v *Motihar Co* ... (1919) 4 Pat L J 13 4 I C 208

(x) See Provincial Small Cause Courts Act 9 of 1887 s 2

Ss. 27-30.

Issue and service of summons—See O 5 below

28 [S 85] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province

Service of summons where defendant resides in another province

(2) The Court to which such summons is sent shall upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

See notes to O 5 r 23

29 [S 650A] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts

Service of foreign summonses

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts

By notification—For notifications issued under this section see General Statutory Rules and Orders Vol I pp 642 655 and Vol IV pp 682 684

30 [*New*] Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like

(*a*) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence,

(*b*) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(*c*) order any fact to be proved by affidavit

Delivery and answering of interrogatories—See O 11 below

Admission of documents and facts —See O 12 below
Discovery and inspection —See O 11 below
Production, impounding and return of documents —See O 13 below
Summonses to persons to give evidence —See O 16 below
Proof of facts by affidavits —See O 19 below

31. [*New*] The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness

32 [*New*] The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default

(*a*) issue a warrant for his arrest,

(*b*) attach and sell his property,

(*c*) impose a fine upon him not exceeding five hundred rupees,

(*d*) order him to furnish security for his appearance and in default commit him to the civil prison

See O 16 rr 10 13 r 17, and r 21

"**To whom a summons has been issued**"—This section applies only if a *summons* has been issued It does not apply where a person is merely *ordered* to produce a document (*y*)

JUDGMENT AND DECREE

33 [S 198] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow

Judgment and decree

See O 20 r 1

On such judgment a decree shall follow —Under this section it is imperative that a decree shall follow the judgment and that it is the duty of the Court to comply with the provisions of the law Hence where no decree is drawn up and an appeal is preferred from the judgment the appeal should not be dismissed, but time should be given to the appellant to apply to the Court which passed the decree for drawing up the decree (*z*)

INTEREST.

34 [S 209] (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum

Interest

(*y*) *Kumar Kameshwar* v. *Rani R Lhnath* (1920) 5 Pat L J 530 58 I C 281

(*z*) *Manoharlal* v. *Nanak Chand* (1913) P R no 68 p 165 5 I C 419

S. 34. adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie

Scope of the section —This section applies only where the decree is for the payment of "money" It does not apply where the decree is for the enforcement of a mortgage or charge See notes below under the head Interest in suits for enforcement of mortgage"

The three divisions of interest —Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads according to the *period* for which it is allowed, namely—

(1) interest accrued due *prior to the institution of the suit* on the principal sum adjudged (as distinguished from the principal sum claimed),

(2) additional interest on the principal sum adjudged from the *date of the suit* to the *date of the decree*, "at such rate as the Court deems reasonable ,

(3) further interest on the aggregate sum adjudged *i e*, the principal sum *plus* interest, from the *date of the decree* (i) to the *date of payment* or (ii) to such earlier date as the Court thinks fit, ' at such rate as the Court deems reasonable '

This section does not provide for payment of interest under the first head (a) It applies only to the second and third heads

1. Interest prior to date of suit —As has just been said, this head of interest does not come within the purview of the present section It is governed by other enactments to be presently noted The subject may be considered under the following two heads

(1) *where there is a stipulation for the payment of interest at a fixed rate,*

(2) where there is no stipulation at all for the payment of interest

1 If the rate of interest is stipulated, the Court must allow that rate up to the date of the suit, however high it may be [Usury Laws Repeal Act 28 of 1855 s 2] But if the rate is penal, the Court may award interest at such rate as it deems reasonable [Indian Contract Act, 1872, s 74] Even if the rate is not penal, the Court may reduce it if the interest is excessive *and* the transaction was substantially unfair [Usurious Loans Act 10 of 1918, s 3].

2 If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except in the following cases —

(i) *Mercantile usage* —Where it is allowed by mercantile usage (b)

(a) *Crewdson* v *Ganesh* (1920) 32 Cal L J 250 253 60 I C 288

(b) *Doolubdas* v *Ramlall* (1850) 5 M I A 109, 136 (Bombay) *Juggomohun* v *Manickchund* (1859) 7 M I A 263 (Calcutta) *Juggomohun* v *Kasreechund* (1862) 9 M I A 290 (Calcutta

(ii) *Statutory right to interest* —Interest is payable where a right to it, or an authority for its allowance or payment, is conferred by statute It has thus been provided by the Negotiable Instruments Act 26 of 1881, sec 80, that when no rate of interest is specified in a promissory note or bill of exchange, the Court may award interest at the rate of 6 per cent per annum from the date on which the amount claimed became due and payable. Similarly it has been provided by the Interest Act 32 of 1839, that where there is no stipulation to pay interest, but the amount claimed is a sum certain (as distinguished from unascertained damages), *and is payable at a certain time* by virtue of some "written instrument," the Court will allow interest at a rate not exceeding the current rate of interest *from the date on which the amount became payable* If no time is fixed for the payment of the amount, the Court may award interest at the rate aforesaid *from the time the creditor demands payment in writing intimating* to the debtor that interest will be claimed from the date of such demand up to the date of payment The provisions of the Interest Act 32 of 1839 are in the main a reproduction of the provisions of Lord Tenterden's Act [3 and 4 Wm. 4, c 42, s 48] It has been held by the House of Lords in *London, Chatham and Dover Railway Co* v *South Eastern Railway Co* (c), the modern leading case on interest, that the "sum certain" within the meaning of that Act must be a certain sum which is one absolutely and in all events due from one party to the other, and not a mere provisional payment to be made by one party to the other

(iii) *Implied agreement* —Where an agreement to pay interest can be implied from the course of dealing between the parties (d)

It has been held by the House of Lords in *London, Chatham and Dover Railway Company's case*, cited above, that interest could not be given by way of damages for detention of a debt.

II. Interest from date of suit to date of decree.—The rate of interest from the date of the suit to the date of the decree is in the discretion of the Court (e), and this discretion is not excluded even if a fixed rate is mentioned in the contract as payable ' up to *realization* " (f) But though the rate of interest for the aforesaid period is discretionary, the Court should, in the exercise of that discretion, award interest at the *contract rate*, unless it would be inequitable to do so (g) The Court may under this head award interest in a suit for money although interest is not specifically asked for in the plaint (h) [see O 7, r 7] It has also been held that the Court may under this head award interest even on damages, but as such an order is out of the ordinary, the Court should state its reasons for the order (i) It is settled law that no interest can be allowed on damages for any period *prior* to the suit (j) It is submitted that no interest can be awarded on damages even from the date of the suit to the date of the decree The section does not enable a Court to award interest where no interest is allowed either by the common law or the statute law (k)

III. Interest from date of decree to date of payment.—The rate of interest from the date of the decree, to the date of payment is also in the discretion of the Court "The plaintiff getting *security* of a decree, has his interest reduced in the generality of cases" (l) If the Court awards interest from the date of the

(c) [1893] A C 429 See Halsbury, Vol 21 pp 37 39

(g) *Orde* v. *Skinner* (1880) 3 All 91, 103, 107, 7 I A 196

(h) *Pup Ram* v *Harphul* (1921) 2 Lah 256, 64 I C 846

(i) *Pannalal* v *Mulhram* (1924) 39 Cal L J [illegible]

[illegible] cited Chunder's case, *supra*.

S. 34. decree, but no *rate* is specified, the decree holder will be entitled to interest at the Court rate, which is usually 6 per cent (*m*) But if no such interest is awarded by the decree it will be deemed to have been refused (*n*) [see sub sec (2)]

Illustration of the above rules.—*A* lends Rs 5,000 to *B* to be repaid with interest at the rate of 18 per cent per annum In a suit by *A* to recover the amount of the loan with interest at the rate aforesaid, it is contended on behalf of *B* that the rate of interest is penal (Contract Act, s 74) The Court finds that the rate of interest is not penal nor is the transaction substantially unfair Hence—

(1) as regards interest [on Rs 5,000] from the date of the loan to the date of the suit, the Court *must* allow it at the contract rate, that is, at the rate of 18 per cent per annum Usury Laws Repeal Act s 2

(2) as regards interest [on Rs 5 000] from the date of the suit to the date of the decree, the Court *may* allow it at the contract rate, that is, at the rate of 18 per cent per annum, or it may in its discretion allow it at a lower rate or may disallow it altogether

(3) as regards interest from the date of the decree to the date of payment on the aggregate sum adjudged [*i e*, Rs 5 000 *plus* the interest adjudged under the above two heads], the Court may allow interest at such rate as it deems reasonable This rate is usually 6 per cent As to interest on costs, see s 35, cl (3)

Interest in suits for enforcement of mortgage.—The section does not apply to decrees for the enforcement of a mortgage or charge A decree for foreclosure of a mortgage or for the sale of mortgaged property passed under sections 86 and 88, respectively, of the Transfer of Property Act now O 34 rr 2 and 4 is a decree for the enforcement of a mortgage Where such a decree is passed the Court is *to* [illegible] to award to the mortgagee—

(1) interest on the principal *prior to the date of the suit* at the *rate provided by the mortgage* [Usury Laws Repeal Act s 2], unless the rate is penal, in which case the Court may award such interest as it deems proper ( ) [Contract Act, s. 74] or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it [Usurious Loans Act, 1918, s 3], and

(2) interest on the principal from the *date of the suit* up to the date *fixed by the Court for payment of the mortgage debt*, also at the *rate provided by the mortgage* [Transfer of Property Act, ss 86, 88, now O 34, rr 2 and 4] unless the rate is penal, in which case the Court may award interest at such rate as it deems proper (*p*), or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it (*q*),

further, where the decree is for the *sale* of the mortgaged property, the Court *may* in its discretion award—

(3) interest on the *aggregate amount* of principal, interest and costs, from the *date fixed for the payment of the mortgage-debt* up to the *date of realization or*

(*m*) *Prem Lal* v. *Pelari* (1871) 7 B L R App 30

[illegible]

(*p*) *Ramesar* v. *Mehdi Hossein* (1899) 26 Cal 39, 25 I A 179 as explained in *Sundar Koer* v. *Sham Kishen* (1907) 34 Cal 150, 34 I A 9,

actual payment, at such rate as the Court deems proper It may be allowed at the Court rate, that is 6 per cent per annum (r) or at any other rate (s) The Court is not bound to award it at the contract rate (t) The Court rate it is conceived, is the proper rate

As to item (3) above, it was contended on behalf of the mortgagor before their Lordships of the Privy Council in *Maharaja of Bharatpur* v. *Kanno Dei* (u) that, according to the true construction of s 88 of the Transfer of Property Act, the Court had no *power* to award interest subsequent to the date fixed for payment of the mortgage debt, but this contention was over ruled, and it was held that that section did not preclude the payment of such interest, and this view was reiterated by their Lordships in *Sundar Koer* v *Rai Sham Kishen* (v) and *Raja Gokuldas* v *Sheth Ghasiram* (w) O 34, r 4 which is in the main a reproduction of s 88 of the Transfer of Property Act, now contains an express provision for the payment of such subsequent interest

As to the *rate* at which such interest may be allowed it was contended on behalf of the mortgagee in *Sunder Koer* v *Rai Sham Kishen* (x) that the Court was *bound* to award the same at the rate provided by the mortgage and not at the Court rate as was done by the Court below, but this contention was over ruled, their Lordships holding that the rate was entirely in the discretion of the Court

Rule of damdupat—This is a rule of Hindu Law according to which interest exceeding the amount of the principal sum cannot be recovered at any one time This rule is in force in the Bombay Presidency (y) and in the Presidency Town of Calcutta (z), but it is not recognized outside that town (a) or in the Madras Presidency (b) The meaning of the rule is that if a Hindu lends Rs 500 to another Hindu, and the loan is not repaid till the interest amounts to Rs 600, the lender cannot sue the borrower for more than Rs 500 for principal and Rs 500 for interest But the Court may, *under this section*, award further interest to the lender from the *date of the suit*, though the aggregate interest may hereby exceed Rs 500 The reason is that the rule of *damdupat* ceases to operate from the date of the suit (c) But this is entirely in the discretion of the Court (d) It has been held by the High Court of Madras that the rule of *damdupat* does not apply where interest is claimed under a mortgage governed by the Transfer of Property Act 1882 (e) A different view has been taken by the High Court of Bombay (f) and Calcutta (g) The rule of *damdupat* does not apply where the mortgagee has been placed in possession and is *accountable* for the rents and profits received by him as against the interest due (h) See Mulla s Hindu Law Chapter 28

(r) *Sundar Koer* v *Rai Sham Kishen* (190) 34 Cal 150 34 I A 9 *Subbaraya* v *Ponnusami* (1898) 21 Mad 364, *Sam athan* v *Swamiappa* [illegible]

[illegible] Cal 150 34 I A 9

(u) (1901) 23 All 181 28 I A 35

(v) (1907) 34 Cal 150 34 I A 9

(w) (1908) 35 Cal 271 35 I A 28

(x) (1907) 34 Cal 150 34 I A 9

(y) *Ali Saheb* v *Shabji* (1897) 21 Bom 85

(z) *Nobin Chunder* v *Romesh Chunder* (1887) 14 Cal 781

(a) *Het Narain* v *Ramdeni* (1883) 12 C L R 590

[illegible] redempt on

(e) *Madhava* v *Venkata* (1903) 26 Mad 662 The judgment proceeded upon the assumption that the rule of *damdupat* was in force in the town of Madras

(f) *Jeewanbai* v *Manordas* (1911) 35 Bom 199 8 I C 849

(g) *Kunja Lal* v *Narsamba* (1915) 42 Cal 826 31 I C 6

(h) *Sundarabai* v *Jayavant* (1900) 24 Bom 114

34. decree, *but no rate* is specified, the decree holder will be entitled to interest at the Court rate, which is usually 6 per cent (*m*) But if no such interest is awarded by the decree it will be deemed to have been refused (*n*) [see sub sec (2)]

Illustration of the above rules.—*A* lends Rs 5,000 to *B* to be repaid with interest at the rate of 18 per cent per annum In a suit by *A* to recover the amount of the loan with interest at the rate of aforesaid, it is contended on behalf of *B* that the rate of interest is penal (Contract Act, s 74) The Court finds that the rate of interest is not penal nor is the transaction substantially unfair Hence—

(1) as regards interest [on Rs 5,000] *from the date of the loan to the date of the suit*, the Court *must* allow it at the contract rate, that is, at the rate of 18 per cent per annum Usury Laws Repeal Act s 2

(2) as regards interest [on Rs 5,000] *from the date of the suit to the date of the decree*, the Court *may* allow it at the contract rate that is, at the rate of 18 per cent per annum, or it may in its discretion allow it at a lower rate or may disallow it altogether

(3) as regards interest from the date of the decree to the date of payment on the aggregate sum adjudged [*i e* Rs 5 000 *plus* the interest adjudged under the above two heads] the Court may allow interest at such rate as it deems reasonable This rate is usually 6 per cent As to interest on costs, see s 35, cl (3)

Interest in suits for enforcement of mortgage—The section does not apply to decrees for the enforcement of a mortgage or charge A decree for foreclosure of a mortgage or for the sale of mortgaged property passed under sections 86 and 88, respectively, of the Transfer of Property Act now O 34 rr 2 and 4 is a decree for the enforcement of a mortgage Where such a decree is passed, the Court is to [illegible] to award to the mortgagee—

(1) interest on the principal *prior to the date of the suit* at the *rate provided by the mortgage* [Usury Laws Repeal Act s 2], unless the rate is penal, in which case the Court may award such interest as it deems proper ( ) (Contract Act, s. 74) or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it [Usurious Loans Act, 1918, s 3], and

(2) interest on the principal from the *date of the suit* up to the date *fixed by the Court for payment of the mortgage debt*, also at the *rate provided by the mortgage* [Transfer of Property Act, ss 86, 88, now O 34, rr 2 and 4] unless the rate is penal, in which case the Court may award interest at such rate as it deems proper (*p*), or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it (*q*),

further, where the decree is for the *sale* of the mortgaged property, the Court *may* in its discretion award—

(3) interest on the *aggregate amount* of principal, interest and costs, from the *date fixed for the payment of the mortgage debt* up to the *date of realization or*

(*m*) *Pani Lalun* v *Behari* (1871) 7 B L R App 30 [illegible]

to [illegible] per cent]

(*p*) *Jameswar* v *Mehdi Hossein* (1899) 26 Cal 39 26 I A 1,9 as explained in *Sundar Koer* v *Rai Sham Kishen* (1907) 34 Cal 150 34 I A 9 [illegible]

S. 35.

medley, nor by caprice nor in temper (n) In the exercise of this discretion the Court is not confined to the consideration *of the conduct of the parties in the actual litigation* itself, but may also take into consideration matters which led up to and were the occasion of that litigation (o) The discretion conferred upon the Court by this section is very wide (p), in fact, wider, as stated in one case (q), than that under the English law (r) Thus the Court may order the costs to be paid by the parties in definite proportions, or it may order one party to pay to the other a fixed sum in lieu of taxed costs (s) Similarly it may disallow costs to a successful plaintiff, as where the rate of interest claimed by the

and must be exer ised on fixed principles Where there are no materials before the Court on which it can exercise its discretion, it is not justified in depriving a successful party of his costs (w) The following are the leading rules on the subject —

1 *Costs shall fol ow the event* —The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders This means that the *successful party is entitled to costs unless he is guilty of misconduct or there is* some other good cause for not awarding costs to him (x) The Court may not only consider the conduct of the party in the *actual* litigation, but the matters which *le l up* to the litigation (y) A refusal to go to arbitration is no ground for refusing costs (z), nor is the fact that the plaintiff brought his action without previous communication with the defendant (a) An offer of compromise which the Court considers insufficient is no bar to a plaintiff s right to costs (b)

It is provided by O 45 r 1, of the English Rules that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action cause, matter, or issue is tried, or the Court shall for good cause, otherwise order ' It has been held by the House of Lords that the expression the costs shall follow the event means that the party who on the whole succeeds in the action gets the general costs of the action, but where the action involves *separate issues* whether arising under different cau es of action or under one cause of action, the word ' event should be read distributively and the costs of any particular issue to go to the party who succeeds upon it An issue, in this sense need not go to the whole cause of action but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part *A* sued *B* for 164*l* for the price of 34 bags of goat s hair sold to *B* *B*, by his defence, pleaded (1) that the goods were not according to sample and were consequently worth 24*l* less (2) that there was an overcharge on the bags for 2*l* and (3) payment into Court of the balance *B* succeeded on the first issue but failed on the

(n) *Huxley* v *West London Ex Ry* (1886) 17 Q B D 373 376 *Justan Hull* v *Laull* (1919) 24 C W N 35? 35 58 I C 4 1

(t) Act 28 of 1855

(x) *Kuppuswami* v *Zamindar of Kalahasti* (1904) 27 Mad 341 *Cooper* v *Whittingham*

(y) *Bostock* v *Ramsey Urban District Council* [1900] 1 Q B 357 360 affirmed [1900] 2 Q B 616 *Sulaiman* v *Corp Matan* (1916) 43 Cal 190 31 I C 66?

(z) *Leckett* v *Miles* (1888) 5 Times Law Rep 68

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second The Court of first instance gave judgment for *A* for 2*l* with costs On appeal it was held by the House of Lords, reversing the decision of the Court of Appeal, that the issue as to quality (1st issue) was an "event" within the meaning of the expression 'the cost shall follow the event,' and that *B* was entitled to the costs of that issue (*c*)

2 Where a party successfully enforces a legal right, and in no way misconducts himself, he is entitled to costs as of right (*d*)

3 The fact that a successful defendant has set up the Gaming Act as an answer to the plaintiff's claim is not good cause for depriving him of his costs (*e*) Nor is the fact that he has pleaded the Statute of Limitations (*f*)

4 *If a plaintiff substantially succeeds, he is entitled to his costs, though he* may not have got the precise form of relief he wanted (*g*)

5 If a plaintiff recovers a less (but not a trifling less) amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed (*h*)

6 Where a plaintiff succeeds on part of his claim but fails on the most important and expensive heads of controversy, he may be made to pay the whole costs of the suit to the defendant (*i*)

7 Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs (*j*)

8 A successful party ought not to be deprived of part of his costs because some of his witnesses were guilty of exaggeration (*k*)

9 A person wrongfully made a party should get his costs (*l*)

10 Where both the parties advance pleas far in excess of their legal rights, each party will be made to bear his own costs (*m*)

11 Separate costs should not be allowed to defendants if the defence is common to all, or their interests are the same (*n*)

12 Where two defendants join in defending an action, and judgment is entered for one and against the other, the successful defendant is *prima facie* entitled to receive from the plaintiff half the costs incurred in the joint defence (*o*)

13 Where two plaintiffs join in one action, claiming for separate and distinct causes of action and judgment is entered in favour of one plaintiff and against the other, the successful plaintiff is entitled to recover from the defendant the whole of his general costs of the action, and the defendant is entitled to recover from the unsuccessful plaintiff the costs occasioned by his joinder as plaintiff (*p*)

14 Where the decree of the lower Court is confirmed by the appellate Court, the mere fact that the grounds upon which the confirmation proceeds are not the same as the *ratio decidendi* of the Court below, is no ground for departing from the rule that the costs shall follow the event (*q*)

(C A)
(*f*) *Lims* v *Hedges* (1906) W N 114
(*g*) *Ghanasham* v *Moroba* (1894) 18 Bom 474
(*h*) *Mudhun Mohun* v *Gokul Doss* (1866) 10 M I A 563, *Velu* v *Ghose* (1934) 17 Mad 293 296
(*i*) *Forster* v *Farquhar* [1893] 1 Q B 564

... *Kalik...mar* (1891) ... 2
... *achmeshwar* v *Manowar* (1892) ... 43
... *Doe Angos* (1872) 17 W R 188
... *Kossella* v *Beharee* (1863) ... 12 W R 70 (separate interests)
(*o*) *Beaumont* v *Senior* [1903] 1 K B 282
(*p*) *Viscount Gort* v *Rowney* (1886) 17 Q B D 625
(*q*) *Peck* v *Gurney* (1873) L R 6 H L 377, 413-414

15. Where a third party with no sufficient reason appears and defends an action separately, he must bear the costs of so doing, even though the plaintiff be unsuccessful in the action (r)

16 *Costs in an administration suit*—See Williams on Executors, 11th ed, Vol II, p 1649 *et seq*, Ingpen on Executors, 2nd ed, p 352 *et seq*

17 *Costs in a partnership suit*—See Lindley on Partnership, 9th ed, pp 627 629

18 *Costs of mortgagee*—See Fisher s Law of Mortgage, 6th ed, paras 1894 1897

19 *Costs of trustee*—See Lewin s Law of Trusts, 12th ed, p 1265 *et seq*

20 *Costs of proceedings in Probate Court*—See Ingpen on Executors, 2nd ed, p 97-99

Discretion not to be delegated—The discretion given to the Court under this section cannot be delegated to the taxing officer (s)

Costs against person not a party to the suit—An order for costs cannot be made against persons who are not parties to the suit (t) As regards an action for costs against a third person on the ground that he was the mover of and had an interest in the suit, it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause (u)

Costs where relief is claimed against the defendants in the alternative—See notes under the same head to O 1, r. 3

No separate suit for costs—If costs are not awarded to a party, he cannot bring a separate suit for costs But if costs are awarded, a separate suit does not lie to realise the costs The procedure in such case is, if the costs are awarded by a *decree*, to realise them by execution of the *decree*, and if they are awarded by an *order*, to realise them by executing the order (v) [see s 36]

"Subject to such conditions and limitations as may be prescribed"—"Prescribed" means prescribed by rules contained in or made under this Act [see s 2, ls 16 and 18] As to rules dealing expressly with costs, see O 11, r 3 [costs of interrogatories], O 24, r 4 [costs on payment into Court], O 35, r 3 [costs in interpleader suits]

"The provisions of any law for the time being in force"—The rule contained in this section, which leaves costs to the discretion of the Court does not affect the provisions of special enactments giving costs in particular cases Thus it is provided by s 27 of the Land Acquisition Act 1894, that when the award of the Collector is not upheld by the Court, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the party whose property has been acquired was so extravagant, or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made, or that he should pay a part of the Collector s costs These provisions are not affected by the rule contained in the present section See the Land Acquisition Act, s 53, and the undermentioned case (w)

Whether an appeal lies for costs only—The decisions of a Court of law may be divided into three classes, namely,—

I Decrees. [Every decree is appealable (s 96)].

II Appealable orders (s. 104)

III Non appealable orders (s. 105)

[illegible]

. 35. I *It is settled that an appeal will lie for costs only when the costs are awarded by a "decree," if the order as to costs involves a question of principle, but it is not settled whether such an appeal will lie, if no question of principle is involved* —A decree contains—

1 a decision on the *rights* of parties—this we shall call item No 1—and

2 a direction as to *costs*—this we shall call item No 2

A party, while appealing from item No 1 or any part thereof, may appeal also from item No 2 He may at the hearing abandon the appeal from item No 1 and may proceed with the appeal from item No 2 (*x*) But can he appeal from item No 2 alone without appealing from item No 1 ? In other words, does an appeal lie on a matter of costs only ?

All the High Courts are agreed that such an appeal does lie—

(1) *where the order as to costs involves a matter of principle* (*y*), as where a *formal* party to a suit against whom no relief is claimed is made to pay the costs of the suit (*z*) or

(2) *where there has been no real exercise of discretion in making the order as to costs.* This may happen when a successful party is made to pay the costs of the losing party (*a*) If the discretion was exercised in fact, an appellate Court would not interfere merely because it would itself have exercised the discretion differently (*b*),

(3) *where the order as to costs proceeds upon a misapprehension of fact or law* (*c*)

For brevity's sake we shall describe all the three cases as cases where a question of "principle" is involved. We may therefore say that it is settled law that an appeal lies for costs only, where the order as to costs involves a question of principle But it is not settled whether an appeal lies for costs only, where no question of principle is involved It has been held by the High Court of Calcutta that no appeal lies on a question of costs unless there is a question of principle involved (*d*) On the other hand, it has been held by the Bombay High Court that an appeal will lie for costs only, whether the order as to costs involves a question of principle or not (*e*) The ground of the Bombay decisions is that every decree being appealable, *any part* of it is also appealable, though it be the part relating to costs, whether there is a matter of principle involved or not But even according to the Bombay decisions, though an appeal may lie for costs only, the appellate Court will not as a rule vary or set aside the order of the lower Court as to costs, unless there is a principle involved and the principle has been violated. From a practical point of view, it may be said that the distinction between the Calcutta and Bombay decisions is a distinction without a difference

Does a *second* appeal lie on a matter of costs only ? It has been held that it does, provided there is a question of law or principle involved (*f*), see s. 100, cl. (a)

II *Appeal from a direction as to costs contained in an "appealable order."*— The law as to appeal from a decision as to costs contained in an order

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53 I C 421

(as distinguished from a decree) is that if the order is itself appealable, an appeal will lie from that part of the order which relates to costs (g) But no second appeal lies on a matter of costs awarded by an appealable order, for no second appeal lies from *any order* see s 104, sub sec (2)

III *Appeal from a direction as to costs contained in a non appealable order* '—Since no appeal lies from a non appealable order, no appeal can lie from a direction as to costs contained in such order Thus if an order is made adjourning the hearing of a suit, and one of the parties is directed to pay the costs occasioned by the application for adjournment, he cannot appeal from the direction as to costs, for an order adjourning the hearing of a suit is not an appealable order, it not being included in s 104 below (h)

Letters Patent appeal—An order as to costs is not a " judgment " within the meaning of clause 15 of the Letters Patent, and is not appealable as such (i)

Costs against Secretary of State.—The Secretary of State is in an unsuccessful litigation liable to pay costs like any other unsuccessful party (j)

Suit for contribution towards costs—A defendant is not entitled as against a co defendant to contribution in respect of costs to which both are liable unless there be some equity existing between him and the co defendant (k)

Compensatory costs in respect of false or vexatious claims or defences

35-A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vaxatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act 1887, and

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(h) *Bulkissen* v *Luchmeeput* (188-) 8 Cal 91
(i) *Manali Saravana Mudaliar* v *Tajagopala Chetty* (1907) 17 Mad L J 569.
(j) *Secretary of State* v *Lown Karan* (1920) 6 Pat L J 3-1 3-7 56 I C 407
(k) *Mulla Singh* v *Jagannath* (1910) 32 All 685, 6 I C 631

S. 35-A.

not being a Court constituted under that Act, are less than t hundred and fifty rupees, the High Court may empower su Court to award as costs under this section any amount r exceeding two hundred and fifty rupees and not exceedi those limits by more then one hundred rupees

Provided, further, that the High Court may limit t amount which any Court or class of Courts is empowered award as costs under this section

(3) No person against whom an order has been ma under this section shall, by reason thereof, be exempted fro any criminal liability in respect of any claim or defence ma by him.

(4) The amount of any compensation awarded under th section in respect of a false or vexatious claim or defence sha be taken into account in any subsequent suit for damages c compensation in respect of such claim or defence

This section was added into the Code by Act 9 of 1922 The section does not come into operation until the Local Government has with the previous sanction of the Governor General in Council, by notification in the local Official Gazette directed that the A shall come into force in the Province on such date as may be specified in the notification

The section provides for payment of costs by way of compensation in cases of fal or vexatious claims and defences See notes to s 35, Costs as penalty on p 10 above

PART II.

Execution.

General.

36. [*New.*] The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders

S. 36.

What decrees may be executed.—(1) *The only decree capable of being executed is the decree of the Court of last instance* —When an appeal is preferred from a decree and a decree is passed in appeal, the question frequently arises as to which decree is the one capable of execution, the decree of the lower Court or the decree of the appellate Court The question arises in the following cases —

(a) Where a decree has to be amended [The decree to be amended must be the *decree capable of execution*]

(b) Where the question is whether the execution of a decree is barred by limitation [Time runs from date of *decree capable of execution*]

(c) Where the *lower* Court has by its decree fixed a time for the payment of money, as in a suit for redemption [Time runs from date of *decree capable of execution*]

(d) Where under O 20, r 12, mesne profits are awarded from the date of the suit until the expiration of three years *from the date of the decree* [Here 'decree' means *decree capable of execution*]

(e) Where notice is to be given under O 21, r 22, when execution is applied for more than one year after the *date of the decree* [Here 'decree means *decree capable of execution*]

In answering the question—*which decree is capable of execution*, it is important to bear in mind the provisions of O 41, rr 11 and 32 By O 41, r 11, it is provided that the appellate Court may *dismiss* an appeal (1) without serving notice of the appeal on the respondent in the circumstances there indicated, also (2) if the appellant does not appear when the appeal is called on for hearing But when the case goes on to a hearing, then the powers of the Court are defined in O 41, r 32, which provides that "the judgment may be for *confirming, varying* or *reversing* the decree from which the appeal is preferred" It may be that when the appeal is incompetent as being out of time or as coming within the provisions of s 102, the proper course is to *dismiss* it Apart from that the proper course is to *confirm, vary* or *reverse* the decree from which the appeal is preferred as provided by O 41, r 32 (*l*) Bearing these observations in mind, it may be stated that where an appeal is *dismissed simpliciter*, the decree capable of execution is the *decree appealed from* (*m*) But where the appellate Court acting under O 41, r 32

Ss. 36, 37.

confirms, varies or reverses the decree appealed from, the decree capable of execution is the *decree of the appellate Court* (n) Similarly where the decree of the Court of first instance is confirmed by the High Court on appeal, and the latter decree is confirmed by the Privy Council, the decree capable of execution is the decree of the Privy Council (o). The result is that even where the decree of the lower Court is confirmed on appeal, the period of limitation to execute the decree runs from the date of the decree of the appellate Court. Similarly when time is fixed by the lower Court for the payment of money, and the decree of the lower Court is confirmed on appeal the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree (p) There are, however, two cases in which the decree of the lower Court was confirmed on appeal, but the Court held that the time for payment commenced to run from the date of the decree of the lower Court (q) But these cases seem to be of doubtful authority

(ii) *The decree to be executed must be a subsisting decree* —A obtains a decree against *B* and *C* *B* subsequently sues *A* to set aside the decree on the ground of fraud and the decree is set aside as against him *A* cannot execute the decree as against *B*, for the decree does not subsist as against *B* But he may execute the decree as against *C*, for the decree is a subsisting decree as against *C* (r)

(iii) *The decree to be executed must be a decree of which execution is not barred by the law of limitation* —See Limitation Act, 1908, arts 182 and 183 and see notes to s 48 below

Execution of orders —The term order is defined in s 2 cl 14 as the formal expression of any decision of a civil Court which is not a decree An order under s 34 of the Guardians and Wards Act 8 of 1890 directing a guardian to pay a sum of money out of his ward s estate for the marriage expenses of a person dependent on his ward is not an 'order within the meaning of s 2 cl 14 and it cannot be enforced against the ward after he has attained majority and the guardian has been discharged (s) But an order made after the dismissal of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the Commissioners of partition, is an order within the meaning of s 2 cl 14 and it may be executed as a decree (t)

Merger of decree —As to merger of decree of the first Court in the decree of the appellate Court see *Gajraj v Swami Nath* (u) where all the cases are reviewed. See also notes to O 9, r 13 Hearing of application after disposal of appeal'

Definition of Court which passed a decree

37. [S 649, 2nd para.] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

... L. J 116 43 I C 855 (mesne profits under O 20 r 12 (1) (c) (iii))

(u) (1917) 39 All ... 5...

(*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Changes introduced in the section—This section differs from the corresponding section 649 of the Code of 1882 in that the expression "the Court of first instance" in clause (a) has been substituted for the expression "the Court which passed the decree against which the appeal was preferred" As to the effect of this alteration, see notes below

"Court which passed a decree."—Section 38 indicates the Courts by which decrees may be executed. A decree may be executed either by "the Court which passed it," or by the Court to which it is sent for execution It may also be executed by the Court to which it is transferred under s 24 above (*v*) The present section explains the meaning of the expression "Court which passed a decree"

The expression "Court which passed a decree" includes not only the Court which actually passed the decree, but the Courts mentioned in clauses (a) and (b) of the present section Reading sections 37 and 38 together, we obtain the following rules —

1. Where the decree to be executed is a decree of a Court of first instance, the proper Court to execute it is the Court of first instance

2. Where the decree to be executed is a decree passed by a Court of first appeal, the proper Court to execute it is also the Court of first instance [see cl (a) of the section]

3 Where the decree to be executed is a decree passed by the High Court in second appeal, then also the proper Court to execute it is the Court of first instance Thus where a suit is instituted in the Court of a Subordinate Judge, and an appeal from the decree is preferred to the District Court, and a second appeal is preferred to the High Court, the proper Court to execute the decree of the High Court is the Court of first instance, that is, the Court of the Subordinate Judge Under the Code of 1882, s 649, para 2, of which the present section is in the main a reproduction, the Court to execute the decree would be the District Court, the expression there used being the Court which passed the decree against which the appeal was preferred ' As a matter of practice, however, the Court of intermediate appeal never executed decrees passed by the High Court in second appeal. The substitution of the expression ' Court of first instance" in clause (a) of the present section for the expression ' Court which passed the decree against which the appeal was preferred," gives legislative recognition to the practice followed by the Courts when the present code was enacted

4 Where the Court of first instance has *ceased to exist*, the only Court that can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed A Court does not cease to exist merely by reason that its head-quarters are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered (*w*)

(*v*) See *Muhammad v Tilam Chand* (192.) 47 All 57, 58, 85 I C 746 (25) A I 276

(*w*) *Latchman v Maddan Mohun* 1881 C (al 513 517

37.

5 Where the Court of first instance has ceased to have jurisdiction to execute the decree —A decree is passed by Court *X* directing the sale of immoveable property within its jurisdiction *After* the decree and before the application in execution for sale, the property directed to be sold is transferred by the Local Government s notification from the jurisdiction of Court X to the jurisdiction of Court *Y* Has Court *X* jurisdiction to entertain the application in execution and to order the sale of the property ? According to the Calcutta decisions, both Court X and Court Y have jurisdiction to entertain the *application* in execution for the sale of the property, but if the application is made to Court *X*, it should not itself order *the sale of the property, but transfer the application to Court Y* for making and executing the order for sale (*x*) According to an earlier decision of the Madras High Court, Court *X has* jurisdiction to entertain the application in execution, but the question whether it could itself order the sale of the property was not decided (*y*) In a later Madras case, the opinion was expressed that Court *X* had no jurisdiction to entertain the application for execution (*z*), but this view was overruled by a Full Bench of the same High Court, the Full Bench taking the same view as the Calcutta High Court (*a*) But a court to which a decree is transferred for execution has no jurisdiction to order either the attachment or sale of immoveable property in execution, if at the time of the order such Court had no territorial jurisdiction over the property (*b*)

Cl (b): "Ceased to have jurisdiction to execute."—A Court does not cease to have jurisdiction to execute its decree, merely because its business is transferred by the District Judge under the Act constituting it to another Court (*c*) Where an order was made by the High Court of Calcutta rejecting a petition for leave to appeal to the Privy Council, and directing the petitioner to pay the respondent s costs, but the order was silent as to the Court by which it was to be executed, it was held that the circumstance that the High Court on its appellate side does not in practice execute its own decrees and orders, did not make that Court, as regards the execution of the order, a Court that had ceased to have jurisdiction to execute its decree (*d*) [O 45, r 15] Nor does a Court which passed a decree cease to have jurisdiction to execute it, ' because after the passing of the decree a party [*e g*, Court of Wards] is added in execution who, had he been a party when the *suit* wherein the decree was passed was instituted, would have deprived the Court of its jurisdiction (*e*) In a recent Madras case (*f*), the Court said with reference to cl (b) of the section " In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another ' In applying this section the nature of the cause which put an end to the jurisdiction of a Court is immaterial (*g*)

What decrees may be executed —See note under the same head to s 36, on p 115 above

(*x*) *Latchman* v *Maddan Mohun* (1881) 6 Cal 513, *Premchand* v *Mokhoda* (1890) 17 Cal 699 (F B) *Jahar* v *Kamini Debi* (1901) 28 Cal 238, *Udit Narain* v *Mathura Prasad* (1908) 35 Cal 974 The case of *Kali Pado* v *Dino Nath* (1898) 25 Cal 315, which is sometimes cited in this connection is not a case of transfer of *jurisdiction*, there was in that case an order merely for the *distribution of business* between two Courts each of which had jurisdiction, see 28 Cal 238 240-241, and 35 Cal 974 977

(*y*) *Panduranga* v *Vythilinga* (1907) 30 Mad 537

(*z*) *Subbiah* v *Ramanathan* (1914) 37 Mad 462 471, 22 I C 899

(*a*) *Seeni Nadan* v *Muthusami* (1919) 42 Mad 821, 832-833, 835 842 53 I C 213, *Muthukaruppa* v *Paiya* (1923) 45 Mad L J 210 73 I C 956 (24) A M 32

(*b*) *Veerappa* v *Ramasami* (1920) 43 Mad 135, 53 I C 579

(*c*) *Kali Pado* v *Dino Nath* (1898) 25 Cal 315

(*d*) *Hurro Pershad* v *Bhupendro* (1881) 6 Cal 201

(*e*) *Bandoo* v *Narsingrao* (1914) 38 Bom 667, 25 I C 406

(*f*) *Venkatasami Naik* v *Sivanu Mudali* (1919) 42 Mad 461, 464 51 I C 102

(*g*) *Gaustha* v *Abdul* (1893) 17 Bom 162

Courts by which Decrees may be executed.

38 [**S 223, 1st para.**] A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. **S. 38.**

Court by which decree may be executed

Court which passed a decree —See notes to s 37 under the same heading

Jurisdiction of Court executing a decree —The following are the leading rules relating to the jurisdiction of Courts executing decrees —

RULE I —*No Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate "entirely" outside the local limits of its jurisdiction* —Territorial jurisdiction, in other words, is a condition precedent to a Court executing a decree (*h*)

Exception I —The Court which passed a decree for the enforcement of a mortgage of immoveable property" included therein has power in execution of its decree to order the sale of such property, though it may be situate "beyond" the local limits of its jurisdiction.— *A* sues *B* in a Court in district *X* on a mortgage of two properties, one situate in district X and the other in district *Y* A decree is passed for the sale of both the properties The Court in district *X* having jurisdiction to entertain the *suit* in respect of the property situate in district Y (s 17), has also jurisdiction to sell that property *in execution* of its decree, though the property is situate *beyond* its jurisdiction It is *not bound* to send the decree for execution as regards the property in district Y to the Court of that district under cl (c) of s 39, but it *may* do so (*i*) In the latter case the decree as respects the property in district Y may be executed by the Court of district Y (*j*) See also notes to s 17

Exception II —Where "after the passing of a decree" in a "suit for the enforcement of a mortgage" the whole of the immoveable property included therein falls, by transfer of jurisdiction, within the local limits of the jurisdiction of another Court, the application for execution of the decree, according to the Calcutta rulings may be made either to the Court which passed the decree (though the property is no longer within its jurisdiction), or to the Court within the local limits of whose jurisdiction the immoveable property falls by such transfer, but where the application is made to the former Court, it should not itself order the property to be sold, but should transfer it to the latter Court for passing and executing the order for sale (k) In a Madras case, the opinion was expressed that it is the latter Court alone that has jurisdiction to execute the decree, and that it is to that Court alone that the decree holder should apply for execution (l) But this view was overruled by a Full Bench of the same High Court, the Full Bench taking the same view as the Calcutta High Court (m) In the Full Bench case it was observed by Wallis, C J, that the fact that s 150 of the present Code confers upon the Court of the transferred area power to entertain the application in the first instance does not take away from the Court which passed the decree the power which it had according to the unbroken current of decisions for many years, namely, the power to entertain the application (n) See notes to s 37 above

Exception III —The salary of a public officer or of a servant of a Railway company or local authority may be attached by a Court though the disbursing officer may not be within the local limits of the Court's jurisdiction See O 21, r 48, and notes thereto

(*h*) *Prem Chand* v *Mokhoda Debi* (1890) 17 Cal 699 703

(*i*) *Maxwell* v *Steel* (1887) 14 Cal 661 *Kartick Nath* v *Tilukdhari* (1888) 15 Cal 667 *Gopi Mohun* v *Doybaki* (1892) 19 Cal 13 *Tincouri* v *Shib Chandra* (1894) 21 Cal 639

(*j*) *Aziz Bakhsh* v *Sultan Singh* (1915) P R no 43 p 152 46 I C 9 *Jagernath* v *D p Pani* (1895) 22 Cal 871

(*k*) *Latchman* v *Madan* (1881) 6 Cal 513 [illegible]

S. 38.

RULE II —*Where a decree has been passed for the payment of money and the decree holder applies for attachment and sale of immoveable property (belonging to the judgment debtor) which forms one estate of which a part is situated within the local limits of the jurisdiction of the Court executing the decree and part beyond such local limits, the Court executing the decree has the power to attach and sell the whole estate including the portion situated beyond the local limits of its jurisdiction* See O 21, r 3, and notes thereto

RULE III —*Whether a Court to which a decree has been sent for execution under s 39 has jurisdiction to execute the decree if the amount of the decree exceeds the limits of the pecuniary jurisdiction of the Court?* To put the question in a concrete form whether if a decree for Rs 7,000 is sent for execution to a Court whose pecuniary jurisdiction does not exceed Rs 5,000, the latter Court can execute the decree? Yes according to Madras decisions (*o*) No, according to Calcutta (*p*), Bombay (*q*), and Patna (*r*) decisions See notes to s 6, ' Pecuniary jurisdiction in passing decrees

RULE IV —*Where the decree sought to be executed is passed by a competent Court the Court will not be deemed to be incompetent to execute the decree merely because by reason of the amount of interest or mesne profits ascertained for a period ' subsequent to the institution*

application for execution, the total amount of the decree by reason of accumulation of interest exceeds Rs. 5,000 Has the Court jurisdiction to *execute* the decree regard being had to the fact that the amount sought to be recovered in execution exceeds the pecuniary limits of its jurisdiction? It has been held that it has (*s*) See notes to s 6 Pecuniary jurisdiction in passing decrees '

RULE V —*A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immoveable property in execution, if at the time of the order such Court had no territorial jurisdiction over the property* (*t*)

Powers of executing Court—Court executing a decree cannot go behind the decree —A Court executing a decree cannot go behind the decree It must take the decree as it stands (*u*) It has no power to entertain any objection as to the legality or correctness of the decree (*v*) *e g*, an objection that the decree sought to be executed was passed against a wrong person (*w*) or that it was passed against a lunatic or a minor not properly represented (*x*) The reason is that a decree though it may not be according to law, is binding and conclusive between the parties until it is set aside either in appeal or revision (*y*) For the same reason the Court executing a decree cannot alter, vary, or add to the terms of the decree (*z*), even by consent of parties, unless it is in adjustment of the

(*o*) *Narasayya* v *Venkata* (1884) 7 Mad 397

53 I C 579
(*u*) *Ramphal* v *Ram Baran* (1883) 5 All 53 *Muttia* v *Virammal* (1887) 10 Mad 293, *Sheik Budan* v *Ramchandra* (1887) 11 Bom 537

decree (*a*) But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the record is a *nullity*, and it cannot be executed against his estate (*b*) As to whether a decree passed by a Court *without jurisdiction* can be executed see notes to s 21, Questions arising under the section' As to the powers of a Court to which a decree is transferred for execution see notes to s. 42 and O 21, r 7

Construction of decree by executing Court —But though a Court executing a decree *cannot go behind the decree it is quite competent to construe the decree* where the terms of the decree are ambiguous, and to ascertain its precise meaning for, unless this is done the decree cannot be executed The construction of a decree must be governed by the pleadings and the judgment (*c*) And the Court should, if possible, put such a construction upon the decree as would make it in accordance with law (*d*) See notes, Orders in execution proceedings, on p 68 above

39 [S 223, 2nd and 3rd paras] (1) The Court which passed a decree *may, on the application of* the decree holder, send it for execution to another Court,—

Transfer of decree

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of *the jurisdiction of such other Court*, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(*c*) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction

Alterations in the section —The words of competent jurisdiction are new

) 6 All 269
Secretary of
186 Jagat
I A 165
Shrilal v
I 4 Takar
idha Kishen
2 0 226

Ss. 39, 40.

The Court which passed a decree.—See notes to s 37 under the same head on p 117 above

Jurisdiction of Court executing a decree.—See notes under the same head to s 38, on p 119 above

Transmission of decree for execution —A decree passed by one Court may be transmitted for execution to another Court either on the *application* of the decree holder on one of the grounds stated in this section, or by the Court which passed it *of its own motion* When a decree is sent by the Court which passed it for execution to another Court, the Court sending the decree shall send a copy of the decree and other documents mentioned in O 21, r 6, to the Court by which the decree is to be executed The latter Court shall, on receiving the copy of the decree and the other documents, cause the same to be filed (O 21, r 7) The decree holder may then apply to that Court for execution (O 21, r 10), unless he has already applied for execution to the Court by which the decree was passed (*dd*) The Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (s. 42)

Clause (d) —In a Bombay case, the Court expressed a doubt whether clause (d) of this section enabled a Subordinate Judge to transfer a decree for execution to a Small Cause Court, where the property attached was within the local jurisdiction of the Subordinate Judge (*e*) Note in this connection the words "of competent jurisdiction," in sub sec (2) These words are new

A decree may be executed simultaneously in more places than one — A Court passing a decree has the power to send its decree to more Courts than one for concurrent execution But this power should be sparingly exercised and when exercised, it would be in many cases proper to impose terms on the decree holder that he should not proceed to a sale under all the attachments at once (*f*)

Appeal —An appeal lies from an order rejecting an application for the transfer of a decree The reason is that questions relating to the transfer of decrees are questions relating to execution within the meaning of s 47 [Code of 1882, s 244] (*g*) See s 2, cl (2)

Madras Village Munsif's Court Act I of 1889 —This Act is a complete code of procedure by itself, and the provisions of the Code cannot be imported into it except to the extent provided by the Amending Act 2 of 1920 (*h*)

Award.—An award filed under s 11 of the Indian Arbitration Act 9 of 1899 is enforceable under s 15 of the Act "as if it were a decree of the Court" It may therefore be transferred for execution as a decree under this section to another Court (*i*) So also an award made under rules framed under s 43 of the Co operative Societies Act 2 of 1912 (*j*)

40 [*New.*] Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Transfer of decree to Court in another Province

(*dd*) *K B D v Taraprasanna* (1923) 2 Pat [illegible]

[illegible]

(*g*) *Bhabani Charan v Pratap Chandra* (1904) 8 C W N 575

(*h*) *Sankaran v Atchuthan* (1923) 46 Mad 731, 73 I C 799 (1923) A M 651

(*i*) *Sital v Clement Robson & Co* (1921) 43 All 394, 61 I C 401

(*j*) *Krishnaji v Mahadeo* (1922) 46 Bom 129, 64 I C 337, (1922) A B 377

"Executed in such manner as may be prescribed by rules in force in that province"—The manner of execution is that of the Court which executes the decree, but as to whether execution of the decree is barred by limitation or not it is the law governing the Court which passed the decree that applies (*l*)

41. [S. 223, 4th para.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure.

Result of execution proceedings to be certified

See notes to s 42 below

42. [S. 228] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court in executing transferred decree

Powers of Court in executing transferred decree.—A Court executing a transferred decree has no power to entertain any objection regarding—

(a) the legality or propriety of the order directing execution, or

(b) the right of the person shown in the order as the person entitled to execute the decree,

(c) the jurisdiction of the Court which passed the decree [O 21, r 7]

By reason of the rule contained in cl (a), the Court executing a transferred decree cannot refuse execution on the ground that the order directing execution was wrong or improper, and that it ought not to have been made under the particular circumstances of the case (*l*) Nor can it refuse execution on the ground that the execution of the decree was barred by limitation on the date on which the order for execution was made and that the order was therefore illegal (*m*) It is otherwise however, where the transferring Court has made *no order* for execution but has merely transferred the decree for execution, and sent a certificate of non satisfaction In the latter case, the Court to which the decree is transferred for execution has the power to decide whether execution is barred by limitation (*n*), or it may stay execution (O 21, r 26) so as to leave the objection to be decided by the Court which passed the decree (*o*) See notes to s 38, "Powers of executing Court, on p 120 above See also notes to s 11, "Orders in execution proceedings" on p 68 *ante* As to decrees of Courts of Native States, see notes to s 44 below

By reason of the rule contained in cl (b), the Court executing a transferred decree cannot entertain any question as to the validity of an assignment of the decree [O 21, r 16] if the assignee is shown in the order for execution as the person entitled to execute the decree (*p*)

(*k*) *Tincowri* v *Debendro Nath* (1890) 17 Cal 491 497

... 39 p 41 *Jeake* v *Daniel* (1869) 10 W R F B 10 *cf Jamu Ram* v *Dayal Singh* (1894) 16 All 390

(*o*) *Sethary* v *Murari* (1886) 13 Cal 257

(*p*) *Ram Chander* v *Mohendro Nath* (1874) 21 W R 141 *Mussamut Dhuneah* v *Oolfat* (1874) 21 W R 219

Ss. 46.

or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply

Court established or continued in Native States—For a list of such Courts see General Statutory Rules and Orders, Vol I pp 638-642, and Vol IV, p 683

Note that there is no provision for sending decrees of British Indian Courts for execution to *Courts in Native States established or continued by the authority of the Governor General in Council,* though s 44 provides for the issue of notifications declaring that the decrees of Courts of Native States *not so established or continued* may be executed in British India as if they had been passed by the Courts of British India Such a notification was issued with regard to the Travancore Courts and also the Cochin Courts in 1857 as part of a reciprocal arrangement by which those Courts were to execute the decrees of our Courts, and there are regulations made by Travancore and other States providing for execution of decrees of our Courts upon receipt from our Courts of a copy of the decree a certificate of non satisfaction, and a copy of any order for execution or a certificate that no such order has been made Such being the case there is no reason why our Courts should not act in aid of the Travancore Courts and furnish them *as matter of comity* with the documents they require to enable them to execute the decree of our Courts *under the powers conferred upon them by the legislative authority in Travancore* The policy of the Indian legislature has been to leave the decrees of our Courts to be executed in the Courts of Native States pursuant to the legislative authority of such States but not to provide as they have in s 45 as regards a limited number of such Courts for the transfer to them of the decrees of our Courts for execution so as to make them the executing Courts as regards such decrees for all purposes with authority to decide all questions arising in the course of execution (g)

"**By notification**"—For notifications issued under this section, see General Statutory Rules and Orders Vol I, pp 618 621

Precepts

46 [*New.*] (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment debtor and specified in the precept

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the

(g) *Pierre Leslie v. Perumal* (1917) 40 Mad 1069 1076-1079 42 I C 234

attachment has been made and the decree-holder has applied for an order for the sale of such property.

Attachment under precept.—The object of a precept is to enable a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. No such attachment, however, can continue for more than two months except in the two cases mentioned in the section.

The effect of the latter part of the section is to do away with a re-attachment of property attached under a precept where, before the determination of the interim attachment, the decree-holder *applies* for execution against the property.

Questions to be determined by Court executing decree.

47. [S. 244.] (1) All questions (*pp. 128-132*) arising between the parties to the suit (*p. 134*) in which the decree was passed, or their representatives (*pp. 135-143*), and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit (*pp. 128-132*, p. *144*).

Questions to be determined by the Court executing decree.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees (*p. 133*).

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court (*p. 142*).

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit (*p. 134*).

Changes introduced in the section.—This section corresponds with s. 244 of the Code of 1882 except in the following particulars:—

1. Sub-clauses (a) and (b) of s. 244, which provided for the determination of questions regarding the amount of mesne profits and interest in execution proceedings have been omitted, as it was deemed expedient that such questions should be determined by the decree and not in execution. See O. 20, r. 12.

2. The words "or to the stay of execution thereof" which occurred in s. 244 after the words, "execution, discharge or satisfaction of the decree" have been omitted in the present section. As to the effect of the omission, see notes, "stay of execution," on p. 133 below.

3. Sub-section (2) of the present section is new. It gives legislative recognition to the practice followed by the Courts under the Code of 1882. See notes below under the head "Sub-section (2)."

S. 47.

4 Under the old s 244 the Court executing the decree had the *option*, when a question arose as to who was the representative of a party, itself to determine the question or to stay execution until it was determined by a separate suit Sub section (3) of the present section renders it *obligatory* on the executing Court itself to determine the question, as it was considered inexpedient that separate suits should be instituted for the decision of such question

5 The *Explanation* sets at rest a conflict of judicial decisions noted below in the commentary under the head Parties to the suit Explanation to the section

Scope of the section—It is settled law in India that no action lies on an *executable judgment, the only remedy being execution* (h) This section provides *inter alia* that all questions relating to the execution discharge or satisfaction of a decree, and arising between the parties to the suit in which the decree was passed or their representatives shall be determined by the Court executing the decree and *not by a separate suit* This section has been enacted for the beneficial purpose of checking needless litigation (i) It provides a cheap and expeditious remedy by empowering the Court executing a decree to determine question that may arise in execution proceedings without requiring the parties to bring a separate suit in respect of every question that may arise between them in such proceedings Hence this section should not be construed narrowly (j) At the same time the conditions which bar a separate suit should not be lost sight of Those conditions are two in number the one relating to the character of the *questions* in respect of which separate suits are prohibited and the other to the character of the *parties* between whom the questions arise The *questions* in respect of which a separate suit is barred must be questions relating to the execution discharge or satisfaction of the decree The *parties* between whom the questions arise must be the parties to the suit in which the decree was passed, or their representatives If a question is of the character mentioned above and if it arises between the parties aforesaid, it cannot form the subject of a separate suit, it can only be determined by the Court executing the decree But if the question is not of that character, *or* if it does not arise between the parties aforesaid, it may be determined by a separate suit

Questions relating to execution, etc., Separate suit will not lie—When it is said with reference to this section that a separate suit will not lie, it is understood that the question relates to the execution, discharge or satisfaction of the decree, and, further, that it arises between the parties to the suit or their representatives We proceed to state the leading cases on the subject —

1 *Claim for excess of property taken in execution of decree*—If a decree holder *takes in execution land which is not at all covered by the decree, or land which is in excess* of the decree, the proper course for the judgment debtor is to proceed by an *application* under this section for the recovery of the land in the one case, and the excess in the other, and not by a separate suit (k) The reason is that the question relates to the *execution* of the decree, and further, it arises between the *parties to the suit*

2 *Restitution of property taken in execution of a decree when the decree is amended*—A obtains a preliminary decree against *B* in a suit for sale of certain property mortgaged to him On taking accounts it is found that a sum of Rs 7,000 is due by *B* to *A*

(h) *Ramanand* v *Jai Ram* (1921) 43 All 170 59 I C 632 *Ramaswami* v *Muthayya* (1924) 48 Mad 482 85 I C 991 (25) A M 279
(i) *Choudry Wahed* v *Mt Jumaee* (1873) 11 B L R 149 155
(j) *Prosunno Kumar* v *Kali Das* (1895) 19 Cal 683, 689, 19 I A 166
(k) *Dulyet* v *Rewal* (1874) 22 W R 435 *Jiru Mahata* v *Shyama Charn* (1895) 22 Cal 483 *Pratab Singh* v *Beni Ram* (1889) 2 All 61 *Abdul Karim* v *Islamun Nissa Bibi* (1916) 38 All 339 343 34 I C 231 *Ganpatrao* v *Anandrao* (1920) 44 Bom 97, 55 I C 967, *Sharfu* v *Mirkhan* (1919) 1 Lah L J 230

on the mortgage, and a decree is passed for *A* for that amount. After the decree has been fully executed, *B* discovered an error in calculation, and the decree is amended by substituting Rs 6,000 for Rs 7,000. *B* may claim a refund of Rs 1,000 by an application under this section, but not by a separate suit (*l*). Similarly if *A* discovers an error in calculation after the decree has been executed, and the decree is amended by substituting, say Rs 7,500 for Rs 7,000, *A* may claim the excess of Rs 500 by an application under this section, but not by a separate suit (*m*).

3. *Restitution of property sold in execution, when the sale is set aside.*—*A* obtains a decree against *B* for Rs 5,000. *B* fails to pay the amount of the decree and his property is thereupon sold in execution, and purchased by *A*, the decree-holder. The sale is set aside on *B*'s application on the ground that the property was purchased by *A* without the leave of the Court as required by O. 21, r. 72. *B* may claim restitution of the property by an application under this section but not by a separate suit (*n*). See s. 144, sub-s. (2), which applies where a *decree* is varied or reversed.

4. *Claim by legal representative of a deceased judgment-debtor for restitution of property taken in execution, on the ground that the judgment-debtor was dead at the date of the decree.*—If the *hearing* of a suit *is concluded* and judgment reserved, and the defendant then dies, the decree is binding upon his estate, though the *judgment* is delivered after his death (*o*). The reason is that in such a case nothing is left to be done by the parties from the moment the judgment is reserved and any delay that takes place is the delay of the Court (*p*) [see O. 22, r. 6]. But if the defendant dies *before the hearing is concluded*, and a decree is passed against him without his legal representative being brought on the record, the decree is a *nullity* and it cannot be executed against his legal representative (*q*). Suppose now that a defendant dies *before the hearing is concluded*, that a decree is passed against him without his legal representative being brought on the record, and that the decree-holder applies for execution of the decree against the legal representative under s. 50, but the latter does not object to execution on the ground that the decree is a nullity, and that the property of the deceased is sold in execution. Is the legal representative entitled to have the sale set aside and to recover back the property on the ground that the decree being a nullity the execution proceedings are void, or is he estopped from doing so on the ground that he ought to have objected to the execution proceedings before the sale of the property? It has been held that the decree being a nullity he is entitled to recover back the property and that he is not estopped from claiming back the property, for it was no duty of his to inform the decree-holder that the proceedings adopted by him were illegal (*r*). Taking it then that the property sold can be claimed back, the question to be considered is by what procedure is the property to be recovered, whether it is to be recovered by an *application* under this section or by a separate *suit*? According to an earlier decision of the Allahabad High Court, the legal representative is entitled to an order for restitution by an application under this section (*s*). According to a later decision of the same Court, he may bring a regular suit for the purpose (*t*). The earlier decision was not referred to in the later decision. According to a Full Bench ruling of the Patna High Court, the legal representative may challenge the decree in execution proceedings on the ground that it is a nullity (*tt*).

(*l*) *Harnam v. Muhammad* (1905) 27 All 485; *Dhan Kunwar v. Mahtab Singh* (1900) 22 All 79.

(*m*) *Nilratan v. Ram Lotan* (1901) 5 C W N 697.

(*n*) *Viraraghava v. Venkata* (1893) 16 Mad 287; *Daulat Singh v. Jugal Kishore* (1900) 22 All 108.

(*o*) *Ramacharya v. Anantacharya* (1897) 21 Bom 314; *Surrendro v. Doorga Soondery* (1892) 19 Cal 513, 538, 19 I A 108.

(*p*) *Chetan v. Balbhadra* (1899) 21 All 314.

(*q*) *Radha Prasad v. Lal Sahab* (1891) 13 All 53, 17 I A 150; *Janardhan v. Ramchandra* (1902) 26 Bom 317; *Sripat v. Tirbeni* (1918) 40 All 423, 45 I C 21.

(*r*) *Beni Prasad v. Mukhtesar* (1899) 21 All 316, 323.

(*s*) *Imdad Ali v. Jagan Lal* (1895) 17 All 478.

(*t*) *Beni Prasad v. Mukhtesar* (1899) 21 All 316.

(*tt*) *Jungli Lall v. Laddu Ram* (1919) 4 Pat L J 240, 50 I C 529.

Note—In some of the cases cited above, it was contended that the provisions of s 244 of the Code of 1882, corresponding with this section, did not apply to questions arising *subsequent* to the execution of a decree and since a claim for *restitution* could only arise *after* a decree has been completely executed, such claim should be made by a regular suit, and not by an application under this section But this contention was overruled and it was held that this section applies to questions arising between the parties *after* the decree has been executed as much as to questions arising between them previous to execution (u) All that is necessary is that the question must be one *relating* to execution

5 *Proceedings for recovery of possession of property sold in execution*—See notes ' Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand on p 138 below

6 *Dispute between decree holder and judgment debtor as to amount of property actually attached*—Where it is alleged by the judgment debtor that the decree holder in collusion with the Court peon had made away with the bulk of the property which had been attached and that only a small portion of the whole had been put up for sale the matter is one which should be enquired into by the Court executing the decree under this section (t)

7 *Second suit for redemption*—See notes to s 11 Finality of decree in redemption suits p 64 above

8 *Questions as to factum of adjustment of decree*—A obtains a decree against B for Rs 27,000 B applies to enter up satisfaction of the decree alleging that the decree was adjusted by a writing in the nature of a compromise signed by A (O 21 r 2) A alleges that the writing was obtained by fraud The question is one relating to the discharge of the decree' within the meaning of this section, and it should be decided on B's application and not by a separate suit (w)

9 *Substituted share*—Where a decree gives a right to possession of a share in an ijmali mahal which has prior to the date of the decree been partitioned under the Estates Partition Act (Beng Act 5 1897), the Court in proceedings for execution of the decree has power under this section to put the decree holder in possession of the specific land substituted for his share on partition (x).

10 *Accretion to mortgaged property*—The question whether certain property is an accretion to the mortgaged property is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee (y)

11 *Waste committed by judgment debtor after decree for possession*—The question whether the judgment debtor has committed waste, e g, cut down trees, after a decree against him for possession, is one to be dealt with under this section, and not by a separate suit ( )

12 *Decree for possession*—Where a decree is passed for possession in a suit for pre-emption conditional on the plaintiff paying a specified sum of money within a time fixed by the Court, and the money is paid, but possession is not delivered to the plaintiff, his only remedy is by an application under this section A suit for possession is barred under this section (a)

Separate suit will lie.—When it is said with reference to this section that a separate suit *will* lie, it is understood that either the question does not relate to the

"execution, discharge or satisfaction' of the decree, or that it does not arise between the parties to the suit or their representatives

I *Where the question does not relate to the execution, discharge or satisfaction of the decree*—In such a case a *separate suit* will lie, for the question not being one relating to the execution, discharge or satisfaction of the decree, it cannot be determined in *execution proceedings* by the *Court executing the decree* The following are the leading cases on the subject —

(1) *Questions as to the validity of a decree.*—If a judgment debtor or his legal representative objects to the execution of a decree on the ground that the decree is not valid, the question as to the *validity* of the decree, not being one relating to the 'execution, discharge or satisfaction' of the decree, cannot be tried in execution proceedings under this section Such a question can only be tried in a regular suit brought for the purpose (*b*) Thus if a judgment debtor objects to the execution of a decree on the ground that the decree was obtained by fraud, the question of the validity of the decree must be determined by a separate suit (*c*) The same rule applies where a reversioner objects to the attachment of his reversionary interest, on the ground that the decree obtained against the widow of the last male owner is *not binding* on him, there being no debt due by the last male owner (*d*) See notes to s 38, "Powers of executing Court, on p 120 above

(2) *Agreement not to execute decree*—*A* applies for execution of a decree obtained by him against *B* *B* objects to execution on the ground that *A* had agreed *prior to the decree* not to execute the decree against him. *A* denies the agreement It has been held by the Calcutta High Court that the question whether or not there was any such agreement between *A* and *B* is not a question relating to the execution, discharge or satisfaction of a *decree* within the meaning of this section, and that *B*s only remedy is to bring a regular *suit* against *A* to restrain him by an injunction from executing the decree The term 'decree,' according to that Court, means a decree which is susceptible and capable of execution, and not a decree which is alleged by the judgment debtor to be a mere paper decree not to be executed (*e*) On the other hand, it has been held by the High Courts of Bombay (*f*), Madras (*g*) and Allahabad (*h*), that the question as to the factum of such an agreement ought to be determined in execution under this section, and not by a separate suit Such an agreement is not obnoxious to O 21, r 2, as that rule relates to agreements *after* the passing of the decree (*i*)

(3) *Uncertified payment or adjustment*—*A* obtains a decree against *B* for Rs 2,000 It is *subsequently* agreed between *A* and *B* that *A* should accept Rs 1 000 in full satisfaction of the decree *B* accordingly pays *A* Rs 1,000 but the adjustment is not certified to the Court as required by O 21 r 2 *A* then applies for execution of the decree *B* objects to execution on the ground that the decree has already been satisfied. This objection cannot be entertained by the Court executing the decree, though it is a question relating to the satisfaction of the decree, for an uncertified adjustment cannot be recognized by a Court in execution proceedings (see O 21, r 2) Nor can *B institute*

(*b*) *Chintaman* v *Chintaman* (1898) 22 Bom 475 *Comatham* v *Komandur* (1904) 27 Mad

p 5. 15 I C .5

(*e*) *Hasan Ali* v *Gauss Ali* (1904) 31 Cal 179 *Benode* v *Brajendra* (19..) 29 Cal 810

(*f*) *Laldas* v *Kishordas* (1898) 22 Bom 463 [F B] See also *Ismail* v *Daudbhai* (1900) 2 Bom L R 118

(*g*) *Rukmani* v *Krishnamachary* (1911) 9 Mad L T 464 8 I C 1071 *Subramania* v *Kumaravelu* (1916) 39 Mad 541 33 I C 66 *Chidambaram* v *Krishna* (1917) 40 Mad 233 37 I C 836 [F B] *Velu* v *Krishnasami* (19..) 48 Mad L J 2.7 87 I C 29. (2) A M 591

(*h*) *Gauri Singh* v *Gajadhar Das* (1909) 6 All L J 403 2 I C 608

(*i*) *Chidambaram* v *Krishna* (1917) 40 Mad 233 37 I C 836

S. 47 *a regular suit* against *A* for a *declaration* that the decree has been satisfied and for an *injunction* restraining *A* from executing the decree Such a suit is barred under the present section, for the principal question in the suit will be whether the decree has been *satisfied*, and such a question being one relating to the "satisfaction" of the decree falls within the scope of this section For the same reason, if *B*'s property is sold in execution of the decree, he cannot bring a suit *to set aside the sale* on the ground that the decree has been adjusted and satisfied But if the decree is executed, *B* may sue *A* for *damages* for breach of the contract The question in such a suit is not a question relating to the "execution, satisfaction or discharge" of the decree, but whether *A* agreed to accept Rs 1,000 in full satisfaction of the judgment debt, and, if so what are the damages sustained by *B* by reason of the *breach of the agreement* These questions are not within the scope of the present section, and hence a suit involving these questions is not barred under this section The cases laying down the above propositions are cited in the notes to O 21, r 2, "Sub rule (3)" See also notes "No 8 Questions as to factum of adjustment of decree" on p 130 above

(4) *Declaratory decree* —A decree which *merely declares* the rights of parties and does not direct any act to be done is incapable of execution (j) Hence a separate suit will lie to enforce the rights declared by such a decree In fact the only mode of enforcing such rights is by a regular suit Thus if it be declared by a decree that the plaintiff is entitled to a monthly allowance the decree is merely declaratory Hence if the defendant fails to pay the allowance for any one month the plaintiff's remedy is by suit, and not in execution under this section (k) But if the decree besides declaring the plaintiff's right to a monthly allowance *directs* the defendant to pay the same from month to month to the plaintiff, the payment can only be enforced by proceedings in execution as often as default is made by the defendant, and a separate suit will not lie (l)

(5) *Claim for contribution by one judgment debtor against another* — A obtains a decree against *B* and *C* for Rs. 1,000 *A* executes the decree against *B alone* and *B* pays the whole amount *B* then sues *C* for contribution. The suit is not barred under this section, for the claim for *contribution* cannot be said to relate to the "execution, discharge or satisfaction" of the decree as between the plaintiff and defendant within the meaning of this section (m) In fact the remedy by suit is the only remedy

(6) *Mal administration of estate of deceased judgment debtor* —*A* obtains a decree against *B* for Rs 25 000 *B* dies leaving a will of which *C* is the executor. Failing in his endeavour to execute the decree, *A* sues *C* for the administration of *B*'s estate by the Court and for an account against *C on the footing of mal administration* The suit is not barred by this section, in fact, the remedy by way of suit is the only remedy, for the Court cannot in execution proceedings go into the question of whether or not an executor has been guilty of mal administration of the estate (n)

(7) *Previous redemption decree right to redeem reserved* —Where a mortgagor is in effect bringing a suit *to execute* a previous redemption decree, the suit is barred under this section (o) But if the right to redeem was reserved to him by the decree in the previous suit, a fresh suit will lie for redemption (p)

Whether an objection not taken under this section may be taken in a subsequent suit —It has been held by the High Court of Calcutta that an objection which ought to have been raised by a party to a suit in execution proceedings under this

(j) *Sri Krishna* v *Singara* (1882) 4 Mad 219
(k) *Nawab* [illegible] v *Vilayetee Khanum* (1898) [illegible] Agra 23 *Madharrao* v *Ramrao* (1898) 22 Bom [illegible]67
(l) *Ashutosh* v *Lukhimoni* (189[illegible]) 19 Cal 139 Distinguish *Matangini* v *Chooneymoney* (189[illegible]) 22 Cal 903
(m) *Ram Saran* v *Janki* (1896) 18 All 106
(n) *Saratmani* v *Lala* (1918) 3[illegible] Cal 1100
(o) *Hari* v *Shapurji* (1886) 10 Bom 461
(p) *Tani* v *Hari* (1887) 18 Bom 6[illegible]9 (F B) *Abdul* v *Yaman* (1921) 4[illegible] Bom 1335 63 I C 9[illegible]

section but which was not so raised, may be made a ground of defence in a subsequent suit between the same parties where the latter suit is not barred under this section (q)

II *Where the question though relating to the execution, discharge or satisfaction of the decree does not arise between the parties to the suit or their representatives* —In such a case, the question cannot be determined in execution proceedings under this section, and a suit will lie A question is said to arise between "the parties to a suit or their representatives, when it arises between the decree holder or his representative *on the one hand* and the judgment debtor or his representative *on the other* Questions between decree holders *inter se* (r) or between judgment debtors *inter se* (s), or between a party and his own representative (t), are not questions arising between 'the parties to the suit or their representatives' within the meaning of this section

Stay of execution —The words or to the stay of execution thereof which occurred in s 244 after the words execution discharge or satisfaction of the decree ' have been omitted in the present section There are two possible views as regards the omission of these words The one is that the words omitted may have been regarded as superfluous for a plea that the execution of a decree may be stayed is equivalent to the plea that the decree should not be executed, and it is thus a question relating to the execution of the decree (u) The other view is that the said words having been deliberately omitted by the Legislature in the present section, questions relating to the *stay* of execution are no longer within the section and no appeal lies from orders determining such questions (v) The latter view, it is submitted, is the correct view

Sub-section (2) —Court may treat suit as an application —This sub section is new It gives legislative recognition to the practice followed by the Courts under the repealed Code It enables the Court to treat an application under this section as a suit or a suit as an application Hence where a regular suit is instituted for the determination of a question which ought to be determined under this section by the Court executing the decree the Court in which the suit is brought may either dismiss the suit as barred under this section, or it may in its discretion regard the *plaint* in the suit as an *application* under this section and dispose of it accordingly, provided the Court in which the suit is brought has *jurisdiction* to execute the decree (w), and the execution of the decree was *not barred* at the date of the suit (x) Suppose now that a suit barred under this section is heard and disposed of as a *suit* is the decree liable to be set aside in appeal on the ground that the Court has no *jurisdiction* to entertain the suit? It has been held that it is not for the case is not one of *absence of jurisdiction* but of *error of procedure* [s 99] Hence if the decree be otherwise good in law, the appellate Court may treat the *plaint* in the suit as an *application* in execution and the *decree* in the suit as an *order* under this section and it may uphold the decree provided the Court *which passed the decree had jurisdiction to execute the original decree (y) But the suit* in such a case must have been brought within the period of limitation appropriate to *applications* under this section namely the period prescribed by art 181 of the Limitation Act, 1908 (z) It has been recently held by the High Court of Madras in a case

55 I C 2 8

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S. 47. decided under the Code of 1882 that even a written statement may in a proper case be treated as an application under this section (a) See s 6 and notes to s 38, "Jurisdiction of Court executing the decree," on p 119 above

Parties to the suit—Explanation to the section —Under the old section it was held by the High Courts of Allahabad (b), and Calcutta (c), that a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, cannot be considered as "parties to the suit within the meaning of that section On the other hand, it was held by the High Court of Madras that such plaintiff and such defendant must be regarded as parties to the suit (d) The Explanation to the section gives effect to the Madras decision

It has been held by the High Court of Madras that a defendant against whom a suit is dismissed *on the ground of misjoinder* is not a defendant against whom a suit has *been dismissed" within the meaning of the Explanation, and that he is not a party to* the suit (e) But where a party has been *properly impleaded* as a defendant in a case, and the case, as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case, and the suit was in consequence dismissed against such defendant, he is 'a defendant against whom a suit has been dismissed ' within the meaning of the Explanation and therefore a party to the suit (f)

Illustrations

(1) *A* sues *B* and *C* A decree is passed against *B*, but as against *C* the suit is dismissed In execution of the decree against *B* certain property is attached as belonging to *B* *C* contends that the property belongs to him and claims to have it released from attachment Here *C* is a party to the suit, though the suit has been dismissed against him He must therefore proceed by an application under this section and not by a separate suit A mere order for attachment will not entitle *C* to proceed under this section There must be an actual attachment (g)

(2) A and B institute a suit against C, praying that the relief claimed in the suit may be granted to *A* or in the alternative to *B* A decree is passed in the suit awarding the relief claimed to *A*, and dismissing *B*'s claim Here *B* is a "party to the suit, though his suit has been dismissed

(3) *A* mortgages his property to *B* He then sells his equity of redemption to *C* *C* sues *B* for redemption of the mortgage, and joins *D* who claims to be the owner of the property as a defendant to the suit At the hearing, the suit is dismissed as against *D* on the ground of misjoinder, that is, on the ground that he is not a proper party to the suit *D* is not "a defendant against whom a suit has been dismissed ' within the meaning of the Explanation, and he is not a party to the suit (h)

As to whether a decree holder ceases to be a party to the suit ' by becoming the purchaser of the property of the judgment debtor at a sale held in execution of his decree, see notes "Execution purchaser," on p 136 below

A minor (h2) or a lunatic (h3) not represented by a proper guardian ad litem, as where the guardian ad litem is a married woman, cannot be said to be a ' party to the suit within the meaning of this section

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(a) *Thathu v Kondu* (1909) 32 Mad 242 1 I C 221

(b) *Kalla v Basant* (1901) 23 All 346 *Sheo Pargash v Nawab Singh* (1910) 32 All 321 5 I C 498

(c) *Fahimuddin v Loll Meah* (1902) 29 Cal 606, *Ram Pershad v Jagannath* (1903) 30 Cal 134

(d) *Ramaswami v Kameswaramma* (1900) 23 Mad 361 [F B] See also *Gowri v Vigneshwar* (1893) 17 Bom 49

(e) *Krishnappa v Periaswamy* (1917) 40 Mad 964, 38 I C 297 The proper course in such a case is to order his name to be struck out under O 1 r 10 (2) *Sannamma v Radhabhayi* (1918) 41 Mad 418 424 425 43 I C 935

(f) *Sannamma v Radhabhayi* (1918) 41 Mad 418 43 I C 935 [F B]

(g) *Chunilal v Kashibhai* (1923) 25 Bom L R 440 73 I C 419 ('23) A B 381

(h) *Krishnappa v Periaswamy* (1917) 40 Mad 964, 38 I C 297 See also *Sham Lal v Amar* [illegible]

"Representatives"—The term "representative" in this section includes not merely "legal representative" in the sense of heirs, executors or administrators, but 'representative in interest," that is, any transferee of the decree holder's interest, or any transferee of the judgment debtor's interest, who, so far as such interest is concerned, is bound by the decree (i) We proceed to give illustrations —

(1) A transferee of a decree, or of the interest of any decree holder in a joint decree within the meaning of O 21, r 16, is a 'representative" of the decree holder (j) A transferee from such transferee is also a "representative" of the decree holder (k)

A judgment creditor who attaches a decree held by the judgment debtor against another is a "representative" of the judgment debtor *A* holds a decree against *B* *C* obtains a decree against *A*, and in execution attaches the decree held by *A* against *B* *C* is a "representative" of *A* in proceedings in execution of *A*'s decree against *B* (l) See O 21, r 53, sub r 3

(2) *A* obtains a decree against *B* for Rs 5,000 *B* then sells certain property belonging to him to *C* *C* is not a "representative" of *B*, for the decree is a simple money decree, and does not relate to the *specific* property sold to *C* (m)

(3) A purchaser, lessee, or mortgagee, from a judgment debtor, of property belonging to the judgment-debtor and *attached* in execution of a decree against him, is the 'representative" of the judgment debtor within the meaning of this section, for the property being *under attachment* at the date of the purchase, lease or mortgage, the purchaser, lessee or mortgagee is bound by the decree so far as the interest transferred to him is concerned (n) See section 64

(4) *Purchaser of judgment debtor's equity of redemption under a private sale*—*A* obtains a decree against *B* for sale of certain property mortgaged to him by *B* After the date of the decree, *B* sells his equity of redemption in the mortgaged property to *C* *C* is a "representative" of *B*, the judgment-debtor, for the property having been purchased after it was affected by *A*'s mortgage decree, *C* is to that extent bound by *A*'s decree Hence any question relating to the execution of *A*'s decree, and arising between *A* and *C*, must be determined by the Court executing *A*'s decree, and not by a separate suit (o) The same procedure would apply even if *B* had transferred his interest in the property to *C during the pendency of the suit* though *before* the passing of the decree (p)

(5) *Purchaser of judgment debtor's equity of redemption at a judicial sale.*—*A* obtains a decree against *B* for the sale of certain property mortgaged to him by *B* Before the property could be sold in execution of *A*'s decree, *X*, who holds a money decree against *B*, brings *B*'s equity of redemption in the mortgaged property to sale in execution of his decree, and the same is purchased by *C* *C* is a "representative" of *B*, the judgment-debtor, for the property having been purchased after it was affected by *A*'s mortgage decree, *C* is to that extent bound by *A*'s decree Hence any question relating to the execution of *A*'s decree, and arising between *A* and *C*, must be determined by the Court executing *A*'s decree and not by a separate suit (q)

(i) *Ishan Chunder* v *Beni Madhub* (1897) 24 Cal 62 *Gulzari Lal* v *Madho Ram* (1904) 26 All 447 *Tara Prasanna* v *Nilmoni* (1914) 41 Cal 418 25 I C 118

(j) *Dwar Buksh* v *Fatik* (1899) 26 Cal 250 *Jotre Narain* v *Jai Kishen* (1894) 16 All 483 *Sheo Prasad* v *Lall* (1925) 4 Pat 120 86 I C 564 (1925) A P 449

[illegible]

(m) *Madho Das* v *Rampal* (1894) 16 All 286, *Shivram* v *Jiru* (1889) 13 Bom 34 *Rashbehary* v *Surnomoyee* (1881) 7 Cal 403 *Mt Ramphul* v *Harbakhsh Singh* (1912) P R no 64 p 242 14 I C 40 [gift by judgment debtor of his entire property]

(n) *Giri Prasad* v *Ram Lal* (1899) 21 All 29 (sale) *Matheson* v *Gobardhan* (1901) 28 Cal [illegible]

[illegible]

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Note.—The only point of difference between this and ill (4) is that in ill (4) we have the case of a purchaser of the judgment debtor's interest in the mortgaged property under a *private sale* from the judgment debtor, while in the present illustration we have the case of a purchaser of the judgment debtor's interest in the mortgaged property at a sale held in execution of a money decree against the judgment debtor. It was at one time thought that a purchaser under a *private* sale from a judgment debtor was a "representative" of the judgment debtor, but that a purchaser at a *judicial* sale was not his "representative" within the meaning of this section (r). But this view is no longer tenable.

(6) *A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not a "representative" within the meaning of this section.*—A obtains a decree against B restraining B by an injunction from obstructing him in the exercise of his right of way to his land over B's land. A then sells his land to C. If B obstructs C in the enjoyment of the right of way, C's proper remedy is by way of *suit* against B and not in execution under this section. The reason is that an injunction does not run with the land, and C cannot therefore claim the benefit of the decree against B (s). Note that C is not a transferee of the decree, but of the property only. See notes to s. 50, "Decree for injunction."

(7) The *Official Assignee* claiming property on behalf of the *creditors* of an insolvent judgment debtor is not a "representative" of the judgment debtor within the meaning of this section (t).

(8) It has been held by the High Court of Allahabad that a *purchaser from a judgment debtor under O. 21, r. 83* [Code of 1882, s. 305] is a "representative" of the judgment debtor within the meaning of this section (u). A obtains a decree against B. In execution of the decree certain property belonging to B is attached and an order is made for the sale thereof. B then obtains a certificate from the Court under O. 21, r. 83 to sell the property by private sale, and the property is sold to C in pursuance of the certificate. C is a "representative" of B within the meaning of this section.

(9) A purchaser from the judgment debtor of an *occupancy holding not transferable by custom* is a "representative" of the judgment debtor. If the holding is sold in execution of the decree against the judgment debtor, and he is dispossessed by the auction purchaser, he may apply for possession under this section, and not under O. 21, r. 100 (v).

(10) A purchaser from a judgment debtor of a portion of a holding is, so far as his interest is concerned, bound by the decree for rent obtained against the judgment-debtor under s. 148A of the Bengal Tenancy Act 8 of 1885 and by the sale in execution of that decree. He is, therefore, a "representative" of the judgment debtor, and if he is dispossessed by the auction purchaser, he may apply for possession under this section, but not under O. 21, r. 100 (w).

(11) A security for the performance of a decree is not a "representative" of a party within the meaning of this section (x). See s. 145 below.

Execution-purchaser.—We now turn to cases where property belonging to a judgment debtor is sold in execution of the decree against him, and questions relating to [illegible] *subsequent to the sale*. There

[illegible] M. 688.
[illegible] an v. L[illegible] shan (1901) 23 All. 116.
[illegible] tan v. [illegible] Sahay (1918) 3 Pat. L. J. 579, 43 I. C. 963.
(w) Jhikhia v. L[illegible] Bihari (1917) 2 Pat. L. J. 478, 42 I. C. 526.
(x) Raghubar Singh v. Jai Indra Bahadur Singh (1919) 46 I. A. 228, 236, 42 All. 158, 168, 55 I. C. 550.

questions may be divided into two classes according to the character of the parties between whom they arise —

A Questions between the decree holder on the one hand and the judgment-debtor on the other, the execution purchaser being only interested in the result —

These questions being essentially questions *between parties to the suit* fall within the scope of this section The fact that the auction purchaser (who was not a party to the suit) is interested in the result does not prevent the questions being questions *between parties* These questions therefore must be determined by the Court executing the decree, and not by a separate suit It has been so held in *Prosunno Kumar* v *Kali Das* (y), which is the leading case on the subject In that case their Lordships of the Privy Council said ' It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 [now s 47] and that, when a question has arisen as to the *execution discharge or satisfaction* of a decree *between the parties to the suit* in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result, has never been held a bar to the application of the section

Illustrations

(a) *A* obtains a decree against *B* In execution of the decree certain property belonging to *B* is sold and purchased by *C* *B* seeks to set aside the sale *B* must proceed by an *application* and *not by a regular* suit The mere fact that *C*, the auction purchaser, who was no party to *A* s suit, is interested in the result of the application, is no bar to the application of this section Now *B* may seek to set aside the sale in execution proceedings—

(1) on the ground of *material irregularity* in publishing or conducting the sale, resulting in substantial injury [O 21, r 90] or

(2) on the ground of *fraud* in publishing or conducting the sale resulting in sub stantial injury [O. 21 r 90], or

(3) on making the deposit required by O 21 r 89 or

(4) on other grounds

(1) If the sale is sought to be set aside by *B* on the first ground the application *should be made under O 21 r 90*

(2) If the sale is sought to be set aside by *B* on the second ground and this is what was sought to be done in *Prosunno Kumar* v *Kali Das* (z) and the undermentioned cases (a), the application in cases governed by this Code should also be made under O 21 r 90 Under the Code of 1882, the application would be exclusively one under s 244 which corresponds to the present section.

(3) If the sale is sought to be set aside on the third ground, that is on making the deposit required by O 21, r 89, the application should be made under that rule

(4) If the sale is sought to be set aside by the judgment debtor on any other ground and the question as to the legality of the sale is virtually one between him and the

[illegible] ...ripathy [illegible] 30 41 [illegible] 101 [illegible]

Mathura Das v *Lachman* (190) 24 All 239 *Durga Kunwar* v *Balwant* (1901) 23 All 4 5 *Harihar Kanta* v *Rama Pantu* (1909) 33 Bom 624 4 I C 3 *Bhaichand* v *Ranchhoddas* (1921) 45 Bom 174 58 I C 231

S. 47. decree holder, and also one relating to the execution, discharge or satisfaction of the decree [see ills (b) and (c) below], the application should be made under this section (c)

There is this difference between an application under this section and one under O 21, rr 89 and 90, that while an order made on an application under this section operates as a decree [s 2, cl (2)] and is therefore open to a second appeal, an order made under O 21, r 92 on an application under O 21, r 89 and O 21, r 90, is appealable only as on order [O 49, r 1, cl (j)] and no second appeal lies from it [s 104 sub s (2)] The object of the Legislature in transferring applications to set aside a sale on the ground of *fraud* in publishing or conducting the sale from the present section to O 21 r 90, is to exclude a second appeal from orders made on such applications See notes to O 21, r 89, ' Appeal, and notes to O 21, r 90 Fraud in publishing or conducting sale

(b) *A obtains a decree against B, and applies for execution of the decree by attach* ment and sale of certain property belonging to *B* An order is made for sale and the *property is sold and purchased by C B sues A and C to set aside the sale on the ground* that the property was not liable to attachment and sale (see s 60) The suit is barred by the provisions of this section (*d*) The reason is that the question as to whether the property was saleable or not is really one between *A* and *B the parties to the suit* in which the decree was passed It is well settled that as between the judgment debtor and the decree holder this is an objection which can only be taken in execution, and it is also well settled that the provisions of s 244 [now s 47] prohibit a suit by a party or his representatives against an auction purchaser to raise a question which as between the judgment debtor and the decree holder must have been determined under that section (*e*) See notes to s 60 Objection to attachment on the ground that the *property is not saleable,* when to be raised

(c) *A* obtains a decree against *B* In execution of the decree certain property belonging to *B* is attached and proclaimed for sale The decree is subsequently adjusted, but the adjustment is not certified to the Court as required by O 21, r 2 [Code of 1882 s 258] The result is that the property is sold by the Court, and it is purchased by *C* *A and B sue C to set aside the sale,* alleging that they had effected an adjustment of the decree, and that the sale was therefore illegal and unnecessary The suit is barred under this section for the question whether the decree was adjusted as alleged is one between *A*, the decree holder, and *B*, the judgment debtor that is, *between the parties to the suit* though they are ranged on one side as plaintiffs (*f*)

B Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand —

Cases under this head frequently arise between the auction purchaser on the one hand and the judgment debtor on the other when the former seeks to *recover from the latter possession of the property purchased by him* The question that arises in such cases is as regards the *remedy* of the auction purchaser Must he proceed by way of application under s 47 or is he entitled to bring a separate *suit* for possession ? This depends on who is the purchaser, for the property may be purchased by the decree holder himself with the leave of the Court under O 21 r 72 or it may be purchased by a stranger We shall deal with these two cases separately

(c) *Gokuldas v Kisans ng* (1910) 34 Bom 546

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First, where the decree holder himself is the purchaser—Whether the decree holder purchaser must proceed by an *application* under s 47 coupled with O 21, r 95, depends on the questions—(1) whether for the purpose of recovering possession of the property he is to be regarded as a "party" to the suit within the meaning of s 47, or whether he has *ceased* to be a party to the suit by reason of his purchase, and (2) whether the question as to delivery of possession is a question relating to 'the execution, discharge or satisfaction of the decree' within the meaning of s 47 Upon these points there is a conflict of decisions According to the view taken by the High Court of Madras (g), and in some cases by the High Court of Calcutta (h), the decree holder *retains* his character of a "party" to the suit though he is also the purchaser, and the question as to delivery of possession is a question relating to 'the execution, discharge or satisfaction of the decree" within the meaning of s 47 The two conditions laid down by the section are therefore satisfied, and he must proceed by an *application* under s 47 coupled with O 21, r 95, and a separate suit for possession is barred under s 47 The High Court of Madras has also held that the same procedure must be followed by a purchaser from a decree holder purchaser, if he is resisted by the judgment debtor in obtaining possession, the reason given being in one case (i), that a purchaser from a decree holder who has purchased at a Court sale is a "representative" of the decree holder, and in another (j) that he is a "representative" of the judgment debtor, within the meaning of this section. In two of the cases cited above, however, the Madras Court observed that if this question had not already been settled by previous decisions of that Court, they would be disposed to hold that proceedings for obtaining possession could not be regarded as those "relating to the execution, discharge or satisfaction of the decree' within the meaning of this section (k) In a recent Full Bench case it seems to have been assumed that such proceedings related to the execution of the decree (l) According to the other view, which is the view taken by a Full Bench of each of the High Courts of Allahabad (m), Patna (n), and Bombay (o), and in a large majority of cases by the Calcutta High Court (p), and in recent cases by the High Court of Lahore (q), a decree holder purchaser stands on the same footing as a purchaser who is a stranger, so that he may proceed *either* by an application under *O 21, r 95*, or by a *separate suit for possession* This view proceeds on the ground that the question as to delivery of possession is not one relating to the execution, discharge or satisfaction of the decree within the meaning of s 47, and that even if it be so, a decree holder after he becomes purchaser of the property can no longer be said to be a party to the suit within the meaning of s 47, in other words, s. 47 does not apply to the case In a recent case a Divisional Bench of the Patna High Court took quite the opposite view on both points (qq) We are inclined to think that s 47 does not apply to the case, not because the decree holder purchaser is not a 'party to the suit within the meaning of s. 47—for we think he is such a party (r), but because the question as to delivery of possession cannot be said

(g) *Kasinatha* v *Uthumansa* (1902) 25 Mad 529 *Kattayat* v *Raman* (1903) 26 Mad 740 *Sandhu* v *Hussain* (1905) 28 Mad 87 *Veyindra Muthu* v *Maya Nadan* (1920) 43 Mad 107 116 54 I C 209 [F B]

[illegible]

(j) *Veyindra Muthu* v *Maya Nadan* (1920) 43 Mad 107, 128 54 I C 209

(k) 26 Mad 740 and 28 Mad 87 *supra*

[illegible]

(n) *Haji Abdul Gani* v *Raja Ram* (1916) 1 Pat L J 23, 35 I C 468 *Dhaniuder Das* v *Lakhshi* (1918) 3 Pat L J 5?1, 43 I C 129 *Sridhar* v *Jageshwar* (1919) 4 Pat L J 716, 52 I C 711

(o) *Hargovind* v *Bhudar* (1924) 48 Bom 550 83 I C 932 (24) A B 420 overruling *Sadashiv* [illegible] 997

[illegible] 843,

[illegible] 602

[illegible] 169 Cal

[illegible] L J

[illegible] Cal

47. to be a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of s 47. The following are the main points of distinction between the two views —

(1) According to the former view, that is, the view taken by the High Court of Madras and in some cases by the High Court of Calcutta, a decree holder purchaser, who seeks to recover possession from the judgment debtor of the property purchased by him at the auction sale, can proceed only by an application under s. 47 *coupled with O 21, r 95, such application must be* made within 3 years from the date on which the sale becomes absolute [Limitation Act, Sch. I, art 181] According to the latter view, that is the view taken by the High Courts of Allahabad, Patna, Bombay and Lahore, and in a large majority of cases by the High Court of Calcutta, he may proceed by an application under O 21, r 95 If he does not so apply or if his application is unsuccessful, he may fall back upon his title and sue for possession Such suit may be brought within 12 years from the date when the sale becomes absolute [Limitation Act, 1908, Sch I, art 138] so that even if the time for an *application* under O 21, r 95, has expired, he may prosecute his remedy by way of suit

(2) According to the former view the application for delivery of possession falls under s. 47, and the order made on the application amounts to a decree [s 2 (2)], and is appealable as such According to the latter view s 47 does not apply to the case, and the application is entirely one under O 21, r 95, and no appeal lies from an order made upon such application

If the decree holder purchaser is obstructed in obtaining possession by the judgment debtor *and a stranger to the suit*, the case does not come within s 47, and he may bring a suit for possession against them (s)

Secondly where the purchaser is a stranger —We next proceed to consider the case where the property is purchased in execution of the decree by a stranger to the suit, and he is obstructed by the judgment debtor in obtaining possession Must he proceed by an *application* under s 47, or is he entitled to file a regular *suit* for possession? Here the person aggrieved is the purchaser, he was not a "party" to the suit, and the question as to delivery of possession is between the *stranger purchaser* on the one hand and the judgment-debtor on the other Unless therefore it can be said that the stranger purchaser is the "representative" of the decree holder, and the question as to delivery of possession can be said to be one relating to the execution, discharge or satisfaction of the decree, the case cannot come within s 47 and, if it does not, a separate suit will lie The first question to be considered therefore is whether an auction purchaser who is a stranger can be said to be the "representative" of the decree holder It is clear that if he is not in law the "representative" of either party, the case is not one under s 47 Further, if he is the "representative" of the *judgment debtor*, the case is equally not one under s. 47, for the question will then be one between *the representative of the judgment-debtor* on the one hand and the *judgment-debtor* on the other There is a conflict of opinion whether an auction purchaser who is a stranger is the "representative" of either party to the suit within the meaning of s 47. This question is important not only in cases of the type now under consideration, namely, resistance to delivery of possession to the purchaser, but other cases which are dealt with later on in these notes We proceed to summarize the result of the decisions The High Court of Bombay has consistently held that an auction purchaser who is a stranger is not the representative of either party to the suit (t) The

(s) *Coba* v *Sakharam* (19-0) 44 Bom 9-- 59 I C 376

(t) *Maganlal* v *Loshi Mulji* (1901) 25 Bom 631 635 *Gokuldas* v *Kisanasingh* (1910) 34 Bom 546 7 I C 457 *Lal Mani* v *Panchod al* (19-3) 25 Bom L R 147, 72 I C 256, (-3) A I R 214

High Courts of Calcutta (*u*) and Allahabad (*t*) have held that he is not the representative of the "decree-holder," but that he is the representative of the "judgment-debtor." In Madras there is a hopeless conflict of opinion The conflict was sought to be set at rest by a reference to a Full Bench in *Veerandramuthu* v. *Maya Nadan* (*u*), but it cannot be said that the object was attained But the preponderance of authority in Madras seems to be in favour of the view that a purchaser at a Court-sale who is a stranger is the representative of the 'judgment debtor' for the purpose of inquiry into question relating to the execution, discharge or satisfaction of the decree, and not of the "decree holder" We give below in foot note (*x*) a list of cases in which it was held that he is not the representative of the "decree holder," and in foot note (*y*) cases in which the contrary was held In the cases cited in foot note (*z*) it was held that he is the representative of the 'judgment debtor,' while the contrary was held in the cases cited in foot note (*a*) The High Court of Lahore has expressed the view that he is not the representative of the "judgment debtor' (*b*) It is worth while noting in this connection the observations of their Lordships of the Privy Council in the undermentioned case (*c*)

All the High Courts (*d*) except the High Court of Madras, seem to be unanimous in holding that where an auction purchaser who is a stranger is resisted in obtaining possession by the judgment debtor of the property purchased by him in execution, he may apply for delivery of possession under O 21, r 95, or he may bring a regular suit for possession *The provisions of s 47 do not apply either because he is not the "representative" of the* decree holder or because the question as to delivery of possession is not one relating to "the execution, discharge or satisfaction of the decree" within the meaning of the section The period of limitation for an application under O 21, r 95, is 3 years from the date when the sale becomes absolute [Limitation Act, 1908, Sch I, a t 181], and that for a suit *is 12 years from the same date* [*ibid*, *art 138*] *He is entitled to bring the suit without* making any application under O 21, r 95, and he may sue even if the application, if made, is unsuccessful The High Court of Bombay has held that an auction purchaser, even though a benamidar for the decree holder, is a *stranger* for the purposes of this rule (*e*) In Madras the recent Full Bench decision in *Veerandramuthu* v *Maya Nadan* (*f*), has been *taken as an authority for the proposition that an auction purchaser, though he be a stranger,* must proceed by an application under s 47, and that he is not entitled to bring a regular suit for possession In the Order of Reference it was assumed that the question as to delivery of possession related to the execution discharge or satisfaction of the decree' within the meaning of s 47 Further, two out of the three learned judges who constituted the Full Bench [Oldfield, J, and Seshagiri Ayyar, J] held that a stranger purchaser at a Court sale was not the representative of the decree holder, but that he was the "representative" of the judgment debtor Abdul Rahim, C J, said that whether

(*u*) *Ishan Chunder* v *Beni Madhub* (1800) 24 Cal 62 [F B]

(*t*) *Gulzari Lal* v *Madho Ram* (1904) 26 All 447 [F B] *Ananti Kunwar* v *Ajudhia Nath* (1908) 30 All 379 383-384

[illegible]

(*v*) *Sinthu* v *Hussain* (1905) 28 Mad 87 *Manickka* v *Vijayagopala* (1907) 30 Mad 507 (1920) 43 Mad 107 124 54 I C 203 (*per* Abdur Rahim C J) *supra*

(*t*) *Viramanandi* v *Mahabeer* (1897) 20 Mad 378 *Sivarama* v *Somasundara* (1905) 28 Mad 119 *Kuppanna* v *Kumara* (1911) 34 Mad 4 [illegible] *Veerandramuthu* v *Maya Nadan* (1920) 43 Mad 107 128 7 I C 418, 54 I C 203 (*per* Oldfield J) *supra*

[illegible] 417 [illegible] 16) I [illegible] Punj

(*c*) *Raghubar Singh* v *Jai Indra Bahadur Singh* (1919) 46 I A 228 236 237 42 All 158 166-167 55 I C 500

[illegible] purchaser

(*e*) *Venkatesha* v *Gajanan* (1923) 44 Bom 352 354 56 I C 349

(*f*) (1920) 43 Mad 107 54 I C 203

47. such a purchaser was to be regarded as the representative of the judgment-debtor or of the decree holder depended on the nature of the question raised and who the contesting party was On analysing the judgments delivered by the learned judges it will be seen that they were all influenced by the observations of their Lordships of the Privy Council in *Prosunno Kumar's case* cited on p 137 above, namely It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and speedily as possible " But can it be done in a case where the question is directly one between the auction purchaser and the judgment debtor, unless the auction purchaser be regarded as the ' representative ' of the decree holder so as to bring the case within s 47 ? The cases now under consideration are cases in which an auction purchaser to whom a certificate of sale is granted under O 21, r 94 seeks to obtain possession of the property comprised in the certificate from the judgment debtor These cases are quite different from those where the question, *e g*, the legality of a Court sale is one primarily between the judgment debtor and the decree holder, and the purchaser is interested in the result of the decision within the meaning of the Privy Council decision

We have hitherto dealt with cases relating to resistance by the judgment debtor to delivery of possession to the auction purchaser We now proceed to deal with other cases in which questions arise between the auction purchaser on the one hand and the judgment debtor on the other The High Court of Allahabad has held that where property not included in the mortgage deed or in the mortgage decree is sold and delivered to a stranger purchaser in execution the judgment debtor is entitled to bring a suit against the auction purchaser for recovery of the property and that the provisions of s 47 do not apply to the case (*g*) In a Madras case however it was held that such a case comes within s 47, and that a regular suit is barred (*h*) A Full Bench of the Allahabad High Court has held that an auction purchaser under a decree which has been after confirmation of the sale, set aside as a result of a separate suit is entitled to apply under s 47 for recovery of the purchase-money from the decree holder (*i*)

Sub-sec (3): Inquiry as to who is the representative of a party.—*A* obtains a decree against *B* *B* dies before the decree is fully executed and *C* is brought on the record as *B*'s legal representative under s. 50 *D* claims to be the legal representative of *B* Under the Code of 1882 it was competent to the Court under these circumstances either to stay execution of the decree until the question as to who is the representative of *B* was determined by a separate suit, or itself to determine the question The present section makes it obligatory upon the Court executing the decree itself to determine the question (*j*) The same procedure is to be followed when a question arises in execution proceedings as to whether a certain person is a transferee of a decree, for a transferee of a decree is, as stated above, a ' representative " of a party within the meaning of this section An order determining whether a certain person is or is not the representative of a party is a decree [see s. 2 c (2)] and is therefore appealable (*l*)

Objection by party or his representative that property attached is not liable to attachment.—All objections to attachment raised by a *party to the suit* in which the decree was passed or his *representative* come under this section But objections to attachment raised by a *third party* come under O 21, r 58 [Code of 1882, s. 278]. The distinction is important, for an order under this section being a decree ' [see 2 (2)] is appealable while an order under O 21, r 58, is not appealable Moreover, if the objection falls under this section, a separate suit is barred, but if it falls under

(*g*) *Munna Lal v Collector of Shahjahanpur* (19_3) 45 All 96 74 I C 995 ('23) A A 470 But see *Imtiazan Nissa v Chuttan Lal* (19_4) 47 All 304 [illegible]

J 120 63 I C 200

(*l*) *Bindeshri Prasad v Padal Singh* (1923) 4_ [illegible]

O 21, r. 58, a separate suit is not barred. If property in the possession of a judgment-debtor is attached, and the judgment debtor objects to the attachment on the ground that the property is not "saleable" within the meaning of s 60, and should not therefore be attached, as where it is a service vatan or an occupancy holding, the objection is one under this section, for it is made by a *party to the suit* (l) But if the judgment debtor objects to the attachment on the ground that he holds it *on behalf of a third party, e g*, as a trustee, the objection comes under O 21, r 58 (m) Similarly where property is attached in execution of a decree passed against a sebait *personally*, and the sebait objects that the property does not belong to him but that it is held by him *as sebait of an idol*, or that it is *wakf* property, the objection falls under O 21, r 58, and not under this section (n)

A mortgages two properties X and Y to *B* He then executes a second mortgage of property X to *C* *B* sues *A* and *C* on his mortgage, and both the properties are ordered to be sold *C* objects to the sale of property Y alleging that after it was mortgaged to *B*, he (*C*) purchased it at a revenue sale and that the effect of that sale was to annul the mortgage of that property to *B* Here *C* was joined as a party to the suit as a puisne mortgagee, while the objection taken by him to the sale of property Y is taken in quite a different character, namely, as one claiming by title paramount adversely both to the mortgagor (*A*) and the mortgagee (*B*) Such an objection is not one by a "party to the suit" within the meaning of this section, and no appeal therefore lies from an order made on his objection (o) See notes to O 34, r 1, "Persons having an interest, etc"

As regards objections to attachment by the legal *representative* of a deceased judgment debtor, it has been held that if property in the hands of a legal representative is attached, and the legal representative objects to the attachment on the ground that the property attached is *his own* property, and does not form part of the estate of the deceased judgment debtor, the objection is one under this section, for it is made by a *representative* of a party to the suit (p) But if the legal representative objects to the attachment on the ground that he holds the property *on behalf of a third party*, the objection is one under O 21, r 58 (q)

Where a decree is passed against the *karnavan* of a *tarwad* in his representative capacity [s 11, Expln vi] all the members of the *tarwad* must be held to be 'parties' to the suit Hence if a decree is passed against a *karnavan* in his representative capacity, and the *tarwad* property is attached in execution of the decree, and a member of the *tarwad* objects to the execution alleging that the property belongs not to the *tarwad*, but to him individually, the question is one between the parties to the suit within the meaning of this section, and the objection therefore is one under this section, and not under O 21, r 58 (r) See notes to s 11 under the head 'Representative suit,' p 51 *ante*.

In a recent case before the Judicial Committee, where the son of a deceased Hindu *brought a suit for redemption against the auction purchaser on the ground that the sale* held in execution of a decree obtained by the auction purchaser against him and his father

[illegible] 313 *Panchanan* v *Tabia Bibi* (1890) 17 Cal 711 *Kali Charan* v *Jewat* (1908) [illegible] All 51 *Venkatappayyan* v *Karimpanakal* (1903) 26 Mad 501, *Madhurad* [illegible]

47. did not pass his interest in the property, but the father s interest only, it was held that the son being a party to the suit in which the decree was passed could have raised the question *before* the sale was confirmed, and that the suit was barred by the provisions of this section (*s*)

Where a sale is sought to be set aside on the ground that the "decree" was obtained by fraud —It has been stated above that where a *sale* is sought to be set aside on the ground of fraud in publishing or conducting the sale, the parties must proceed by an application under O 21 r 90, and not by a separate suit [see p 137, ill (a)] A suit, however, will lie to set aside a sale if the *decree* which resulted in the sale was obtained by fraud The following are the leading cases on the subject —

1 *A suit will lie to set aside a decree and a sale held in execution of the decree*, where *both* the decree and sale are impeached on the ground of fraud (*t*) The reason is that the question of the validity of a *decree* can only be determined by a regular suit See ill (1) under the head ' Separate suit will lie, p 130 above

2 *A* obtains *an ex parte* decree against *B* In execution of the decree certain property belonging to *B* is sold and purchased by *C* The decree is then set aside under O 9, r 13 *B* thereafter sues *A* and *C* to set aside the sale, challenging not only the sale, *but also the decree* on the ground of fraud Is the suit barred under this section ? No, for *B* is entitled to show that the *decree* was obtained by fraud, and this can only be done in a regular suit (*u*)

Appeal —On referring to the definition of decree given in s 2 above it will be seen that an order determining any question within this section is a decree Hence an appeal lies from all orders under this section and also a second appeal (s 100) It is important to note that *all* orders in execution proceedings are *not* appealable As regards appeal, orders in execution proceedings may be divided into two classes —

(1) Orders under this section [An appeal lies from these orders and also a second appeal]

(2) Other orders in execution proceedings These may again be sub divided into two classes

(a) those which are declared appealable under s 104 , and

(b) those which are not so declared, and are therefore non appealable

Where an order is made in execution proceedings, and the order is non appealable, attempts are frequently made by the party against whom the order is made to show that the order comes under this section and is therefore appealable (*v*) Similarly where an order is made in execution proceedings and the order is appealable under s 104 attempts are frequently made by the party against whom the order in appeal is made to show that the order comes under this section to enable the party to prefer a second appeal (*w*) It will thus be seen that this section is important not only as regards the question whether a *separate suit* will lie, but also as regards the question of *appeal*

Interlocutory orders in execution proceedings —It may here be observed that a party is not bound to prefer an appeal from every order in execution proceedings though the order is appealable It is open to the party aggrieved to challenge by an

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Cal 19"

(*v*) *Mammod v Locke* (1897) 20 Mad 457 *Rajha Roy v Ram Kumar* (1899) 26 Cal 529 *Ram Adhar v Narain Das* (1902) 24 All 519

(*w*) *Bibhu Mohun v Nunda Lal* (1899) 26 Cal 324 *Umakanta v Dino Nath* (1901) 28 Cal 4

appeal against the final order which determines the rights of the parties the propriety of interlocutory orders made in the course of execution proceedings (x)

It must be noted that it is not every order made in execution of a decree that comes within this section, if that were so, every *interlocutory order* in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable An order in execution proceedings can come under s 47 only when it conclusively determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree not when it determines merely an *incidental question* as to whether the proceedings are to be conducted in a certain way This follows from the definition of decree in s 2 (2) (y) See notes to O 21, r 66 Appeal

Limitation —An application under this section *to set aside* a sale in execution of a decree must be made within 30 days from the date of the sale [Limitation Act, 1908, Sch I, art 166] But if the sale is *void*, as where no notice is given as required by O 21 r 22 it is not necessary to apply to the Court *to set aside* the sale, hence the article applicable in such a case is the residuary art 181 which provides a period of 3 years from the date when the right to apply accrues, and not art 166 (z) An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment debtor is governed by art 166, and must be made within 30 days from the date of sale (a)

LIMIT OF TIME FOR EXECUTION

Execution barred in certain cases

48. [S 230, 3rd and 4th paras.] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years,

48. where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time *within twelve years immediately before the date* of the application, or

(*b*) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

Changes made in the section—This section corresponds with the third and fourth paras of s. 230 of the Code of 1882 (of which the provisions have been set forth below) except in the following particulars —

(1) The provisions of s 230 applied only to decrees for the payment of money or delivery of other property The present section applies to all decrees *except decrees granting an injunction*

(2) The provisions of s 230 applied only where an application for execution had been made under this section and granted The words under this section' as also the words and granted have been omitted in the present section The result is that the rule of limitation contained in this section applies whether the previous application for execution was *made under this section or not and whether the application was granted* or not See notes below Orders on application for execution

(3) The words or the decree (if any) on appeal affirming the same which occurred in s 230 cl (a) after the words the date of the decree sought to be enforced have been omitted in this section On a proper construction of that section those words were quite unnecessary See notes below *Date of decree sought to be executed.*

(4) The words or at recurring periods in sub section (1) cl (b) are new They are intended to give effect to certain decisions under s 230 of the Code of 1882 See notes below, Where payment is directed to be made at recurring periods

(5) Clause (b) of sub section (2) is new It gives effect to certain decisions under s 230 of the Code of 1882 See notes below, Successive applications for execution of decrees of Chartered High Courts

Civil Procedure Code, 1882, section 230, third and fourth paras—In view of the several alterations made in s 230 of the Code of 1882, we give below the provisions of that section indicating in italics the words that have been omitted in the *present section* —

Where an application to execute a decree *for the payment of money or delivery of other property* has been made *under this section and granted, no subsequent application* to execute the same decree shall be *granted* after the expiration of twelve years from any of the following dates (namely) —

(a) the date of the decree sought to be enforced, *or of the decree (if any) on appeal affirming the same*, or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree

Nothing in this section shall prevent the Court from granting an application for execution of a *decree after the expiration of the said term of twelve years where the*

judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application '

Successive applications for execution of decrees of Courts other than Chartered High Courts—This section deals with the maximum limit of time for execution, it does not prescribe the period within which each application for execution is to be made (b)

What is stated in this paragraph is confined to applications for execution of decrees of *Courts other than Chartered High Courts* A decree holder is entitled to present in succession *any number* of applications for execution of the same decree (c), and the Court has no power to refuse execution unless—

(i) the application is barred by virtue of general principles of law analogous to those of *res judicata* or

(ii) the application is barred under art 182 of the Limitation Act 1908 or

(iii) the *execution* of the decree is barred under sub section (1) of the present section (d), though the *application* for execution may not be barred under cl (i) or cl (ii) above

Clause (i) —Thus if the first application for execution is dismissed after a hearing on the merits, the Court will not, having regard to the general principles of law analogous to those of *res judicata*, entertain a subsequent application for execution of the same decree (e) See notes to s 11, " Orders in execution proceedings, etc , p 68 above

Clause (ii) —Though an application for execution may not be barred as *res judicata*, the Court will not entertain it if it is barred under art 182 of the Limitation Act, 1908 Leaving out of consideration certain portions of that article, the rule of limitation set forth in that article may be stated thus the first application for execution must be made within three years from the date of the decree sought to be executed, and every successive application for execution of the same decree must be made within three years from the date of the last application By this process a decree may be kept alive for any number of years To this a limit has been set by the rule contained in the present section which is considered in the next clause

Clause (iii) —Though an application for execution of a decree may not be barred as *res judicata* or under art 182 of the Limitation Act, 1908, no order *shall* be made for execution of the decree, if the application is presented after the expiration of twelve years (1) from the date of the decree or (2) from the date fixed by the decree for the payment of money or for the delivery of any property under the decree (f) *A* obtains a decree against *B* for Rs 1 000 on 1st January 1910 and applies for execution of the decree within three years from the date of the decree Further applications are made for execution of the same decree each within a period of three years from the date of the next preceding application, and the last of these is made in December 1921 *A* then makes a fresh application for execution on 1st January 1924 No order can be made for execution of the decree, for though the application is not barred under the Limitation Act, it is barred under this section as it is made twelve years after the date of the decree

[*Note* —Under section 230 of the Code of 1882 the twelve years' limitation did not apply unless one at least of the applications prior to that made on 1st January 1924 had been *granted* by the Court If none of the applications was granted, the rule did not apply But the words ' and granted,' which occurred in that section, have now been omitted, and it is no longer material to inquire whether any one of the previous applications was *granted* by the Court]

(b) *Surajman* v *Anjore* (1924) 46 All 73 75 79 I C 605 (24) A A 263

(c) *Thakur Prasad* v *Fakirullah* (1895) 17 All 106 111 112 22 I A 44 See also O 21 r 11, and Limitation Act art 182 cl (4)

(d) *Dhonkal* v *Phakkar* (1893) 15 All 84 100

(e) See *Dhonkal* v *Phakkar* (1893) 15 All 84

(f) *Balaram* v *Maruti* (1915) 39 Bom 256 28 I C 473

S. *Where payment is directed to be made "at a certain date"*—If in the case put above, the decree had directed payment of Rs 1,000 to be made *at a certain date*, for instance, on 1st March 1910, the period of twelve years would run from that date See sub section (1), cl (b)

Where payment is directed to be made "at recurring periods"—The words "at recurring periods" have been added into the section to give effect to decisions under s 230 of the Code of 1882. In fact, these words were read into that section in the undermentioned cases (g) Thus if a decree, dated 1st January 1913, directs payments to be made annually, but no dates are specified, the first yearly payment will fall due on 1st January 1914, the second on 1st January 1915, and thenceforward on the corresponding date year after year Hence the period of twelve years prescribed by this section will run as regards the application to enforce the first yearly payment, from 1st January 1914, as regards the application to enforce the second yearly payment, from 1st January 1915, and so forth, and the decree holder is at liberty to execute for the instalments as they fall due But if it is further provided by the decree that on default in payment of any one instalment the whole decree shall become payable at once, the decree ceases to be an *instalment decree*, and the decree holder must apply for execution of the *whole* of the balance due within 12 years from the date of default (h)

Where payment is directed to be made on the happening of a contingency—In such a case, the period of 12 years provided by this section is to be computed from the date when the contingency happens (for until then the decree is not capable of execution) and not from the date of the decree (i)

Successive applications for execution of decrees of Chartered High Courts—The holder of a decree of a Chartered High Court passed in the exercise of its ordinary original civil jurisdiction is entitled to present in succession *any number* of applications for execution of the decree and the Court is bound to entertain them, unless the application is barred—

(i) by virtue of general principles of law analogous to those of *res judicata*, or

(ii) under art 180 of the Limitation Act, 1877 [now art 183 of the Limitation Act, 1908] that being the article which applies to decrees of Chartered High Courts

It will be observed that cl (iii) which occurs in the preceding paragraph does not occur here The reason is that the twelve years' rule laid down in this section does not limit or otherwise affect the operation of art 183 of the Limitation Act, 1908, as it does that of art 182 In other words, the said rule does not apply to decrees passed by Chartered High Courts It was so held under the Code of 1882 (j) The same is now expressly enacted by sub section (2), clause (b) Hence a decree of a Chartered High Court may be kept alive for any number of years The same rule applies to Orders in Council made on appeal to the Privy Council (k) [The period of limitation for an application for execution of a decree of a Chartered High Court in the exercise of its ordinary original civil jurisdiction as distinguished from appellate civil jurisdiction (l) is twelve years from the several dates specified in art 183 of the Limitation Act, 1908]

Orders on application for execution.—An application for execution may either be—

(1) *granted*, or

(j) *Mayalbai* v *Tribhuvandas* (1882) 6 Bom 258, *Ganapathi* v *Balasundara* (1886) 7 Mad 541

(k) *Futteh Narain* v *Chundrabati* (1893) 20 Cal 551

(l) *Kristo Kinkur* v *Burrodacaunt* (1872) 14 M I A 465

(2) *refused*—

(a) in circumstances operating as a bar to future execution, as where it is refused on the ground that it is barred on the principle of *res judicata* or barred by the law of limitation, or

(b) in circumstances not operating as a bar to future execution, as where it is refused on the ground that it is not in accordance with law [O. 21, r. 17] (*m*), or

(3) *withdrawn* by the applicant—

(a) in circumstances operating as a bar to future execution, as where the withdrawal was with the object of abandoning execution, or

(b) in circumstances not operating as a bar to future execution (*n*)

Under s 230 of the Code of 1882, the twelve years' limitation imposed by that section applied only if one at least of the previous applications was *granted* by the Court but not otherwise. Under the present section the twelve years limitation applies though none of the previous applications may have been *granted*, in other words, though all the previous applications may have been refused or withdrawn All that the section now provides is that where an application to execute a decree *has been made*, whether it be granted or not, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date specified in the section

"Fresh application" to execute the same decree.—The expression "fresh application" has been substituted as being a better expression for the expression "subsequent application" Hence the decisions bearing on the words "subsequent application" apply equally to the words ' fresh application. We proceed to state the effect of those decisions substituting the word ' fresh for the word ' subsequent" The "fresh application referred to in this section means a *substantive* application for execution and not merely an *ancillary* application made with the object of moving the Court to *proceed* in the matter of a *substantive* application already on the file (*o*) Thus where property has been attached on an application for execution, an application for *sale* of the attached property is not a fresh application to execute the decree within the meaning of this section (*p*) Similarly where a warrant is issued for the arrest of a judgment debtor on an application for execution, but the warrant is returned by the peon sent to arrest the judgment debtor with the remark that the judgment debtor could not be found, a subsequent application for the *arrest* of the judgment debtor is not a fresh application to execute the decree within the meaning of this section, but is merely an *incidental* application to carry on proceedings already commenced (*q*) On the same principle it has been held that an application to *revive* an application for execution is not a fresh application within the meaning of this section (*r*)

An application to transfer a decree to another Court for execution is not an application for execution within the meaning of this section Such an application, though made *within* twelve years from the date of the decree, will not entitle the decree-holder to execution if the application for execution to the Court to which the decree is transferred is made *after* the expiration of twelve years (*s*)

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(*p*) *Chowdhry Paroosh Ram v Kali* (1890) 17 Cal 53

(*q*) *Jit Mal v Jwala Prasad* (1899) 21 All 153

(*r*) *Salina v Ganesh* (1918) 3 Pat L J 103, 44 I C 560

(*s*) *Sundar Singh v Doru Shankar* (1898) 20 All 78 [illegible]

8. **"Date of decree sought to be executed"**—The law is that it is only the final decree that can be executed [see notes to s 36, "What decrees may be executed," on p 115 above] Hence if the decree sought to be executed is a decree of a Court of first instance, the period of twelve years prescribed by this section runs from the date of that decree And if the decree sought to be executed is an appellate decree, that period runs from the date of the *appellate decree*, whether the original decree is affirmed, or whether it is set aside or modified, on appeal (t), the same rule applies though the appeal is dismissed on the ground that no appeal lies (u) The words ' or of the decree (if any) on appeal *affirming* the same which occurred in cl. (a) of s 230 of the Code of 1882 have been omitted as being unnecessary and calculated to give rise to the contention, by reason of the word "affirmed," that where the original decree was *modified* or *set aside* on appeal, the period of twelve years was to run from date of the *original* decree On the same principle, where a decree is passed in favour of the plaintiff against the defendant, and part of the decree is appealed from and the rest is not, the period of 12 years prescribed by this section runs from the date of the *appellate decree* both as regards the application to execute the portion appealed from and the portion not appealed from The reason is that there is only one decree that can be executed, and that is the decree of the Appellate Court (v) But where a decree is passed not jointly, but severally against two or more defendants, and one of the defendants appeals from the decree the period of 12 years as against the *other defendants is to* be computed from the date of the *original decree* (w), while as against the appellant defendant it is to be computed from the date of the appellate decree Where a second appeal is preferred to the High Court from a decree passed in first appeal, and an order is made by the High Court declaring the appeal before it to have abated, the period of twelve years under this section runs from the date of that order and not from the date on which the decree was passed in first appeal (x)

By a decree dated 17th November 1897 the defendant is directed *inter alia* to pay Rs 6,000 *forthwith* to the plaintiff On 28th January 1899 the decree is amended in some other respects Several applications for execution are made and the decree is thus kept alive On 2nd December, 1909, that is, more than 12 years after the date of the original decree, but within 12 years from the date of the amended decree, the plaintiff applies for execution The sum of Rs 6,000 being directed by the original decree to be paid *forthwith*, the period of 12 years is to be computed from the date of the *original decree*, and the application is barred so far as it relates to that sum (y)

Where a decree directs payment on the happening of a certain contingency, the period of twelve years provided by this section is to be computed from the date when the contingency happens, and not the date of the decree (z)

As to the operation of this section on applications for an order absolute under s. 89 of the Transfer of Property Act, 1882 [now O 34, r 5], see the undermentioned case (a)

"Fresh application presented after the expiration of twelve years"—These words make it quite clear that all that the section requires is the *presenting* of the fresh application within twelve years from the date of the decree The *order* on the fresh application may be made after the expiration of twelve years. The section does not preclude the Court from making an order for execution after the expiration of twelve years, if the application was presented within that period In fact, it was so

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(t) *Mahomed Mehdi* v *Mohini Kanta* (1907) 34 Cal 874

(u) *Rup Narain* v *Sheo Prakash* (1921) 43 All 405 61 I C 129

(v) *Kristnama* v *Mangammal* (1903) 26 Mad 91

(w) [illegible] 136 5 I C 473

(x) *Narsingrao* v *Panda* (1918) 42 Bom 309 46 I C 107 with facts slightly modified

(y) *Narhar* v *Krishnaji* (1912) 36 Bom 368 15 I C 82. *Aiyasamier* v *Venkatachela* (1917) 40 Mad 949 37 I C 741 (F B) But see *Lavanashi* v *Lhabadeb* (1921) 34 Cal L J 167 66 I C 758

(a) *Muhammad* v *Abdul Karim* (1916) 32 Mad 544, 29 I C 237

held by the High Court of Madras under the corresponding section of the Code of 1882 (*b*)

"Decree not being a decree granting an injunction"—The operation of the twelve years rule laid down in this section is now extended to all decrees except decrees granting an injunction Under s 230 of the Code of 1882, the rule was confined to decrees "for the payment of money and decrees for the delivery of other property" Under that section the question was raised whether a mortgage decree was a decree for the payment of money, and the decisions were not uniform The present section applies to money decrees as well as mortgage decrees, in fact to all decrees except decrees granting an injunction (*c*)

"Subsequent order"—It has been held by the Allahabad High Court that the expression "subsequent order in sub sec (1), cl (b), means a subsequent order made by the *Court which passed the decree and acting as such Court*, and not an order of a *Court executing a decree* Thus an order under O 20, r 11 (2), is a "subsequent order within the meaning of cl (b), but not an order made by a Court executing a decree allowing time to the judgment debtor for payment of the decretal amount (*d*) On the other hand, it has been held by the High Court of Bombay that an order made even by an executing Court is a "subsequent order" within the meaning of this section (*dd*)

"Payment to be made at a certain date or at recurring periods."—See notes above under the head "Successive applications for execution of decrees of Courts other than Chartered High Courts"

Whether section retrospective—*A* obtains a mortgage-decree against *B* in 1900, that is, before the present Code came into force *A* applies for execution of the decree from time to time and the last of such applications is made in 1914, that is, more than 12 years after the date of the decree Is execution of the decree barred under this section, regard being had to the fact that the old section did not apply to mortgage decrees though the present section does? No, according to the Allahabad High Court, the reason given being that this section is not retrospective (*e*) Yes, according to the Calcutta (*f*), Bombay (*g*), and Patna (*h*) High Courts, the reason given being that the present section applies to mortgage decrees, and an application made in 1914 must be deemed to have been made under the present Code The latter view, it is submitted, is correct

Fraud—"Fraud or "force" on the part of a judgment debtor at any stage of the execution gives a new starting point for the period of limitation (*i*) The word "fraud in this section should not be narrowly interpreted (*j*) "The fraud dealt with by this section is such as prevents the execution of the decree within twelve years, and judges ought to take a broad view of conduct deliberately adopted by judgment debtors with a view to defeating and delaying the just payment of their debts by frivolous and *futile objections which are dishonest upon the face of them*" (*k*) *Locking up the house* so as to prevent attachment of moveable property (*l*), or evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant (*m*), is "fraud" within

(*b*) *Virarama* v *Annasami* (1883) 6 Mad 359 See also *Sakina Bibi* v *Ganesh* (1918) 3 Pat L J 103 44 I C 560
(*c*) *Balaram* v *Maruti* (1914) 39 Bom 256, 23 I C 478
(*d*) *Jurawan* v, *Mahabir* (1918) 40 All 198, 44 I C 24
(*dd*) *Apte* v *Tirmal* (1925) 49 Bom 695, 88 I C 949 (25) A B 503
(*e*) *Kaunsilla* v *Ishri Singh* (1910) 32 All 490 6 I C 188
(*f*) *Bisseswar* v *Jasoda Lal* (1913) 40 Cal 704 19 I C 391
(*g*) *Gopaldas* v *Tribhowan* (1921) 45 Bom 365 60 I C 790
(*h*) *Mahanth* v *Sakina* (1916) 1 Pat L J 214 34 I C 27
(*i*) *Venkayya* v *Raghava* (1899) 22 Mad 320 *Mohsin Ali* v *Masum Ali* (1911) 34 All 20 11 I C 612
[illegible]

the meaning of this section Similarly a fictitious transfer of his property made by a judgment debtor to defeat or delay the execution of decrees that may be passed against him amounts to "fraud" within the meaning of this section (*n*) The presentation by a judgment debtor of an application to set aside a decree passed *ex parte* against him, the sole object of the application being to delay the proceedings in execution of the decree, is "fraud" within the meaning of this section (*o*) But though the Court has the power to grant execution after the expiration of twelve years from the date of the decree on the ground of fraud or force on the part of the judgment debtor, the Court should not use that power unless it is satisfied that the decree holder on his part had been diligent in proceeding with execution since the date of the decree (*p*) It is doubtful whether the fraud of one of several judgment debtors keeps the decree alive against all of them (*q*)

Limitation Act, sec. 15 (1)—Sec 15 (1) of the Limitation Act, 1908 cannot be applied in computing the period of 12 years prescribed by the present section (*r*)

Minority—A decree is passed in August 1897 on behalf of a minor in a suit brought by his guardian for partition and mesne profits Various applications for execution are made by the minor through his guardian within 3 years of each other The period of 12 years prescribed *by this section* expires in August 1909 The minor attains majority in November 1909, and in November 1910 he applies for execution of the decree, alleging that he is entitled to an extension of the period on the ground of minority Is he entitled to any extension either under sec 6 of the Limitation Act, 1908, or under any other law? It has been held by the High Court of Madras that he is not entitled to any extension under sec 6, on the ground that that section is expressly limited to cases where the limitation is provided in the Limitation Act itself, and, further, that there is no law apart from the said sec 6 under which minority is a ground of exemption from the operation of the law of limitation (*s*) The High Court of Bombay agrees with the Madras High Court in holding that sec 6 of the Limitation Act applies only to cases dealt with by the Act itself, but differs from that Court in that it holds that the minor is entitled to an extension of the period under the general principle of law which is that time does not run against a minor (*t*) But it has been held by the same Court that where the decree has been obtained in the first instance by an adult, the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by the present section (*u*) In the last mentioned case it was assumed that the provisions of the Limitation Act applied to the case, but it was held that time having once begun to run, the decree having been obtained by an adult, no subsequent disability, that is, minority, can arrest it, having regard to the provisions of sec 9 of the Limitation Act The High Court of Allahabad has followed the Madras decision (*v*)

Dekkhan Agriculturists' Relief Act 17 of 1879—In computing the period of 12 years provided by this section, the time taken up in procuring a conciliator's certificate as required by the D A R Act is to be excluded (*w*) A decree for sale on a mortgage passed under that Act does not require to be made absolute, hence the period of 12 years is to be computed from the date of the decree, and not from the date of the order making the decree absolute (*x*)

Application of Code to execution proceedings—See notes to s 141

[illegible] 785 70 I C 396 (22) A M 268

(*s*) *Ramana* v *Babu* (1914) 37 Mad 186 18 I C 586

(*t*) *Moro* v *Visaji* (1892) 16 Bom 536

(*u*) *Bhagwant* v *Kaji Mahammad* (1912) 36 Bom 498 15 I C 829

(*v*) *Prem Nath* v *Chatarpal* (1915) 37 All 638, s c 13 All L J 166 27 I C 865

(*w*) *Shidaya* v *Satappa* (1918) 42 Bom 367 45 I C 494

(*x*) *Hirachand* v *Aba* (1922) 46 Bom 671, 67 I C 153 (22) A B 95

TRANSFEREES AND LEGAL REPRESENTATIVES.

Ss. 49, 50.

49. [S. 233.] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree-holder.

Transferee

Equity of judgment-debtor—If the judgment debtor has the right or equity to set off his cross decree against the transferor under O 21, r 18, the transferee will hold the decree subject to that right or equity The section applies to all decrees including mortgage decrees (y)

Illustrations

1 *A* holds a decree against *B* for Rs 5,000 *B* holds a decree against *A* for Rs 3 000 *A* transfers his decree to *C* *C* cannot execute the decree against *B* for more than Rs 2,000 (z)

2 *A* obtains a decree against *B* for Rs 5,000 *B* then sues *A* for Rs 2,000 Pending *B*'s suit, *C* obtains a transfer of *A's decree with notice of the suit* A decree is then passed for *B* in his suit against *A* *C* applies for execution against *B* of the whole decree for Rs 5 000 He is not entitled to execute the decree for more than Rs 3,000 as the transfer was taken with notice of *B*'s suit (a)

As to application for execution by transferee of a decree, see O 21, r 16

50. [S. 234.] (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased.

Legal representative

(2) Where the decree is executed against such legal representatives, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of, and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Changes introduced by the section—The present section differs from the corresponding section 234, C P C, 1882, in one respect, viz, that the words "fully satisfied" have been substituted for the words 'fully executed" See notes below under the head "Before the decree has been fully satisfied"

Extent of liability of legal representative.—This section enables a decree holder to execute his decree against the legal representative of a deceased judgment debtor The liability of a legal representative in *execution proceedings* is confined to the property of the deceased which *has actually come to his hands* If the decree holder seeks to make the legal representative answerable also for the property of the

(y) *Sheo Prasad* v *Lall* (19-4) 4 Lat 1-0 86 I C 564 (-) A P 449

(z) *Kaim Ali* v *Lalkikant* (1868) 1 B L R, F B -3

(a) *Kristo Ramani* v *Kedarnath* (1880) 16 Cal 619 See also *Sinnu* v *Senthoji* (1903) 26 Mad 428

s. 48. the meaning of this section Similarly a fictitious transfer of his property made by a judgment debtor to defeat or delay the execution of decrees that may be passed against him amounts to "fraud within the meaning of this section (n) The presentation by a judgment debtor of an application to set aside a decree passed *ex parte* against him, the sole object of the application being to delay the proceedings in execution of the decree, is "fraud within the meaning of this section (o) But though the Court has the power to grant execution after the expiration of twelve years from the date of the decree on the ground of fraud or force on the part of the judgment debtor, the Court should not use that power unless it is satisfied that the decree holder on his part had been diligent in proceeding with execution since the date of the decree (p) It is doubtful whether the fraud of one of several judgment debtors keeps the decree alive against all of them (q)

Limitation Act, sec. 15 (1)—Sec 15 (1) of the Limitation Act 1908 cannot be applied in computing the period of 12 years prescribed by the present section (r)

Minority—A decree is passed in August 1897 on behalf of a minor in a suit brought by his guardian for partition and mesne profits Various applications for execution are made by the minor through his guardian within 3 years of each other The period of 12 years prescribed *by this section* expires in August 1909 The minor attains majority in November 1909, and in November 1910 he applies for execution of the decree alleging that he is entitled to an extension of the period on the ground of minority Is he entitled to any extension either under sec 6 of the Limitation Act, 1908 or under *any other law?* It has been held by the High Court of Madras *that he is not entitled* to any extension under sec 6, on the ground that that section is expressly limited to cases where the limitation is provided in the Limitation Act itself and further that there is no law apart from the said sec 6 under which minority is a ground of exemption from the operation of the law of limitation (s) The High Court of Bombay agrees with the Madras High Court in holding that sec 6 of the Limitation Act applies only to cases dealt with by the Act itself, but differs from that Court in that it holds that the minor is entitled to an extension of the period under the general principle of law which is that time does not run against a minor (t) But it has been held by the same Court that where the decree has been obtained in the first instance by an adult, the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by the present section (u) In the last mentioned case it was assumed that the provisions of the Limitation Act applied to the case, but it was held that time having once begun to run, the decree having been obtained by an adult, no subsequent disability, that is, minority, can arrest it, having regard to the provisions of sec 9 of the Limitation Act The High Court of Allahabad has followed the Madras decision (v)

Dekkhan Agriculturists' Relief Act 17 of 1879—In computing the period of 12 years provided by this section the time taken up in procuring a conciliator's certificate as required by the D A R Act is to be excluded (w) A decree for sale on a mortgage passed under that Act does not require to be made absolute, hence the period of 12 years is to be computed from the date of the decree, and not from the date of the order making the decree absolute (x)

Application of Code to execution proceedings—See notes to s 141

(n) Visalakshi v Sivasankara (1882) 4 Mad 292
(o) *Rai Sham Kissen* v *Damar Kumari Debi* (1906) 11 C W N 440
(p) *Ibid* But see *Abdul Khadir* v *Ahammad* (1911) 35 Mad 670 12 I C 679
(q) *Abdul Khadir* v *Ahmmad* (1911) 35 Mad 670 12 I C 679
(r) *Subbarayan* v *Natarajan* (1922) 45 Mad 785 70 I C 398 ('22) A M 268
(s) *Ramana* v *Babu* (1914) 37 Mad 186 18 I C 586
(t) *Moro* v *Vitaji* (1892) 16 Bom 536
(u) *Bhagwant* v *Kaji Mahammad* (1912) 36 Bom 498 15 I C 829
(v) *Prem Nath* v *Chatarpal* (1915) 37 All 638, s c 13 All L J 166 27 I C 865
(w) *Shidaya* v *Satappa* (1918) 42 Bom 367 45 I C 494
(x) *Hirachand* v *Aba* (1922) 46 Bom 671, 67 I C 153 ('22) A B 95

52. [S. 252] Enforcement of decree against legal representative (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

Scope of the section—Section 50 provides for the case where a decree has been passed *against a party* and the party dies before the decree is fully satisfied and the decree is sought to be executed against his legal representative The present section provides for the case where a *decree* is passed *against the legal representative* of a deceased person As to the latter case it is provided by this section that if the decree is for the payment of money out of the property of the deceased the decree may be executed *against the property of the deceased* in the hands of the legal representative But in so far as the property of the deceased come into the hands of the legal representative has not been *duly* applied by him the decree may be executed *against the legal representative* as if the decree was to that extent passed against him *personally* In other words the legal representative can be proceeded against *personally* to the extent only to which he has failed to apply the assets *duly* An executor or administrator under the Indian Succession Act 1925 s 323 is bound to pay the creditors of the deceased equally and rateably If an executor or administrator under that Act fails to pay the debts *rateably* a creditor of a deceased person, who has obtained a decree against his executor or administrator is entitled to proceed against him *personally* on the ground that the property of the deceased has not been duly applied within the meaning of this section But the case is different where a decree has been obtained against an *heir* of a deceased Hindu or Mahomedan as his legal representative In such a case every payment by the heir on account of debts due by the deceased would be a *due* application of the assets whether the debts were paid rateably or not There is no analogy between the case of an *executor* or *administrator* governed by the provisions of the Indian Succession Act and of an *heir* as a legal representative under the Hindu or Mahomedan law (x)

Legal representative— Legal representative means a person who in law *represents the estate of a deceased* person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued See s 2 (11)

As to how far a decree passed against one of several Mahomedan heirs binds the other heirs see Sir Roland Wilson s digest of Anglo Muhammadan Law 5th ed, p 216 and Mulla s Principles of Mahommadan Law 8th ed, p 21

(x) *Veeraraghavaraju v Rajah* (1903) 26 Mad 79 *Haji Saboo Sidick v Ally Mahomed* (1906) 30 Bom 27

Ss. , 53.

Where on the death of a Hindu father his sons are brought on the record as *his legal representatives in a suit pending against him at the time of his death the decree* should be against them in their representative capacity, and not against them personally It is clear that where the decree is against the sons in their representative character, it can only be executed against the estate of the father in the hands of the sons as provided by this section (*y*)

Out of the property of the deceased —The expression property' includes the *income* of immoveable property though it cannot be both attached *and sold* (*z*)

Decree against a wrong person as heir and legal representative —A decree obtained against an *executor or administrator* of the estate of a deceased person is a decree against the estate of the deceased But a decree obtained against the *heir* of a deceased Hindu or Mahomedan as his legal representative is not a decree against the *estate* of the deceased even if the decree provides for the payment of the decretal amount out of the property of the deceased in the hands of such heir Therefore, a decree obtained by a creditor of a deceased Hindu against a wrong person as his heir cannot be executed against the rightful heir who is in possession of the property The creditor must obtain a fresh decree against the rightful heir (*a*)

Decree against executor who has not proved —A creditor of a deceased *debtor cannot sue a person named as executor in the will of the deceased unless he has* either administered, that is intermeddled with the estate or proved the will Where a decree is obtained against such person and property belonging to the deceased is sold under such a decree, the sale is ineffectual to bind the testator s estate (*b*)

Liability of ancestral property

53. [*New*] For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Scope of the section —This section has been enacted to enforce the recognized rule of the Hindu law, namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any *debt* incurred and decreed against their father before his death, provided that such *debt* is not tainted by immorality The *section does not apply where the joint family property passes by survivorship to a col*lateral, *e g*, a nephew, as he is under no obligation to pay his uncle's debts (*c*)

"Decree"—It has been held by the High Court of Madras that the expression "decree' in this section is not confined to money decrees, but includes also a decree obtained against a Hindu father for possession of joint family property which the father could sell and which is liable to be sold for his debts (*d*) This decision seems to be of doubtful authority However that may be, the word "decree ' in this section does not include a decree for an injunction obtained against the father restraining him from

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obstructing the plaintiff from using a water tank, such a decree cannot, after the father's death, be enforced in execution against the sons (e).

Liability of ancestral property in execution proceedings—This section is new. It settles a question of procedure on which there was a conflict of judicial decisions. To understand the precise scope of the section it is necessary to bear in mind the rule of Hindu law that where a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including judgment debts. The question we are now concerned with is—by what *procedure* is this liability to be enforced? We proceed to consider the subject under the following four heads:—

1. *Where a money-decree has been passed against the father, and the father dies before issue of execution.*—*A* and his sons *B* and *C* constitute a joint Hindu family owning an ancestral house. *D* obtains a decree against *A* for Rs 5,000. *A* dies, and on his death *B* and *C* take the ancestral property *by survivorship*. *D applies for execution* of the decree against *B* and *C* by attachment and sale of the whole of the family house (f). Is he entitled to do so or must he institute a fresh suit against *B* and *C* to recover the debt? According to the procedure prescribed by this Code, *D* should proceed to bring *B* and *C* on the record as the legal representatives of *A* under s. 50, and then apply under that section to the Court which passed the decree to execute it against *B* and *C* to the extent of the ancestral property come to their hands. The words in s. 50 are, "to the extent of the *property of the deceased* which has come to his [legal representative's] hands." According to the present section, the ancestral property in the hands of *B* and *C* being liable under Hindu law for the payment of *A*'s debts, it is to be deemed, for the purposes of s. 50, to be the *property of the deceased* which has come to the hands of *B* and *C* as the legal representatives of *A*. If *B* and *C* object that the debt in respect of which the decree was passed was tainted with immorality, the question is one "relating to the *execution* of the decree" within the meaning of s. 47, and it should be determined by the Court executing the decree (g). This coincides with the view taken by the High Courts of Bombay and Calcutta under the Code of 1882 (h). According to the Madras and Allahabad decisions under that Code, a decree against a Hindu father could not be executed against ancestral property in the hands of the sons not even to the extent of the father's interest in the property, and the only remedy of the decree holder was to institute a *regular suit* against the sons. This view proceeded on the ground that the question whether the debts were tainted with immorality was not one that could be gone into in execution proceedings (i). These decisions are no longer law.

2. *Where a money decree has been passed against the father, and the father dies after attachment but before sale of the ancestral property.*—All the High Courts are agreed that where the father dies after *attachment* of the ancestral property, the proceedings in execution can be continued against the sons (j). In fact, having regard to the provisions of the present section, a separate suit against the sons would be barred by s. 47.

3. *Where a mortgage decree has been passed against the father, and the father dies before sale of the mortgaged property.*—Where a decree is obtained against the father for sale of ancestral property *mortgaged* by him, and he dies before sale, the proceedings in

(e) *Chunilal* v. *Bai Mani* (1918) 42 Bom 504, 46 I C 745.

(f) D's remedy is not confined to the one ... See *nabat* ...

... Cal 642. See *Hanmant* v. *Ganesh* (1919) 43 Bom 612 at p. 6–6, 51 I C 612.

(i) *Ravi Varma* v. *Koman* (1882) 5 Mad [illegible]; *Venkataramma* v. *Senthivelu* (1890) 13 Mad 265; *Lachmi Narain* v. *Kunji Lal* (1894) 16 All 449; *Jagannath* v. *Sita Ram* (1889) 11 All 3[illegible].

(j) *Sivagiri Zamindar* v. *Tiruvengada* (1884) 7 Mad 339; *Lachmi Narain* v. *Kunji Lal* (1894) 16 All 449; *Peary Lal* v. *Chandi Charan* (1906) 11 C W N 163.

Ss. 53, 54.

execution may be continued against the sons But the sons, not being parties to the suit, are entitled to raise in execution proceedings such questions as they could have raised if they had been made parties (k) They can dispute the *factum* of the debt, or they can show that the debt was incurred for immoral purposes and is not therefore binding on the property (l) See notes to O 34, r 1, Mortgage of joint family property

4 *Where a decree has been passed against the sons in respect of their father's debt for payment of the debt out of the ancestral property*—In such a case the decree holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons The proceedings would be under s 52 The expression property of the deceased ' in that section would be construed in the light of the present section In fact, s 53 is an *Explanation* to ss 50 and 52, explaining the meaning of the expression " property of the deceased

It will be seen from what has been stated above that a creditor can now follow the property in the hands of the sons or grandsons in execution not only in cases (2), (3) and (4), but also in case (1)

" Debt of a deceased ancestor "—As to debts for which a Hindu s n or grandson is liable, see Mulla's Hindu law, 5th ed, sec 243

54. [S 265] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Partition of estate or separation of share

Partition by Collector—This section is a reproduction of s 265 of the Code of 1882 with a few verbal alterations Where a decree has been passed for partition or for separate possession of a share of an estate of the description mentioned in this section, the proper authority to effect the partition or to deliver possession of the share is the Collector, the Court has no power to do so (m)

Application of the section—This section does not apply to a suit for partition of a revenue paying estate where *no separate allotment of revenue* is asked for It has been so held by a Full Bench of the High Court of Calcutta in *Jogodishuri* v *Kailash Chandra* (n), a case under s 265 of the Code of 1882 Commenting on that section Maclean, C J, said " The suit is one for the partition, not of the *whole* estate, but of a part only of the estate, and it does not seek to *affect any division or payment of the revenue* I do not think that the section intended to make it compulsory that the Collector should make the partition, save in cases *where as the result of partition the revenue would or might be affected* "

Partition—The term " partition " in this section is not confined to a mere division of the lands in question into the requisite parts, but includes the *delivery* of the shares to their respective allottees (o)

334 5 I C 987 *Indar Pal* v *Imperial Pink* (1915) 37 All 214 28 I C 593

(m) *Dattatraya* v *Mahadaji* (1892) 16 Bom 528

(n) (1897) 24 Cal 725

(o) *Parbhudas* v *Shankarbhai* (1887) 11 Bom 662

Jurisdiction of Court to control Collector's action.—Where a decree relates to an estate of the kind mentioned in this section, it should declare the rights of the several parties interested in the property, but as regards partition or separation it should direct the same to be made by the Collector or any gazetted subordinate of the Collector deputed by him in that behalf (*p*) [see O 20, r 18] This section places the execution of the decree entirely in the hands of the Collector But if the Collector contravenes the decretal command of the Court, or transgresses the law for the time being in force relating to partition, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution (*q*) *In such a case, the* aggrieved party should proceed by an application under s 47, and not by a separate suit (*r*) Where a Collector has made a partition there is nothing to prevent him from reversing the partition for mistake or other cause before he has passed final orders and returned the proceedings to the Court (*s*)

It has been held by the High Court of Bombay that an objection that the Collector has made an unequal partition is no ground for interference by the Court with the order passed by the Collector (*t*) But in a Madras case, where all the parties objected to a partition effected by the Collector on the ground that it was unequal, it was held that the Court had the power to entertain the objection (*u*)

"Estate."—The word 'estate' is here used in its ordinary signification (*v*) *Sheri* lands, that is lands held under a lease from Government for a fixed period, come within the terms of this section as revenue paying lands (*w*) But isolated plots of land which fall short of being the share of a co sharer of a *mahal* do not (*x*) A *raiyatwari* holding has been held not to be an 'estate' within the meaning of this section (*y*)

ARREST AND DETENTION.

55. [S. 336.] (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained

Arrest and detention

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise

(*p*) ... Rel[illegible] a d[illegible] 41 A[illegible] Singh[illegible]

(*q*) [illegible] (1890) 14 Bom 371

(*t*) *Dev Gopal* v *Vasudev* (1888) 12 Bom 371 *Shrinivas* v *Gurunath* (1891) 15 Bom 527 *Bhimangauda* v *Hanmant* (1918) 42 Bom 689 46 I C 10

(*u*) *Chinna* v *Krishnaranamma* (1896) 19 Mad 435

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304 5 I C 967 *Indar Pal v Imperial Bank* (1915) 37 All 214 28 I C 593
(m) *Dattatraya v Mahadaji* (1890) 16 Bom 528
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Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise

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(*u*) *Chinna* v *Krishnaranamma* (1896) 19 Mad 435

(*v*) *Secretary of State* v *Nundun Lall* (1884) 10 Cal 435

(*w*) *Dattat*[illegible]

S. 55.

Provided, secondly, that no outer door of a dwelling house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment debtor and who according to the customs of the country does not appear in public, the officers authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest

Provided, fourthly, that, where the decree in execution of which a judgment debtor is arrested, is a decree for the payment of money, and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he *may* (z) be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force

(4) Where a judgment debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court *may* (a) release him from arrest, and,

(z) The word may was substituted for will by Act 3 of 1921

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if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree. S. 55

See O 21, r 40 [proceedings on appearance of judgment debtor in obedience to notice or after arrest]

Changes introduced in the section —This section corresponds with s 336 of the Code of 1882, except in the following particulars —

1 *Any outer door of a dwelling house may now be broken open to effect the* arrest of a judgment debtor in execution of a decree But the dwelling house *must be in the occupancy of the judgment debtor* See sub section (1), proviso (2)

2 The security under sub sec (4) must not only be for the filing by the judgment debtor of a petition in insolvency, but also for his appearance, when called upon, in any proceeding upon the application in insolvency or upon the decree in execution of which he was arrested See notes below, ' Discharge of surety

3 A power has been conferred on the local Government to exempt certain persons from arrest See sub section (2)

Breaking open of outer door.—Under the Code of 1882 the breaking open of any *outer* door of a dwelling house was strictly prohibited This prohibition has now been removed to this extent that where a dwelling house is *in the occupancy of the judgment debtor,* and he refuses or prevents access thereto, the officer authorized to make the arrest may break open any outer door of *such* dwelling house But this does not authorize him to break open the outer door of a dwelling house merely because the judgment debtor is to be found in that house The prohibition above referred to as well as the prohibition against entering a dwelling house after sunset for effecting an arrest are to be traced to the maxim of English law that a man s house is his castle Referring to this maxim Bentham wrote more than a century ago This poetical expression is certainly no *reason* for if a man s house be his castle by night why not by day? The course of justice is sometimes interrupted in England by this puerile notion of liberty' (*b*)

Sub-section (2) —This sub section is new It is intended to cover the cases of certain persons or classes of persons whose summary arrest might as in the case of railway servants, be attended with danger or inconvenience to the public

Sub-section (4)—Discharge of surety.—Under the Code of 1882 the security required was that the judgment debtor will appear when called upon, and that he will, within one month apply under section 336 to be declared an insolvent ' It was held upon the construction of those words that where a security bond provided that the surety would produce the judgment debtor when the Court should direct him to do so, the surety was released from his obligation under the bond by the mere filing by the judgment debtor of a petition to be declared an insolvent Neither the withdrawal of the petition nor failure to proceed with the petition, nor even failure on the part of the judgment debtor to appear in Court when the direction to appear was made *subsequent* to the filing of the petition, was held to affect the surety s discharge (*c*) And the same was held where a surety undertook that the judgment-debtor

(*b*) Bentham s Theory of Legislation 2nd edn, p 70

(*c*) *Koylash Chandra* v *Christophorus* (1888) 15 Cal 171 *Ram on* v *Gerard* (1891) 13 All 100, *Dwarkadas* v *Isabhai* (1895) 19 Bom 210 *Krishna yar* v *Krishnasamy* (1903) 26 Mad. 366

s. 55-57.

would appear before the Court when called upon, and would within one month file a petition to be declared an insolvent (d) These decisions are no longer law Sub section (4) *now makes it clear that where a security bond is passed in the terms* of that sub section, that is, where a surety undertakes (1) that the judgment debtor will undertake within one month to apply to be declared an insolvent, *and* (2) will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the surety will not be released by the mere filing by the *judgment debtor of the petition in insolvency The security continues until a final* order is made on the petition (e)

A surety under this section is discharged by the death of the judgment debtor before breach of either of the two conditions mentioned above (f) But the death of the judgment debtor *after the first condition has failed namely, the undertaking to apply* to be declared an insolvent within one month, cannot affect the surety's liability with regard to that condition (g) A surety is also discharged if the execution proceedings are struck off (h), but not if liability had already accrued under the bond by a breach of either of the two conditions before the proceedings were struck off (i)

It is provided by sub sec (4) that if the judgment debtor fails to apply or to appear, the Court may either direct the security to be realized or commit the judgment debtor to prison This does not mean that the Court may proceed both against the surety and the judgment debtor, for if the surety is proceeded against and *the amount is recovered* from him under the conditions of the bond then the judgment debtor cannot be *committed to jail in execution, and if the judgment debtor is committed to jail* the state of affairs is just the same as if the surety had never come forward But the mere issue of a warrant against the judgment debtor, the warrant remaining unexecuted, is not sufficient by itself to discharge the surety (j)

Realization of security —See s 145

56. [S. 245A] Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money

Security for costs —This section provides that a woman shall not be arrested in execution of a decree for the payment of money At the same time, if the plaintiff is a woman and her suit is for the payment of money, she may be required to give security for the defendant's costs See O 25, r 1 (3)

57. [S. 338.] The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Subsistence allowance

See O 21, r 39 [subsistence allowance]

(e) *Nabin Chandra* v *Mritunjoy* (1914) 41 Cal 50, 19 I C 931

(g) *Makanji* v *Bhukandas* (1924) 48 Bom 500, (24) A B 428

(h) *Lalji* v *Odoya* (1887) 14 Cal 757

(i) *Dedhraj* v *Mahabir* (1920) 5 Pat L J 417, 420 57 I C 303

(j) *Makanji* v. *Bhukandas* (1924) 48 Bom 500, (24) A B. 428

58 [Ss 341, 342] (1) Every person detained in the civil prison in execution of a decree shall be so detained,— **S. 58.**

Detention and release

(*a*) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(*b*) in any other case, for a period of six weeks

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court

(2) A judgment debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re arrested under the decree in execution of which he was detained in the civil prison

Period of detention in jail—The first part of sub section (1) up to the words '*six weeks*' *corresponds with s 342 of the Code of 1882* *The phraseology of that* section however has now been altered to make it quite clear that the period of detention shall be (1) six months where the amount of the decree exceeds Rs 50 and (2) six weeks in any other case and that the Court has no power to fix shorter periods than those prescribed in the section (*k*)

Re-arrest—The immunity of a judgment-debtor from a second arrest depends not only upon his having been *arrested* but upon his having been detained *in jail* under the arrest Thus where a judgment debtor while acting as a pleader in Court was arrested and discharged on the ground that he was exempt from arrest under s 642 of the Code of 1882 (now s 135) it was held that he was liable to be re arrested in execution of the same decree against him (*l*) Similarly where a judgment-debtor was arrested,

(*k*) See Subbiah v. *Singa* (1890) 13 Mad 141 (*l*) *Jogendra* v. *Chunder Mohun* (1896) 23 Cal. 198

but was liberated owing to non payment of subsistence money, it was held that he was liable to be re arrested in execution of the same decree (*m*) To use the language of sub section (2), the judgment debtor was not in either case *released from detention* so as to prevent his re arrest

Interim protection order.—*A* is arrested and committed to jail in execution of a decree against him While in jail he files his petition in insolvency, and obtains an *interim* protection order for one week, and is thereupon released from jail. He then applies for a further protection order, but his application is refused Is *A* liable to be re arrested in execution of the same decree? The Calcutta High Court has held that he is not liable to be re arrested, on the ground that a judgment debtor once discharged from jail cannot be arrested a second time in execution of the same decree (*n*) On the other hand, it has been held by the High Court of Bombay that *A* is liable to be re arrested, the reason given being that the only cases in which a judgment debtor is exempt from re arrest are those specified in this section, and that release under an *interim* protection order is not one of them (*o*) The Calcutta decision, it is submitted, is not correct

Contempt of Court—This section does not apply to cases of imprisonment for contempt of Court (*p*)

59. [S 653] (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

Release on ground of illness

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(*a*) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(*b*) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

(*m*) *Habibul Rahman* v *Ram Salai* (1904) 26 All 317

(*n*) *Bolye Chund in the matter of* (1893) 20 Cal 874, *Secretary of State* v *Judah* (1886) 12 Cal 62

(*o*) *Shamji* v *Poonja* (1902) 26 Bom 652; *Suraj Din* v *Mahabir Prasad* (1911) 33 All 279, 8 I C 743

(*p*) *Martin* v *Lawrence* (1879) 4 Cal 655

ATTACHMENT.

S. 60.

60. [S. 266.] (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf

Property liable to attachment and sale in execution of decree

Provided that the following particulars shall not be liable to such attachment or sale, namely —

(*a*) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman,

(*b*) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section,

(*c*) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him,

(*d*) books of account,

(*e*) a mere right to sue for damages,

(*f*) any right of personal service,

S. 60.

(*g*) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions;

(*h*) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty;

(*i*) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (*h*), while on duty, to the extent of—

(i) the whole of the salary, where the salary does not exceed forty rupees monthly;

(ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly, and

(iii) one moiety of the salary in any other case,

Provided that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word 'twenty' were substituted for the word 'forty' wherever it occurs and the word 'forty' for the word 'eighty.'

(*j*) the pay and allowances of persons to whom the Indian Articles of War apply;

(*k*) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as *they are declared by the said Act not to be liable* to attachment;

(*l*) the wages of labourers and domestic servants whether payable in money or in kind,

(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(*n*) a right to future maintenance;

(*o*) any allowance declared by any law passed under the Indian Councils Acts, 1861, and 1892, to be exempt from liability to attachment or sale in execution of a decree; and

S. 60.

(*p*) where the judgment-debtor is a person liable for the payment of land revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation—The particulars mentioned in clauses (*g*), (*h*), (*i*), (*j*), (*l*) and (*o*) are exempt from attachment or sale whether before or after they are actually payable

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment of sale in execution of decrees for rent of any such house, building, site or land.

Changes introduced by the section—This section corresponds with s 266 of the Code of 1882 except in the following particulars —

1 In cl (a), the words ' cooking vessels, ' beds,' and and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman, ' have been added See notes below.

2 The latter portion of cl (b) relating to agricultural produce is new

3 Cl (c) stood as follows in s 266 of the Code of 1882 — The materials of houses and other buildings belonging to agriculturists

4 In cl (g), the words " or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf have been added

5 Cl (h) is new See notes below

6 In cl (i), the words or allowances equal to salary and while on duty ' have been added See notes below

7 Cl (k) is new See notes below

8 In cl (l), the words whether payable in moneys or in kind are new

9 The alterations in sub section (2) cl (a) correspond with the alterations in sub section (1), cl (c)

Amendment of the section—Sub sec (2) as it originally stood contained a clause being clause (b) which ran thus (b) to affect the provisions of the Army Act or of any similar law for the time being in force That clause was repealed by Act 10 of 1914, Sch II See notes below Salary of Army officers

In clause (i), the word forty was substituted for twenty, and the word "eighty" for ' forty" by Act 26 of 1923

The proviso to clause (i) was added by the Amending Act 20 of 1925

" In execution of a decree "—The expression decree in this section refers to a money decree, and not a mortgage decree, for attachment is not necessary in mortgage decrees The result is that the exemptions from attachment and sale contained in the proviso to this section do not apply to a mortgage decree for sale (q)

" Saleable property "—Subject to the proviso to sub section (1), all saleable property which belongs to the judgment debtor may be attached and sold in execution of a decree against him The equity of redemption of a mortgagor in mortgaged pro-

(q) Mubarak v [illegible] (1924) 46 All 489 [illegible]

S. 60. perty is "saleable property" within the meaning of this section, and is therefore liable to be attached and sold in execution of a decree against him (r) The share of a partner in a partnership business is "saleable property," and can be attached and sold in execution of a decree obtained against him by his creditor (s) The right to claim specific performance of a contract to sell land is also attachable and saleable (t) A life interest in trust funds is attachable and saleable in execution of a decree against the life tenant (u) Similarly a vested remainder can be attached and sold in execution of a decree against the remainderman (v)

The word "saleable" in this section means saleable by auction at a compulsory sale under the orders of the Court It has no reference to property made non transferable by an agreement between the parties to a transaction It has accordingly been held that a condition in a permanent lease that the landlord would re enter if the tenant made any transfer of the land demised, does not make the land unsaleable in execution The lease forbids a sale by the tenant, but does not prevent a sale by the Court (w) Country liquor is "saleable" property within the meaning of this section, though the permission of the Collector may be necessary to the sale thereof under the Abkari Act (x)

Security for performance of duty —Money or other valuable security deposited as security for the due performance of duty by a servant with his master may be attached in execution of a decree against the servant but the attachment will be subject to the lien which the master has upon the deposit, and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment (y)

Land assigned for maintenance —Where land was assigned to a Hindu widow for her maintenance with a proviso against alienation, it was held that she had no saleable interest in the usufruct (z)

Non transferable offices —A religious office is not saleable property (a) Similarly the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable (b) The right to officiate at funeral ceremonies is also not saleable (c) The property of a temple cannot be sold away from the temple But there is no objection to the sale of the right, title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service, the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from office for failure to perform the service (d)

Service of a public nature —Land burdened with the performance of a service of a public nature, e g, land held on Swastivachakam service tenure, is inalienable, and cannot be attached (e)

Restraint upon anticipation —The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in

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(x) Purshottam v Balvant (1908) 10 Bom L R 13

Narasimma v Anantha (1882) 4 Mad 391, Rangasami v Ranga (1893) 16 Mad 146, Man

(e) Anjaneyalu v Sri Venugopala (1922) 45 Mad 620, 70 I C 466, (22) A M 197

execution of a decree against the separate property of a married woman passed under s 8 of the Married Women's Property Act, 1874 (*f*)

Right of residence —The right of a widow under the Hindu law to reside in her husband's family house is a purely personal right and cannot be transferred Such right cannot be attached in execution as it is not "saleable" property (*g*) For other kinds of property which cannot be alienated, see Transfer of Property Act, 1882, s 6

"Property"—*A* sues *B* for partnership accounts The question of accounts is then referred to arbitration with the consent of the parties While the award is not yet made, *X*, a creditor of *A*, applies for attachment of the 'rights and interest' of *A* in the award The attachment cannot be allowed for the expectant claim under an inchoate award is not "property" within the meaning of this section (*h*) Money paid into Court as a fine in a criminal case against a judgment debtor is, after the order imposing the fine is set aside, attachable under this section as money belonging to the judgment debtor even before the issue of a refund certificate (*i*)

The doors and windows of a building cannot be *separately* attached, for they have no separate existence as *property* (*j*) An unascertained right in unascertained property could not be the subject of attachment (*k*)

"Disposing power."—A property may not belong to a judgment debtor, and yet he may have a *disposing power* over it exercisable *for his own benefit*. In such cases the property is liable to attachment and sale subject to the proviso to this section

Trustee of a charity —A trustee of a religious endowment has no disposing power over the *corpus* of the trust estate exercisable for his own benefit, hence the *corpus* cannot be attached (*l*)

Life interest —Where under a compromise with a reversioner a Hindu widow was allowed to keep certain property for her life, and she agreed not to alienate it, and on her death the property was to pass to the reversioner, it was held that she had no disposing power over the property (*m*)

Bonus sanctioned by railway company —A bonus sanctioned by a Railway Company to its servant is virtually a gift which must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act A Railway Company sanctioned a bonus to *A*, and the amount was forwarded to the District Paymaster of the Company for payment to *A* *Before* the amount was paid to *A*, it was attached in the hands of the Paymaster by a creditor of *A* It was held that the amount could not be attached, for the gift was not complete and *A* had therefore *no disposing power* over the money (*n*)

Delivery to post office —*A* sends a cover containing currency notes to the Post Office for delivery to *B*, the addressee Can the cover be attached while it is yet in the Post Office by a creditor of *B*? It has been held that it can be attached, the reason given being that the cover is in *the disposing power of B* "When once the letter has been posted, the property in it becomes vested in the addressee" (*o*)

Auctioneer —An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him, but only over that portion of it which represents his commission Hence the whole of the sale proceeds in the hands of an auctioneer cannot be attached, in execution of a decree against him, but only so much of it which represents his commission (*p*)

[illegible] (1888) 51

[illegible] 923) 47 Bom

[illegible] (1884) 6 All

[illegible] L R 509

[illegible] 13 Mad 242

[illegible] 23 All 135

S. 60.

Life policy—Where a married man effects a policy on his own life, and the policy is expressed on the face of it to be for the benefit of his wife or of his wife and children, or any of them, then, in cases to which the Married Women's Property Act, 1874, applies, a simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them, and the policy cannot be attached by his creditors [see s 6 of the Act] But in cases to which that Act does not apply, such a declaration is not sufficient to create a trust, and the insured has a disposing power over the policy for his own benefit, and the policy may be attached by his creditors unless it has been assigned as provided by s 130 of the Transfer of Property Act, 1882, or a trust has been declared in respect thereof as provided by s 5 of the Indian Trusts Act, 1882 There was a conflict of opinion whether s 6 of the Act applied to Hindus it having been held by the High Court of Madras that it did (q), and by the High Court of Bombay that it did not (r) But the Act has now been amended [see Act 13 of 1923], and the provisions of that section are made applicable to policies of insurance effected by Hindus Muhammadans Sikhs or Jains in Madras after the 31st day of December, 1913 [being the year of the Madras decision], and in other parts of British India after the 1st day of April 1923 but nothing contained in the Amending Act is to affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the 1st day of April 1923

"Debts"—Debts are expressly mentioned in the section and they are liable to attachment and sale A debt is an *obligation* to pay a *liquidated* (or specified) sum of *money* (s) Money that has not yet become due does not constitute a debt for there is no *obligation* to pay that which has not yet become due The word debt in this section means an actually existing debt that is a perfected and absolute debt A sum of money which might or might not become due or the payment of which depends upon contingencies which may or may not happen is not a ' debt (t) A money claim that *has already become due* is a debt and it may be attached as such, though it may be *payable* at a future day but a money claim *accruing due* is not a debt and cannot be attached *The attachment must operate at the time of the attachment and not be anticipatory so as to fasten on a claim that may ripen into a debt at some future time* (u)

A debt that is enforceable by a foreign Court only is not liable to attachment under this section (v)

Illustrations

1 *A* delivers goods to his agent, *B*, for sale *B* sells the goods, and receives the sale proceeds The sale proceeds in the hands of *B* constitute a ' debt " due to *A*, and they may therefore be attached while in *B* s hands in execution of a decree against *A* *Madho Das* v *Ramji* (1894) 16 All. 286

2 *A* is bound under a deed to pay a monthly allowance to *B* for *B* s maintenance *C*, who holds a decree against *B*, attaches in August the allowance for September The attachment is not valid, for the allowance can only be attached as a ' debt ' and the allowance for September was not a debt due to *B* at the time of attachment in August *Hari das* v *Baroda Kishore* (1900) 27 Cal. 38 , *Nilkunto* v *Hurro* (1878) 3 Cal 414

3. *A* agrees to sell his property to *B* for Rs 2,000 to be paid to *A* on the execution of the conveyance The purchase money payable to *A* is not a 'debt' owing to him by *B until* the conveyance is executed Hence it cannot be attached *before* the execution

(q) *Balamba* v *Krishnayya* (1914) 37 Mad 483 20 I C 934 [F B]
(r) *Shankar* v *Umabai* (1913) 37 Bom 471 19 I C 736
(s) *Webster* v *Webster* (1862) 31 Beav 393
(t) *Haridas* v *Baroda Kishore* (1900) 27 Cal 38
(u) *Syud Tufoo ul* v *Rughoonath* (1871) 14 M I A 40 50, *Sher Singh* v *Sri Ram* (1908) 30 All 248
(v) *Ghamshamdas* v *Bhansali* (1881) 5 Bom 249

of the conveyance in execution of a decree against *A* *Ahmaduddin* v *Majlis Rai* (1881) 3 All 12 But once the sale is completed, the amount representing the purchase money may be attached in the hands of *B*, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments *Harshankar* v *Baijnath* (1901) 23 All 164

4 Maintenance allowance that has already become due, *private* pensions that have already become due, and the wages of private servants [other than those mentioned in cl (1)] that have already become due are ' debts within the meaning of this section *Kasheeshuree* v *Greesh Chunder* (1866) 6 W R Mis 64 (maintenance), *Bhoyrub* v *Madhub Chunder* (1880) 6 C L R 19 (private pensions), *Ayyaiayyar* v *Virasami* (1898) 21 Mad 393; *Devi Prasad* v *Lewis* (1908) 31 All 304 (wages of private servants)

5 *A* agrees to advance Rs 5,000 to *B* on a mortgage of *B* s property *B* advances Rs 3,000 only *C*, who holds a decree against *B*, seeks to attach the balance of Rs 2,000, payable by *A* to *B* as a *debt* due by *A* to *B* *C* cannot attach the balance, for it is not a *debt* due by *A* to *B* It is clear that if *A* fails to pay the balance, *B* is not entitled to specific performance, and his only remedy against *A* is by way of *damages* for non payment of the balance *Phul Chund* v *Chand Mal* (1908) 30 All 252

As to the mode in which a debt may be attached, see O 21, r 46 See also O 21, r 79

Clause (a) : ornaments—Ornaments on the person of a Hindu wife, forming part of her *stridhan*, cannot be attached in execution of a decree against the husband, even though the Hindu law concedes him a personal right of user (*u*) The *mangalsutra*, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it, is also exempted from attachment (*x*)

Clause (b) : implements of husbandry—Charaks, kadhais, and planks of timber used by an agriculturist for extracting sugar juice from sugarcane which he has grown on his field, and for turning it into jaggery, are implements of husbandry, within the meaning of cl (b), and are exempt from attachment (*y*)

Clause (c) : houses occupied by agriculturists—The term ' agriculturist" includes persons engaged in cultivating the soil for remuneration although they may have no interest in the soil either as proprietor or tenant (*z*) The Code of 1882 (s 266) exempted from attachment only the *materials* of houses occupied by agriculturists But it was held that even a *house* occupied by an agriculturist could not be attached provided it was occupied by an agriculturist as *such* (*a*), that is to say, it was occupied by him *bonâ fide for the purposes of agriculture* (*b*) The burden of proving that it was so occupied lies on the agriculturist debtor, and it must be proved by him in *execution proceedings* (*c*) The exemption extends, after the death of the agriculturist, to his representative occupying the house in good faith as an agriculturist (*d*) But if by a consent decree an agriculturist agrees in consideration of time being given to him that his house may be attached and sold on default in payment of the decretal amount, the house may be attached and sold on default (*e*)

If a house occupied by an agriculturist is specifically mortgaged, it is not protected from sale in execution of a decree upon the mortgage Clause (c) does not prohibit the sale of property *specifically mortgaged*, though it may be occupied by an agriculturist as such, unless he is prohibited by law from mortgaging or selling it (*f*)

(*u*) *Tukaram* v *Gunaji* (1871) 8 B H C A C 129 [illegible] R [illegible] 39

(*a*) [illegible] v *Balvant* (1883) 7 Bom 530
(*b*) *Jiran* v *Hira* (1888) 12 Bom 363

[illegible] 57 I C 249

(*f*) *Bhagvandas* v *Hathibai* (1880) 4 Bom 25 *Bhola Nath* v *Kishori* (1912) 34 All 25 11 I C 646 *Mubarak* v *Ahmad* (1924) 46 All 489 (24) A A 328 (F B)

S. 60. **Clause (e): right to sue for damages**—"Mesne profits" are in the nature of damages, and the right to sue for mesne profits is a right to sue for 'damages' Such a right cannot therefore be attached and sold in execution of a decree against the person entitled to the right Thus if *A* is entitled to claim mesne profits from *B* for wrongful dispossession of his lands, *A*'s right to claim for mesne profits from *B* cannot be attached and sold in execution of a decree against *A* If the right is attached and sold and purchased by *X*, *X* is not entitled to sue *B* for the mesne profits the sale to him being void (*g*)

Clause (f) right of personal service—A *vritti* is a right to receive certain emoluments as a reward for personal service, and is therefore exempt from attachment and sale (*h*) The *birt Maha brahmani* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service and cannot therefore be attached (*i*) *Jatri bahis* which merely contain the names and addresses of pilgrims who are clients of the judgment debtor and which are of use to him to perform personal service to the pilgrims are not attachable (*j*)

Clause (g): gratuities allowed by Government—The gratuity referred to in this section is a bonus allowed by Government to its servants in consideration of past services It may be allowed to one who is not a pensioner,' or it may be allowed to a pensioner in addition to his pension. *In either case it is exempt from attachment* (*k*)

Stipends payable out of service family pension fund notified in the Gazette of India—For notifications issued under this clause [*i e*, cl (*g*)], see General Statutory Rules and Orders Vol IV, p 685

Political pensions.—All pensions of a political nature payable directly by the Government of India are political pensions A pension which the Government of India has given a guarantee that it will pay by a treaty obligation contracted with another *sovereign power is a political pension (l) Arrears of political pension due to a pensioner* and lying in the hands of Government at the time of his death do not lose their character of political pension by reason merely of the pensioner's death The character of the funds remains unchanged so long as it remains unpaid in the hands of Government and it is not liable to attachment in the hands of Government in execution of a decree against the deceased But once the fund has passed out of the hands of Government into the hands of the legal representative of the deceased, it may be attached like any other portion of the deceased's estate (*m*)

A grant of a Zamindari by Government to *A B*, as a reward for past services rendered by him to Government is not a *pension*, but a *gift*, and may therefore be attached in execution of a decree against the grantee The word "pension" in this section implies *periodical* payments of *money* by Government (*n*) Allowances granted to the Candyan pensioners' of Ceylon (*o*), to the members of the family of the King of Oudh (*p*), to the members of the Mysore family (*q*), and to the descendants of the Nawab of Carnatic (*r*), are instances of political pensions

(*g*) *Shyam Chand* v *Land Mortgage Bank* (1883) 9 Cal 695

(*h*) *Ganesh* v *Shankar* (1886) 10 Bom 395 *Govind* v *Ramkrishna* (1888) 12 Bom 366, *Rajaram* v *Ganesh* (1899) 23 Bom 131

(*i*) *Durga Prasad* v *Shambhu* (1919) 41 All 656 51 I C 639

(*j*) *Lachman* v *Baldeo* (1922) 1 Pat 619 68 I C 944 ('22) A.P 556

(*k*) *Bawan Das* v *Mul Chand* (1884) 6 All 173 *Muhammad* v *Carlier* (1882) 5 Mad 272 (decided under the Code of 1877 which did not include gratuities)

(*l*) *Bishambar* v *Imdad Ali* (1891) 18 Cal [illegible]

(*p*) *Bishambar Nath* v *Imdad Ali* (1891) 18 Cal 216 17 I A 181

(*q*) *Mahamed* v *Mohamed* (1867) 7 W R 169

(*r*) *Mahomed* v *Comandur* (1869) 4 M.H C 277

Private pensions —Private pensions, as distinguished from Government pensions, are not exempt from attachment and they may be attached either as "debts" or as "property belonging to the judgment debtor" within the meaning of this section But they neither constitute "debts" nor "property belonging to the judgment debtor" until they have become due and payable Hence they cannot be attached *before* they have *become due* and payable Pensions granted by Railway Companies to their servants are private pensions (*s*)

Clause (h): allowances, being less than salary, of a public officer while absent from duty —This clause is new The allowances (being *less* than salary) of a public officer [s 2 (17)] *while absent from duty* are now *wholly* exempt from attachment Under the Code of 1882 it was held, in the absence of any specific provision as to these allowances, that they stood on the same footing as the salary of a public officer *while on duty* and were exempt from attachment only to the extent to which such salary was exempt, and no more [see cl (i)] Thus where an officer was on sick leave *on half pay* which was Rs 150, it was held that the decree holder could attach Rs 75 (*t*) Under this clause the whole of Rs 150 is exempt from attachment

Clause (i): salary of public officer while on duty —The salary of a public officer [s 2 (17)] can be attached only *partially*, except where it does not exceed Rs 40 monthly in which case the *whole* of it is exempt from attachment The object of the exemption appears to be to enable a public officer to maintain himself and his family in a position suitable to his rank This exemption did not occur in the Code of 1859, hence the salary of a public officer and of the other persons mentioned in this clause was attachable to the extent of the whole as a "debt" And since it could only be attached as a "debt," it was not attachable until it had *become due* (*u*) Under the Codes of 1877 and 1882, and under the present Code, the salary, to the extent to which it is attachable, may be attached *in advance* (*v*) It is no valid reason for refusing the attachment that the attachment, if allowed would not leave the officer enough to live on (*u*) As to the salary of Army officers, see notes below under the head "Salary of Army officers" See notes "Amendment of the section, on p 169 above

Salary of private servant —The salary of a private servant can be attached as a debt, hence it cannot be attached *before* it has *become due* (*x*)

Clause (j): Indian Articles of War —The Indian Articles of War apply *only to soldiers and followers of the Native Army see Act V of 1869 amended by* Act XII of 1894 Hence the pay and allowances of soldiers and followers of the Native Army are exempt from attachment

Clause (k): compulsory deposits —The expression compulsory deposit is defined in s 2 (a) of the Provident Funds Act 19 of 1925 as being a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a policy of life insurance, and includes etc By s 3 of the Act it is provided that a compulsory deposit in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor A compulsory deposit cannot be attached so long as it

(*s*) *Bhojrub v Madhub Chunder* (1880) 6 C L R 19

(*t*) *Leard v Egerton* (1883) 6 Mad 179

(*u*) *Tejram v Kusaji* (1870) 7 B H C A C 110

(*v*) *Beard v Egerton* (1883) 6 Mad 179 *Bhojrub v Madhub Chunder* (1880) 6 C L R 19

(*w*) *Debi Prasad v Lewis* (1918) 40 All 213, 43 I C 984

(*x*) *Ayyacayyar v Virasami* (1898) 21 Mad 303 *Debi Prasad v Lewis* (1909) 31 All 304, 1 I C 148

60. retains the character of compulsory deposit A deposit which, when it was made was a "compulsory deposit," continues to retain that character *so long as it remains in the hands of the Railway Company* It does not lose that character, though the employee may have ceased to be in the service of the Company by retirement, resignation or dismissal, and may have become entitled in that event to be paid the amount due to his credit in the Provident Fund But once it is *paid out* by the Company on the happening of any of the above events, it loses the character of ' compulsory deposit, ' and it may be attached in the hands of the party to whom it has been paid (*y*) Th same principle applies to the case of an optional subscriber who cannot under the rules demand payment of his deposits at his option (*z*)

Clause (l): wages of labourers—A ' labourer " is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education Thus persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers, and their wages cannot be attached (*a*)

Clause (m): expectancy of succession, etc—The interest which a Hindu reversioner has in the immoveable property of a deceased Hindu on the death of the deceased s widow, is an expectancy of succession by survivorship , in other words it is an interest *expectant* on the widow s death to which the reversioner could only succeed if he *survived* the widow (*b*) The interest in the pre empted property of a successful pre emptor who *has not yet paid the pre emption price* fixed by his decree is a merely contingent interest which cannot be attached (*c*) See O 20 r 14

Clause (n): right to future maintenance—If A is entitled to a monthly maintenance allowance under an agreement, the allowance cannot be attached until after it has become due (*d*) It cannot be attached prospectively, that is before it has become due (*e*) In other words, *arrears* of maintenance may be attached, but not the right to *future* maintenance A hereditary grant of an allowance of paddy out of the melwaram

Salary of Army Officers—Sub sec (2) of the present section as it stood originally ran as follows —

(2) Nothing in this section shall be deemed—

(*a*) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building site or land, *or*

(*b*) *to affect the provisions of the Army Act or of any similar law for the time being in force*

(*c*) *Gorak Singh* v *Sidh Gopal* (1906) 28 All 323

(*d*) *Kasheeshuree* v *Greesh Chunder* (1866) 6 W R Mis 61

The italicized words and letters were replaced by the Repealing and Amending Act 10 of 1914, sch. II.

It is provided by s 136 of the Army Act, 1881 [stat 44 and 45 Vict], amended by the Army (Annual) Act of 1895, that the pay of an officer or soldier of His Majesty's Regular Forces serving in India shall be paid to him *without deduction* unless the Legislature in India has directed to the contrary in that behalf Under section 60 of the Code as it stood before the amendment above referred to, questions arose as to the extent of application of the Army Act As regards officers in the *British* Army, it was held that they were officers of His Majesty's Regular Forces within the meaning of s 136 of the Army Act, and that their salary therefore could not be attached at all (i) As regards officers in the *Indian* Army, there was a conflict of decisions The High Courts of Calcutta and Madras (j) held that an officer in the *Indian* Army was not an officer of His Majesty's Regular Forces within the meaning of s 136 of the Army Act, and that his salary therefore was liable to be attached to the extent mentioned in s 60 (1) (i) On the other hand, it was held by the High Court of Bombay (k), relying on s 190, sub s (8), of the said Act, that an officer in the *Indian* Army was an officer of His Majesty s Regular Forces and that his salary therefore could not be attached at all

Cl. (b) of sub s (2) having been repealed, the question arises whether the salary of an officer of His Majesty's Regular Forces can be attached under this section as salary of a public officer to the extent mentioned in cl (i) of sub sec (1) It has been held by the High Courts of Allahabad (l) and Bombay (m), that it can be so attached These cases must be distinguished from a Bombay case in which the question was whether the salary of a First Class Warrant Officer can be attached under the provisions of the Code of Civil Procedure in execution of a decree for maintenance obtained against him by his wife It was held that it would not be attached under the Code The ground of the decision was that a First Class Warrant Officer was a soldier ' as defined by s 190 of the Army Act, that under s 145 of the Act no execution can issue against his pay in respect of the maintenance of his wife but a specified sum may be deducted for such maintenance from his pay, and that an order had already been made for such deduction by the Commander in Chief (n)

Objection to attachment that property not saleable when to be raised—*A* obtains a decree against *B*, and applies for execution of the decree by attachment and sale of certain property belonging to *B* The property is attached and sold, and purchased by *C* *B then* applies to the Court to set aside the sale on the ground that the property was not liable to attachment and sale Can the application be entertained ? It has been held that if *B* was a party to the order for sale, or was aware of it and did not appeal against it, he is precluded from questioning the propriety of the order *after* the sale, and he cannot therefore impeach the sale "A judgment debtor who might have raised objections *prior* to the sale, but who has refrained from doing so, and who might have appealed against the order for sale, has no right *after* the sale has been carried out to prefer an objection that the property sold was not legally saleable" (o) But if *B* was not aware of the proceedings in attachment of the property, or of the proceedings in connection with the sale thereof, the application to set aside the sale may be entertained even after the sale is confirmed (p) The same procedure and principles

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43 Bom 308

(1899) 26

apply where a sale effected by the Collector is sought to be set aside on the ground that the property was not ancestral and therefore could not legally be sold by the Collector (q) See notes to s 47 Execution purchaser ill (b) on p 138 above

Objection by party or his representative that property attached is not liable to attachment on p 142 above

61 [*New*] The Local Government may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree

Partial exemption of agricultural produce

"Be exempted from liability to attachment or sale —These words are large enough to include agricultural produce which has been hypothecated See s 60 cl (b)

As to attachment of agricultural produce see O 21 rr 44 45 As to sale of such produce see O 21 rr 74 75

62 [S 271] (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling house after sunset and before sunrise

Seizure of property in dwelling house

(2) No outer door of a dwelling house shall be broken open unless such dwelling house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe any such property to be

(3) Where a room in a dwelling house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw, and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal

(q) *Da lat Singh v Jagal Kishore* (1900) 22 All 108 See s 69 and Sch III to the Code

Changes introduced by the section —This section corresponds with s 271 of the Code of 1882, except that the prohibition against breaking open any *outer* door of a dwelling house has been relaxed where the dwelling house is in the occupancy of the judgment debtor See notes to s 55 under the head "Breaking open of outer door" on p. 163 above

"Dwelling-house"—A shop or a godown is not a "dwelling house" within the meaning of this section (r)

63. [S 285] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached

Property attached in execution of decrees of several Courts

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees

Changes introduced in the section —This section corresponds with s 285 of the Code of 1882 except in the following particulars —

(1) The words "is under attachment" have been substituted for the words "has been attached." See notes below, under the head Is under attachment

(2) Sub section (2) is new See notes below

Object of the section —The object of this section is to prevent different claims arising out of the attachment and sale of the same property by different Courts, in other words, it is to prevent confusion in the execution of decrees (s)

Application of the section.—*A* attaches certain property in execution of a decree obtained by him against *B* in the Small Causes Court at Surat The same property is subsequently attached by *C* in execution of a decree obtained against *B* in the Court of the Subordinate Judge at Surat The Court of the Subordinate Judge is a Court of higher grade than the Small Causes Court, and it is therefore the proper Court under this section for deciding objections to the attachment, for determining claims made to the property, and for ordering the sale thereof and receiving the sale proceeds (t)

Sub-section (2) —This sub section is new It declares in effect that a proceeding in execution shall not be deemed to be invalid, merely because it was taken by a Court which ought not to have taken it, having regard to the provisions of sub section (1) Under the Code of 1882 there was a conflict of decisions on the question whether the rule contained in s 285 of that Code [now sub sec (1)] was a rule of *procedure* only or whether it affected *jurisdiction* It was held by the High Courts of Calcutta (u), Bombay (v), and Madras (w), that the rule was merely a rule of procedure, and that it did not oust the

(r) *Damodar* v *Ishrar* (1870) 3 Bom 89
(s) *Ram Narain* v *Mina* (1898) 25 Cal 46 48
Bykant Nath v *Rajendro Narain* (1886) 12 Cal 333 338
(t) *Turmuklal* v *Kalyandas* (1895) 19 Bom 127
Ballu Ram v *Raghubar* (1894) 16 All 11
(u) *Bykant Nath* v *Rajendro Narain* (1886) 12 [illegible]

jurisdiction of the inferior Court in proceedings in execution of its own decree On the other hand, it was held by the High Court of Allahabad that the section affected juris diction, that is to say, it took away the juri diction of the inferior Court in the several matters specified in the section (x) The result was that where a sale was effected by a Court of lower grade in a case where it ought to have been effected by a Court of higher grade, the sale, according to the Calcutta Bombay and Madras decisions, was not for that reason invalid, but according to the Allahabad decisions it was absolutely void as one made without jurisdiction Sub section (2) gives effect to the Calcutta, Bombay and Madras decisions (y)

There yet remains another point to consider and it may be considered in the form of an illustration A obtains a decree against *B* in the Court of a Subordinate Judge In execution of the decree certain property belonging to *B* is attached by the Subordinate Judge s Court C obtains a decree against *B* in a District Court The same property is then attached by the District Court in execution of *C* s decree [Here the proper Court to sell the property is the District Court] The property is sold by the Subordinate Judge in execution of A s decree and it is purchased by X *Subsequently* the same property is sold by the District Court in execution of *C* s decree and it is pur chased by Y Which of the two purchasers has the better title? According to the decision of the Calcutta High Court in *Bykant Nath* v *Rajendro Narain* ( ) X the first purchaser would take an indefeasible title (1) if the sale was held by the Subordinate Judge s Court *and* (2) the purchase was made by X without notice of the attachment by the District Court but if either the sale was held or the purchase was made *with notice* of the attachment the purchase of X would be liable to be defeated by the purcha e of Y According to the deci ion of the Bombay High Court in *Abdul Kar m* v *Thakordas* (a) it is quite enough to give an indefeasible title to X if he purchased without notice of the attachment by the District Court The Bombay Court does not regard any notice which the inferior Court may have of the attachment by the superior Court as of any consequence for the simple reason that the jurisdiction of a Court cannot depend upon notice A similar view has been taken by the Madras High Court (b) Under the present section it seems X would take an indefeasible title to the property, whether or not he or the Subordinate Judge s Court had notice of the attachment by the District Court

The result therefore is that where property is under attachment by two Courts one of which is of a higher grade than the other, and the property is sold by the Court of lower grade in contravention of the provisions of sub section (1), the sale is not thereby rendered invalid though the Court selling the property and the purchaser at the Court sale may be aware of the irregularity The course to be adopted by the Court of higher grade in such a case is to accept the sale made by the lower Court and after the sale proceeds are received by it to distribute them rateably amongst all the decree holders (c) Where both the Courts are subordinate to the District Court the procedure to be followed, according to the Bombay High Court (d) is for the *petitioner* to apply to that Court to have the sale proceeds transferred to the Court of higher grade, according to the Calcutta High Court (e), *the Court of higher grade* should move the District Court for that purpose In a recent case the Bombay High Court held that it is competent to the petitioner to apply to the Court of the higher grade for a transfer of the sale proceeds to that Court and that Court is competent to make the order (ee)

(b) See *Kunhayan* v *Ithukutti* (1899) 2[illegible] Mad 29[illegible]

(c) See *Bykant Nath* v *Rajendro Narain* (1886) 12 Cal 333 338 *Patel Naranji* v *Harudas* (1894) 18 Bom 458 463 *Nilkanta* v *Gosto* (1919) 46 Cal 64 44 I C 249

(d) (1894) 18 Bom 458 *supra*

(e) (1919) 46 Cal 64 68 69 44 I C 249 *supra*

(ee) *Dee Kappa* v *Chabhanappa* (19[illegible]) 4[illegible] Bom 6[illegible] 8[illegible] I C 9[illegible]0 ([illegible]5) A B 4 0

Suppose now that the same property is attached by a Munsif and by a Subordinate Judge, s 64, that it is then sold by the Munsif to X, and after the sale the decree holder in the Subordinate Judge's Court applies for sale of the property to that Court In such a case, as stated above, the sale by the Munsif is valid, but the question is whether X is entitled to apply to the Subordinate Judge under s 47 to stop the sale on the ground that the title to the property has passed to him According to the Madras High Court, he is, the reason given being that he is the 'representative' of the judgment debtor within the meaning of s 47 (*f*) According to the Calcutta High Court, he is not, the reason given being that he is not the 'representative" of the judgment debtor (*g*)

"Is under attachment"—These words have been substituted for the words "has been attached" to make it clear that the provisions of this section do not apply unless there are two or more attachments *existing at the same time* (*h*)

"Decrees of more Courts than one"—This section applies only as between Civil Courts of different grades or as between Revenue Courts of different grades It does not apply where one decree is that of a Civil Court and another that of a Revenue Court Hence where the same property is attached by a Civil Court and a Revenue Court, and it is sold by the Revenue Court, the purchaser is entitled to the property, and it cannot be sold in execution of the decree of the Civil Court (*i*)

Rateable distribution—See notes to s. 73, ' Court to which application for execution should be made

64. [S 276.] Where an attachment has been made any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Private alienation of property after attachment to be void

Explanation—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Section 276 of the Code of 1882 was as follows:—

'When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment debtor during the continuance of the attachment shall be void as against all claims enforceable under the attachment

Private alienation of property after attachment to be void

Changes introduced by the present section—The present section differs from the corresponding s 276, C P C 1882 in the following respects —

(1) The words ' by actual seizure or by written order duly intimated and made known in manner aforesaid after the words where an attachment has been made in s 276 have been omitted as being mere surplusage (*j*) See notes below Where an attachment has been made

(*f*) *Srinivasachariar* v. *Apparao* (1924) 47 Mad 17, 84 I C 263 (24) A M 883

(*g*) *Mahadeo Lal* v. *Dirsan* (1911) 15 C W N 542, 9 I C 194

(*h*) See *Stowell* v. *Ajudhia* (1884) 6 All 255

(*i*) *Poshan Lal* v. *Muhammad* (1921) 43 All 612, 63 I C 909

(*j*) *Sunak Lal* v. *Lachhman* (1917) 39 I C 857, *Sinnappan* v. *Arunachalam* (1919) 42 Mad 844, 851, 852, 53 I C 207

64.

(2) The words "during the continuance of the attachment," which occurred in s 276, have been omitted, and the words "contrary to such attachment" have been substituted for them See notes below, "Contrary to such attachment."

(3) The explanation to the section is new See notes below, "Explanation to the section, etc"

Object of the section—*A* sues *B* for Rs 5,000 *B* owns a house worth Rs. 5,000, and he has no other property *B* may sell or mortgage the house notwithstanding the institution of the suit against him, and he may sell or mortgage it even after a decree has been passed against him in the suit, and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee (*k*) But if the property is *attached* in execution of the decree, any private transfer of the property by *B* contrary to such attachment shall be void as against *all claims enforceable under the attachment* The object of the section is to prevent fraud on decree holders (*l*), and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations *pending attachment* (*m*)

"Where an attachment has been made."—An attachment to render a subsequent alienation invalid must be made in the manner prescribed by the Code Thus a promissory note must be attached by actual seizure as provided by O 21, r 51, and not by the issue of a prohibitory order The mere issue of a prohibitory order does not amount to an attachment within the meaning of this section (*n*) Similarly in the case of immoveable property, the attachment to render a subsequent alienation invalid must be made in the manner prescribed by O 21, r 54 (*n2*) An attachment made under that rule operates as a valid prohibition against alienation from the date on which the necessary proclamation is made and a copy of the order of attachment is affixed as provided by that rule, and not from the date of the order of attachment (*o*)

Attachment before judgment—An alienation of property after it is attached pursuant to an order for attachment before judgment is void under this section even though the property was not actually attached until after the passing of the decree There is nothing in O 38 which requires that the actual attachment in pursuance of the order directing attachment should be made before the passing of the decree (*p*). See notes to O 38, r 5

"Private transfer"—The expression "private transfer" means a voluntary sale, gift, or mortgage in contravention of the attachment order, and not the enforced execution of a conveyance or assignment in obedience to a decree of a Court competent to pass it (*q*) The decree may be one on an award (*r*)

Releasing an easement by the dominant owner to the servient owner is a transfer within the meaning of this section (*s*)

(*k*) *Pullen Chetty* v *Ramalinga Chetty* (1870) 5 M H C 368

(*l*) *Shirlingappa* v *Chanbasappa* (1906) 30 Bom 337, 339

(*m*) *Dinobundhu* v *Jogmaya* (1902) 29 Cal. 154, 29 I A 9

50 I C 261 *Sinnappan* v *Arunachalam* (1919) 42 Mad 844 53 I C 207 [F B], *Mula Ram* v *Jiwandaram* (1923) 4 Lah 211 72 I C 452, ('23) A L 423

(*p*) *Venkatasubbiah* v *Venkata Seshaiya* (1919) 42 Mad 1, 48 I C 232

(*q*) *Qurban Ali* v *Ashraf Ali* (1882) 4 All 219 225

(*r*) *Narayana* v *Biyari* (1922) 45 Mad 103, 109-110 68 I C. 673 ('22) A M 271, *see also* *Sunkari* v *Mudaragaddi* (1924) 46 Mad L J 301, 80 I C 338 ('24) A M 610

(*s*) *Kristodhone* v *Nandarani* (1908) 35 Cal 889

A private transfer under this section is not absolutely void, that is, void as against all the world (*t*), but void only as against claims enforceable under the attachment :— **S. 64.**

(1) In execution of a decree obtained by *A* against *B*, certain property belonging to *B* is attached. During the pendency of the attachment, *B* mortgages the property to *C*. The property is then sold in execution of the decree and purchased by *D*. Here the mortgage having been made contrary to the attachment is void as against *A*'s claim, and *D* is entitled to take the property free from the mortgage created by *B*. This illustration shows the operation of the section. See notes, 'Private sale of property attached to decree holder,' on p. 186 below.

(2) *B*'s property is attached in execution of a decree obtained by *A* against him. While the attachment is pending, *B* sells the property to *C*, and pays out of the sale proceeds the amount of the decree into Court, and the attachment thereupon ceases [see O. 21, r. 55]. The sale to *C* is *valid*, the decree having been satisfied by payment into Court, *and there being no claim outstanding which is enforceable under the attachment* (*u*). Moreover, an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation *contrary* to the attachment (*v*).

(3) On the same principle, where *A* attaches *B*'s property in execution of a decree obtained by him against *B*, and applications are thereafter made by other decree holders, *C*, *D* and *E* for rateable distribution without attaching the property in execution of their decrees, and subsequently *B* sells the property to *F* and pays off *A* (the attaching creditor), the other decree holders, namely, *C*, *D* and *E* are not entitled to question the alienation to *F*. In the first place, the alienation can hardly be said to be an alienation *contrary to the attachment* within the meaning of this section, for the alienation was the means by which the decree in execution of which the attachment was made was satisfied. In the next place, it cannot be said that the claims of *C*, *D* and *E* are 'claims for the rateable distribution of assets' within the meaning of the Explanation to the section, for to bring s. 73 [which provides for rateable distribution] into play certain conditions are necessary, and one of them is that there should be *assets held by the Court*. In the case now under consideration no assets came into the hands of the Court at all. Therefore *C*, *D* and *E* are not entitled to question the alienation by *B* to *F* and the alienation is perfectly valid (*w*).

(4) A decree holder, though entitled to rateable distribution as contemplated by the Explanation to the section, is not entitled to question a private alienation under this section unless his claim be one 'enforceable under the attachment' within the meaning of this section. The 'attachment' referred to in this section is *the attachment under which the execution sale is made*. Therefore, a 'claim enforceable under the attachment' means a claim enforceable under the attachment under which the execution sale is made (*w*). A claim under any other attachment is not a 'claim enforceable under the attachment' within the meaning of this section. The result is that,—

if *A* obtains a decree against *B* and *B*'s property is attached in execution of the decree, and

B subsequently alienates the property to *C*, and

(*t*) *Anund Lall v. Jullodhur* (1872) 14 M. I. A. 543, 549; *Dinendronath v. Ramkumar* (1881) 7 Cal. 107, 118.

(*u*) *Umesh Chunder v. Raj Bullub* (1882) 8 Cal. 279; *Anund Lall v. Jullodhur* (1872) 14 M. I. A. 543, 550; *Abdul Rashid v. Gappo Lal* (1898) 20 All. 421. See also *Khushalchand v. Nandram* (1911) 35 Bom. 516.

(*v*) *Annamalai v. Palamalai* (1918) 41 Mad. 265, 276, 43 I. C. 539.

(*w*) *Annamalai v. Palamalai* (1918) 41 Mad. 265, 276, 285, 43 I. C. 539 (F. B.).

S. 64.

the property is thereafter attached and sold in execution of a decree obtained by *D* against *B*, and it is purchased by *F*,

and *C* sues *F* for possession,

C's title is to be preferred to *F*'s title, and *C* is entitled to possession of the property *D* cannot object to the alienation to *C*, for the alienation to *C* was *prior* to his attachment *Nor is A entitled to question the alienation, for the sale in execution was not made under his attachment*, but under *D*'s attachment The sale having been made under *D*'s attachment, *A*'s claim cannot be said to be a claim enforceable under the attachment' within the meaning of this section The result would be the same even if we substitute *A* for *D*, that is, even if the decree holder in both cases was the same person It was so held by their Lordships of the Privy Council in *Mina Kumari* v *Bijoy Singh* (x) That was a case under s 276 of the Code of 1882 which did not contain the Explanation which now occurs at the end of the present section But the decision proceeded on the assumption that *Sorabji* v *Govind* (y) cited in the notes below was good law an assumption which involved that what now stands as the Explanation to the present section formed part also of the old section. *Mina Kumari's* case therefore would also govern cases under the present section

If in the case put above the property was sold by the Court under *A*'s attachment instead of *D*'s and *D* had applied for execution before the Court received the proceeds of the sale, the alienation to *C* would be void it being contrary to *A*'s attachment and, further *D* would be entitled to rateable distribution under s 73

The attaching decree holder may agree with a purchaser of the property from the judgment debtor pending the attachment that he will not bring the property to sale in execution of his decree Such an agreement has the effect of rendering the alienation valid as against the attaching creditor (z)

"Contrary to such attachment. —These words have been substituted for the words during the continuance of the attachment, which occurred in s 276 of the Code of 1882 The words, during the continuance of the attachment,' were too wide in that they comprised alienations that could not possibly prejudice the rights of an attaching creditor, as where property is mortgaged by *A* to *B*, and the equity of redemption is subsequently attached at the instance of *C* in execution of a decree obtained by *C* against *A*, and pending the attachment the mortgage is transferred by *B* and *A* to *D* In such a case the transfer of mortgage, though made *during the continuance of the attachment*, cannot prejudice *C*, the attaching creditor, for the effect of the transfer is merely to substitute *D* for *B* But the transfer having been made ' during the continuance of the attachment it came literally within the old section 276, though it was not *contrary to the attachment*, and it was accordingly contended in a case before the Judicial Committee under s 276 that the transfer was void as against *C* But this contention, however, was overruled Their Lordships held that the object of s 276 was merely to prohibit alienations *contrary to the attachment*, and that an alienation such as the above by *B* and *A* to *D* cannot in any sense be said to be *contrary to the attachment* (a) The words, ' contrary to the attachment,' have now been substituted for the words " during the continuance of the attachment , they give effect to the Privy Council ruling noted above Similarly, a renewal, though pending the attachment, of a mortgage already existing

[illegible]

166 29 I A 0 16 *Srinivasa* v *Velliyan* (1924) 47 Mad L J 913 916-917, 85 C 349 (25) A M 338 [where the mortgage prior to the attachment was not kept alive] See also *Qurban Ali* v *Ashraf Ali* (1882) 4 All 219 225

on the property, is not a transfer contrary to the attachment But if the amount secured by the renewed mortgage exceeds the amount due under the original mortgage at the date of the attachment, the additional security is to that extent void (*b*)

Explanation to the section: Claims for rateable distribution of assets under s. 73 are claims enforceable under an attachment within the meaning of this section —The Explanation to the section is new *A* obtains a decree against *B*, and in execution of the decree attaches Rs 7 000 belonging to *B* in the hands of a Railway Company *B* then assigns the said sum in the hands of the Railway Company to his attorneys for costs due to them subject to *A* s attachment After the assignment, *C*, another creditor of *B*, obtains a decree against *B* and in execution of his decree attaches the said sum in the hands of the Railway Company Thereafter the Company pays the said sum to the Sheriff of Bombay The assignment by *B* to his attorneys, though made prior to *C* s attachment, is void as against *C* s claim, for *C* s claim is a claim for rateable distribution of assets [Rs 7 000] within the meaning of s 73 and therefore a claim enforceable under the attachment of *A* by virtue of the Explanation to this section *C* is therefore entitled to be paid in priority to *B* s attorneys This is the law under the present Code, and it is in accordance with the view taken by the Bombay High Court in *Sorabji* v *Govind* (*c*) decided under s 276 of the Code of 1882 The view taken by the other High Courts was that *C* s claim being a claim merely *for rateable distribution* cannot be said to be a claim enforceable under the attachment, but this view is no longer law (*d*) The Explanation gives effect to the Bombay decision But the Explanation does not apply unless the claim of the subsequent decree holder can be said to be a claim for rateable distribution within the meaning of s 73 Now the essential condition of enforcement of claims for rateable distribution under s 73 is that there should be assets held by the Court [see s 73 below] and that condition was satisfied in *Sorabji* v *Govind* *But if there be no assets received by the Court* as would be the case if no payment was made by the Railway Company to the Sheriff and *A* s attachment came to an end [O 21, r 55] by *B* satisfying *A* s decree out of Court and then certifying it to the Court under O 21 r 2, *C* s claim cannot be enforced as a claim for rateable distribution and the assignment to the attorneys will prevail over any claim that may be made by *C* under his subsequent attachment (*e*) The Explanation to the section protects only those decree holders who are entitled to rateable distribution under s 73 and no decree holder can be entitled to rateable distribution under that section unless there are assets held by the Court (*f*) At the same time it must be noted that it is not enough that a decree holder is entitled to rateable distribution under s 73 to bring the Explanation into play it is further necessary that his claim must be one enforceable under the attachment within the meaning of the present section (*g*) see ill. (4) on p 183 above The result is that a decree holder is not entitled to the benefit of the Explanation and is not entitled to question a private alienation unless—

(1) he is entitled to rateable distribution under s 73 for which it is absolutely necessary that there should be *assets held by the Court* and

(2) where there has been a sale in execution his claim is one enforceable under the attachment under which the sale was made as explained in ill (4) on p 183 above

(*b*) *Mahaleerappa* v *Srinivasa* (188[illegible]) 4 Mad 417

(*c*) (189[illegible]) 16 Bom 91 referred to in *M*[illegible] [illegible]

(*e*) *Jetha Bhima & Co* v *Lady Janbai* (1912) 37 Bom 138 17 I C 6[illegible] *Mina Kumari* v [illegible] 662 [illegible]

64 As regards the first condition it is obvious that it cannot be present if the judgment debtor satisfies the claim of the decree holder *out of Court*, and that is what happened in the undermentioned cases (*h*) In the Privy Council case of *Mina Kumari* v *Bijoy Singh* (*i*), the first condition was satisfied [rather it was assumed that it was] but the second condition was not

Private transfer under O 21, r 83 —A private transfer of his property by a judgment debtor made pursuant to the provisions of O 21, r 83 is absolute, notwithstanding the provisions of this section, even against claims enforceable under the attachment (*j*)

Attachment raised and subsequently restored —Where the property of a defendant is attached, and the attachment is subsequently raised by the executing Court but the attachment is restored by the High Court on appeal the order of the High Court relates back to the date when the attachment was first made, with the result that an alienation of the property made by the judgment debtor between the date on which the attachment was raised and that on which it was restored is void as against all claims enforceable under the attachment (*k*) The same principle applies where the property attached by Court *A* is released from attachment by that Court and it is subsequently re attached by the same Court in execution of the same decree (*l*)

Private sale of property attached to the decree holder —*A* obtains a decree against *B* In execution of the decree *B*'s property is attached Pending the attachment *B* sells the property to *C* *A* then buys the same property from *B* Is the sale to *C* *void* under this section? No because *A* bought the property not at a Court sale but by private treaty with *B* The title obtained by the purchaser on a private sale of property in satisfaction of a decree differs from that acquired upon a sale in execution. Under a private sale the purchaser derives title through the vendor, and cannot acquire a title better than his Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title and interest of the judgment debtor, acquires that title, by operation of law, adversely to the judgment debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold (*m*)

Effect of striking off execution proceedings or of removing them from the file —An attachment is not necessarily *at an end* because the execution case is struck off or removed from the file The effect of such a proceeding depends on the circumstances of each case Where after an attachment has been made the proceedings in execution are struck off or removed from the file *under circumstances which render a fresh attachment necessary* to bring the judgment debtor's property to sale, a private transfer of the property by the judgment debtor made after the proceedings are struck off is *valid*, though the same property may subsequently be re attached in execution of the same decree on a fresh application for execution. But if the execution proceedings are struck off or removed from the file *under circumstances which do not render a fresh attachment necessary* the transfer is *void* as against all claims enforceable under the attachment, and the mere fact that a fresh application for attachment is subsequently made in execution of the same decree will not render the transfer valid *The reason is*

(*h*) 37 Bom 133 17 I C 625 *supra* 41 Mad [illegible]

(*i*) (1917) 44 I A 72 44 Cal 662 40 I C 242

(*j*) *Shidlingappa* v *Chanbasappa* (1906) 30 Bom 337

(*k*) *Aziz Bakhsh* v *Kaniz* (1910) 34 All 400 15 I C 49 *Gopal* v *Kashi* (1920) 42 All 39 52 I C 343

(*l*) *Budhu* v *Barkat Ram* (1920) 2 Lah L J 93 103

(*m*) *Dinendronath* v *Taralchandra* (1881) 7 Cal 107, *Budhu* v *Barkat Ram* (1920) 2 Lah L J 99

that in the former case the proceedings in execution are deemed to have *terminated* on the same being struck off or removed from the file, and the attachment is deemed to be at an end, and the transfer having been made after the *termination* of the attachment, it cannot be affected by the subsequent attachment In the latter case, however, the proceedings in execution are merely *suspended*, and the first attachment is therefore deemed to *subsist*, and the second application for attachment is a superfluity (*n*) Whether the execution proceedings have been struck off or removed from the file under these or those circumstances is a question of fact in each case (*o*) But where a fresh application for attachment is made, the presumption is that the first attachment has *ceased*, and the burden of proof is on the party alleging that the first attachment was still *subsisting* when the second application was made and that the second application was superfluous (*p*) *B*'s property is attached in execution of a decree obtained against him by *A* The execution proceedings are then struck off *B then* sells the property to *C* The property is again attached on a fresh application by *A* Is the sale valid? There being a fresh application for attachment, the presumption is that the first attachment *ceased from the moment the proceedings were struck off The sale would therefore be* valid and the second attachment inoperative unless *A* showed that the first attachment was still *subsisting* at the date of transfer and that the second application was superfluous

The above cases would not have arisen if the Courts, instead of making an order for "striking off proceedings" or "removing proceedings from the file, had made an order either dismissing the application or adjourning the proceedings where the Court was, by reason of default on the part of the decree holder, unable to proceed further with the proceedings in execution The practice of striking off proceedings or removing proceedings from the file' had no justification under any of the previous Codes To put a stop to this practice it is now expressly provided by O 21, r 57, that where any property has been attached in execution of a decree, but by reason of the decree holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a further date, upon the *dismissal* of such application the *attachment shall cease* Cases like the above are not likely to arise under this Code if the procedure prescribed by O 21, r 57, is strictly followed

Effect of attachment —Attachment creates no charge or lien upon the attached property (*q*) It merely prevents and avoids private alienations it does not confer any *title* on the attaching creditors (*r*) There is nothing in any of the provisions of the Code which in terms makes the attaching creditor a *secured* creditor or creates any *charge* or *lien* in his favour over the property attached (*s*) But an attaching creditor acquires, by virtue of the attachment, a right to have the attached property kept *in custodia legis* for the satisfaction of his debt, and an unlawful interference with that

(*n*) *Kishen Lal* v *Charat Singh* (1901) 23 All 114 *Puddomonee Dosee* v *Muthooranath* (1874) 12 B L R 411, *Peary Lal* v *Chandi Charan* (1906) 11 C W N 163 *Shaikh Kamar ud din* v *Jawahir Lal* 32 I A 102

(*o*) *Mohunt Bhagwan* v *Khetter Moni* (1896) 1 C W N 617 *Rangasami* v *Periasami* (1894) 17 Mad 58 *Mungul Pershad* v *Grija Kant* (1882) 8 Cal 51 8 I A 123 *Srinivasa* v *Sami Rau* (1894) 17 Mad 180 *Mahomed* v *Kishori Mohun* (1895) 22 Cal 909 22 I A 129, *Daud Ali* v *Ram Prasad* (1915) 37 All 542 30 I C 787 *Yakub Ali* v *Durga* (1915) 37 All 518 30 I C 877

(*p*) *Hafiz* v *Abdullah* (1894) 16 All 133

(*q*) *Sarkies* v *Bundho Baee* (1869) 1 N W P H C Rep 172, *Soobul Chunder* v *Russick Lall* (1888) 15 Cal 202 *Zemindar of Karvetnagar* v *Trustee of Tirumalai* (1909) 32 Mad 429 *Frederick Peacock* v *Madon Gopal* (1902) 29 Cal 428

(*r*) *Motilal* v *Karrabuldin* (1898) 25 Cal 179 24 I A 170 *Raghunath Das* v *Sundar Das* (1914) 42 Cal 72 41 I A 251 24 I C 304 *Ram Bhaj* v *Ram Das* (19??) 3 Lah 414 69 I C 790 (23) A L 261

(*s*) *Kristnasawmy* v *Official Assignee of Mad* (1903) 26 Mad 673 678

right constitutes an actionable wrong Thus it is an actionable wrong if A cuts and carries away crops attached by B in execution of a decree against C, and a suit will lie at B's instance against A to recover from A damages which should not, however, exceed *the value of the attached property* (t)

Effect of vesting order on attachment —A vesting order is an order made by the Insolvent Debtor's Court whereby the whole property of the insolvent vests in the Official Assignee What is the effect of a vesting order on an attachment levied *prior to the date of the vesting order? Has the attaching creditor, by reason of his* prior attachment priority over the Official Assignee in respect of the property attached by him prior to the date of the vesting order or is the Official Assignee entitled to claim the attachment property by virtue of the vesting order as part of the property of the insolvent? It has been held that whether the attachment is one before judgment (u), *or in execution of a decree* (v) *the attaching creditor has no priority over* the Official Assignee, and the latter is entitled to the attached property for the benefit of the creditors of the insolvent including the attaching creditors These decisions are based on the ground that an attaching creditor does not obtain a charge or lien on the attached property and it cannot therefore be said that the property vests in the *Official Assignee subject to his claim under the decree Once the vesting order is made*, the attaching creditor and other creditors of the insolvent stand on the same footing and they are entitled to a rateable distribution out of the property of the insolvent in the hands of the Official Assignee *In execution of a decree obtained by A against B* certain property belonging to B is attached B *is subsequently adjudicated an insolvent* and a *vesting order is made The attachment will be set aside and the property will* vest in the Official Assignee for the benefit of B's creditors This subject is dealt with in s 53 of the Presidency Towns Insolvency Act, 1909 The provisions of that section are in accordance with the decisions prior to that enactment See also Provincial Insolvency Act 1920 s 51

Effect of winding up order on attachment —The position of the liquidator of a registered company differs from that of the Official Assignee in this that the property of the company *does not vest* in him An attachment, therefore, made on the property of the company at the instance of a decree holder before the winding up of the company cannot be released at the instance of the liquidator (w)

SALE.

65 [S. **316**] Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Purchaser's title

Corresponding section of the Code of 1882 —*Section 316 of the Code of 1882* ran as follows —

"When a sale of immoveable property has become absolute in manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person

(t) *Sankaralinga v Kandasami* (1907) 30 Mad 413

(u) *Krishnaswami v Official Assignee of Madras* (1903) 26 Mad 673

(v) *Frederick Lea & Co v Madan Gopal* (1902) 29 Cal 428, *Jitmand v Ramchand* (1905) 29 Bom 405, *Sri Chand v Murari Lal* (1912) 34 All 638, 16 I C 183, *Raghunath Das v Sundar Das* (1914) 41 I A 251 42 Cal 72 24 I C 304 *Muhammad Sharif v Radha Mohan* (1919) 41 All 274, 57 I C 760

(w) *Amrita Lal v Anukul* (1916) 43 Cal 596, 34 I C 253

who at the time of sale is declared to be the purchaser Such certificate shall bear the date of the confirmation of the sale, and so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before

Provided that the decree under which the sale took place was still subsisting at that date"

The first part of section 316 now stands as O 21, r 94, with slight verbal alterations The second part, with certain substantial alterations to be presently noted, stands as s 65 The proviso to s 316 has been omitted altogether

Changes introduced in the section —Under s 316 of the Code of 1882 the title to immovable property sold at an execution sale vested in the purchaser from the *date of the certificate of sale*, that is, the date on which the sale became absolute Under the present section the title to such property, where the sale has become absolute, vests in the purchaser from the *time when the property* is sold, and not from the time when the sale becomes absolute

The proviso to s 316 has been omitted It is therefore no longer necessary that the decree should be subsisting at the time of the confirmation of sale

Vesting of property in auction-purchaser —In the case of a private sale of immovable property, the property vests in the purchaser from the time when the deed of sale is executed The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor In the case, however, of a Court sale, the property does not vest in the purchaser immediately on the sale thereof The reason is that a compulsory sale does not become absolute until some time after the sale A period of at least thirty days must expire from the date of sale before the sale can become absolute During that period the sale is liable to be set aside at the instance of the judgment debtor on the ground of irregularity in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser [O 21 rr 89 90] The application by the judgment debtor to set aside the sale in either of these two cases must be made within 30 days from the date of sale Where no such application is made the Court must make an order confirming the sale, *and it is upon such confirmation that the sale becomes absolute* [O 21, r 92] After the sale has become absolute, a certificate is granted by the Court to the purchaser which is called a certificate of sale [O 21, r 94] Such certificate bears as date the day on which the sale became absolute It is only when the sale becomes absolute, that the property sold vests in the purchaser But though the property does not vest in the purchaser until the sale has become absolute, when it does vest in him, it *shall* be deemed to have vested on the sale becoming absolute, *from the time when it was sold* The vesting of the property is thus made to relate back to the date of sale

Successive purchasers at sales in execution of money decrees —Under the Code of 1882, s 316 the property sold vested in the purchaser from the date of the certificate of sale, and not before This gave rise to some difficulty when the question arose as to which of two successive auction purchasers should have priority in cases where the later purchaser had the certificate of sale issued to him first Had the question been determined with exclusive reference to the terms of that section, the priority would have rested with the purchaser who first procured the certificate of sale But this inequitable result was avoided, and the difficulty was got over by holding that the first purchaser had by his prior purchase obtained an *equitable* interest in the property, and

65. that the subsequent purchaser must be deemed to have purchased the property *subject to* such interest (*x*) No such difficulty can arise under this Code for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale and not from the date of the certificate of sale

Illustration

In execution of a money decree obtained by *A* against *B* certain immovable property belonging to *B* is sold and purchased by *P1* The same property is subsequently purchased by *P2* at a sale in execution of a money decree obtained by *C* against *B* *P2* obtains a certificate of sale first and is placed in possession of the property Subsequently *P1* obtains a certificate of sale and sues *P2* for possession Under the present section *P1* is entitled to possession for the property is to be deemed to have vested in him from the date of *sale* and the sale to him was *prior* to the sale to *P2* The same result was arrived at under the Code of 1882 by holding that *P2* bought subject to *P1*s equitable interest and he could not therefore retain possession against *P1* after *P1*s title was perfected by the issue of a certificate to him

But where property is sold in execution of a decree to *P1* and the sale is *set aside on the ground of irregularity under O 21 r 90 and the same property is subsequently* sold in execution of another decree and is purchased by *P2* *P2* is entitled to priority as against *P1* even though the sale to *P1* may subsequently be confirmed The sale to *P1* not having been confirmed until after the sale to *P2* *P1* is not entitled to priority over *P2* Even under the Code of 1882 *P1* would not be entitled to priority over *P2*, for the sale to him (*P1*) having been set aside it could not be said that *P2* purchased subject to *P1*s interest in the property *P1* had no interest in the property when it was sold to *P2* (*y*)

Successive purchasers at sales in execution of mortgage decrees — Priority between successive purchasers of the same mortgaged property in execution of mortgage decrees against the same mortgagor is determined by the dates of the several purchases and not by the dates of the several mortgages (*z*)

Suit for possession by auction purchaser —It was held under the Code of 1859 that a purchaser of immovable property at a Court sale could not maintain a suit for possession thereof *against a third person*, unless he had a certificate of sale issued to him before suit although the sale had become absolute The reason given was that the transfer of property to a purchaser at a Court sale was not complete until a certificate of sale was issued to him The decisions turned upon the language of s 259 which provided that the certificate shall be taken and deemed to be a valid transfer of such right title and interest as had passed from the judgment debtor to the purchaser The line of reasoning adopted was that if a certificate was to be taken as a transfer, the transaction must necessarily be incomplete until the certificate was issued The said words were construed as controlling the operation of s 256 which provided that a sale became absolute when it was confirmed by the Court (*a*) But it was held that *as against the judgment debtor and his representatives* the purchaser s title became complete on the confirmation of the sale (*b*) Under the present section it seems that an auction purchaser can maintain a suit for possession even against a person not a party to the suit after the sale is confirmed by the Court though no certificate has been issued to him

(*x*) *Yeshvant v Govind* (1886) 10 Bom 4 3 *Chintamanrav v Jiliabai* (1887) 11 Bom 88
(*y*) *Banke Lal v Jagat Narain* (1900) 22 All 168
(*z*) *Kutti v Subramania* (1909) 32 Mad 485 4 I C 1077 *Nanakchand v Tel ch Ije* (1880) 5 Cal 265

before the institution of the suit, provided it is produced at or before the passing of the decree The reason is that property under the present section vests in the purchaser immediately the sale is confirmed by the Court and the vesting is not postponed until the grant of a certificate In a case under the Code of 1859 where the equity of redemption of the judgment debtor was sold, it was held that the purchaser was entitled to sue the mortgagee for redemption even before the issue of the certificate, the reason given being that the suit was not one in ejectment on title, but one for redemption and therefore of an equitable nature, and the purchaser was equitably entitled to redeem The certificate in that case was produced at the hearing (c)

Mesne profits —Under the Code of 1882, the property sold vested in the purchaser from the *date of the sale certificate* and not before Hence it was held that the purchaser was entitled to mesne profits from the date of the certificate, and not from the date of sale (d) Under the present section the property is to be deemed to vest in the purchaser from the date of sale The purchaser, therefore, is entitled to mesne profits from the date of sale

Title of auction purchaser —Under the Code of 1882, property sold in execution of a decree vested in the purchaser *so far as regards the parties to the suit and persons claiming through or under them* That is to say, a purchaser at a Court sale was entitled to *hold* the property only against the judgment debtor and his representative but not against third parties The words italicized above, which occurred in s 316 of the Code of 1882, have been omitted in the present section The omission, however, has not the effect of enlarging the purchaser s rights, and a purchaser at a judicial sale will now as before get a good title only against persons bound by the decree, but not against strangers (e)

Sale when void, and when voidable —A sale in execution of a decree is void, if the Court had *no jurisdiction* to sell the property Thus a Court has no jurisdiction to sell property in execution of a decree if the notice required by O 21 r 22 is not served (f) Similarly a Court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or properly represented on the record (g) Again, the Court of first instance has no jurisdiction to sell property after an order is made by the appellate Court for stay of execution (h) In each of these cases the sale is a *nullity*, and may be disregarded without any proceeding to set it aside (i)

But where a Court *has* jurisdiction to sell the property, and there has been an irregularity in the course of execution proceedings the sale is not void but merely *voidable* Thus where the notice required by O 21, r 22, is served upon a person who was not in fact the legal representative of the deceased judgment debtor, but whom the Court wrongly held to be his legal representative the sale is voidable, and not void (j) Similarly a sale is *voidable* and not void if there has been material irregularity or fraud in publishing or conducting the sale [O 21, r 90]

(c) See *Krishnaji v Ganesh* (188?) 8 Bom 139

(d) *Amir Jazim v Darbari* (190.) 24 All 475

... *Sahab* (1891) 13 All 53 17 I A 1.0 *Rent* ... *Shiam Lal v Nathe Lal* (1911) 33 All 63 7 I C 65

(j) *Malkarjun v Narhari* (1901) 2. Bom .7, 348 27 I A .16

65. *Irregularities of procedure in obtaining decrees or in execution proceedings*— Provided that the Court *has jurisdiction* to sell, a purchaser at a Court sale is not bound to inquire into the correctness of the decree or of the order for sale. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. *If the Court has jurisdiction* a purchaser is no more bound to inquire into the correctness of an order for execution than he *is as to the correctness of the judgment upon which the execution* issues (*l*). Strangers to a suit are justified in believing that the Court has done that which, by the direction of the Code it ought to do (*l*). Therefore when property sold in execution of a decree under the order of a competent Court is purchased by a stranger *bonâ fide* and for value the sale cannot be set aside on the ground that the judgment debtor had a cross decree of a higher amount and the Court therefore ought not to have directed the sale (*m*) or that the decree had been satisfied out of Court before *the sale* (*n*) *or that the Court wrongly held that the defendant was served with the* summons and on that finding passed an *ex parte* decree against him (*o*) or that though an attachment was subsisting at the date of the sale the decree holder's application for an order of sale had been dismissed for want of prosecution *before* sale (*p*) or that the property was not liable to attachment and sale within the meaning of s. 60 (*q*) or that the execution of the decree was barred by limitation (*r*) or that the decree proceeded upon an erroneous view of the law (*s*) or that the decree was one which the Court ought not to have passed (*t*). *See notes to S. 60. Objection to attachment* that property not saleable when to be raised on p. 1— above; notes to O. 21, r. 22 Consequence of omission to give notice and Notice to wrong person and notes to O. 21, r. 90 Material irregularity in publishing or conducting the sale."

The above principles apply in favour of a third party purchasing at a Court sale. They do not apply where the decree holder himself is the purchaser. The reason is that where the decree holder himself is the purchaser he " must be held to have had *notice* of all the facts relating to the suit and execution proceedings (*u*). Nor do they apply in favour of a party to the suit though he may not be a decree-holder (*u2*).

Effect of reversal of decree upon sale where decree reversed after confirmation of sale.—There is a great distinction between decree holders who come in and purchase under their own decree which is afterwards reversed or modified and *bonâ fide* purchasers who come in and buy at a sale in execution of the decree to which they are no parties, and at a time when that decree is a valid and subsisting decree and when the order for sale is a valid order. A *bonâ fide* purchaser who is a stranger to the decree, does not lose his title to the property by the subsequent reversal or modification of the decree. But where the decree holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed or modified. Where the purchaser is a stranger, the judgment debtor whose property is sold is entitled only to the sale proceeds of the property if the decree is

(*l*) *Pewa Mahton* v. *Ramkishen Singh* (1887) 14 Cal 18, 2– 13 I A 106; *Mothura Mohun Ghose* v. *Akhoy Kumar Mitter* (1888) 15 Cal 557; *Narayana* v. *Kaliana* (1896) 19 Mad 219 2 3 2 5

v. *Krishnaji* (1904) 28 Bom 125

(*r*) *Sarada Churn* v. *Mahomed* (1885) 11 Cal 376

(*s*) *Girdharee Lall* v. *Kantoo Lall* (1875) 14 Beng L R 187, 1 I A 321

Chandar Sen (1900) 2– All

v. *Kubra Begam* (1901) –3

Daim (1905) 32 Cal –96

Uma Kumari v. *Jagat Mohun*

Gungapershad v. *Gopal Singh*

–ier v. *Chettiappa* (19–3) 43

subsequently reversed But where the purchaser is the decree holder, he is bound to restore the property to the judgment debtor (v) A sale in execution of a decree at which a *third party* becomes the purchaser is upheld notwithstanding the subsequent reversal of the decree because otherwise there will be less inducement to intending purchasers to buy at an execution sale and consequently less chance of property fetching proper value at such sales (u) See notes to s 144 Who may apply for restitution But where property sold in execution of a decree is bought by the decree holder and it is subsequently re sold by him to a *bona fide* purchaser for value such purchaser acquires a good title though the decree may be subsequently reversed (x)

Effect of reversal of decree upon sale where decree reversed before confirmation of sale —On referring to s 316 of the Code of 1882 (p 188) it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if at the time of application for confirmation the decree under which the sale was effected had ceased to be a subsisting decree (y) That proviso has not been reproduced in the present section Under the present section therefore a sale held in execution of a decree may be confirmed in any event where the purchaser is a third party though the decree has been reversed before confirmation of the sale See O 21 r 92 (1) and note the words the Court *shall* make an order confirming the sale

What passes at a Court-sale —See notes to O 21 r 94

66 [S 317] (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner

66. ***Changes introduced by the section —***

1 The words "on behalf of the *plaintiff* or on behalf of some one through whom *the plaintiff* claims" have been substituted for the words "on behalf of *any other person* or on behalf of some one through whom *such other person* claims" See notes, "Joint purchase," on p 197 below

2 The latter part of sub section (2) is new See notes below under the head "Suit by a third person for a declaration that the certified purchaser is merely a benamidar"

Benami purchases.—The object of the section is to put a stop to benami purchases at execution sales (z) If *A* under a secret understanding with *B* purchases property with his own moneys but in *B*'s name, the purchase is said to be benami In such a case *B* is merely a benamidar or ostensible owner and holds the property in trust for *A*, so that *A* may compel *B* to transfer the property to him (*A*) If, however, *A*'s object in purchasing the property in *B*'s name was to defraud his creditors *and the object of the fraud is carried out*, the Court will not help *A* in recovering possession of the property from *B* But if the object of the fraud is not carried out, the Court will help *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud. This is the law as applicable to benami purchases at a *private sale* (a) But the law is different in the case of benami purchases at a *Court sale* so that if *A* purchases property in *B*'s name at a Court sale, and a certificate of sale is issued to *B* (O 21, r 94), *B* will be *conclusively* deemed to be the real purchaser as against *A*, and no suit will lie under this section by *A* against *B* for possession of the property, unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his consent [see sub section (2)] The same rule applies even if the claim made by the beneficial owner may not be for the whole of the property of which the defendant is the certified purchaser Thus if *B* is the certified purchaser of certain property, part of which was purchased by him on his own account and part benami for *A*, *A* is not entitled to maintain a suit under this section for recovery of the *part* purchased by *B* benami for him (b) At the same time it should be noted that the mere fact that the plaintiff has described the defendant as a benamidar does not make the transaction benami if it was not benami in fact, it is a mere misdescription, and it is no ground for refusing the plaintiff a relief to which he is otherwise entitled (c)

This section must be construed strictly—Where a transaction is once made out to be benami, the Courts of India, which are bound to decide according to equity and good conscience, will deal with it in the same manner as it would be treated by an English Court of equity (d) That is to say, effect will be given to the real and not to the nominal title, unless the result of doing so would be to work a fraud upon innocent persons (e) The present section provides that when property is sold at a Court sale, no suit shall be maintained against the certified purchaser on the ground that the purchase was made benami It provides in effect that the certified purchaser shall be *conclusively* deemed to be the real purchaser, and shall not be liable to be ousted on the ground that his purchase was really made on behalf of another In other words, the provisions of the present section bar the equitable jurisdiction of the Courts. The

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(z) *Bodh Singh* v *Guneth Chunder* (1874) 12 B L R 317

(a) *Govind* v *Lala Kishun* (1901) 28 Cal 370, *Jadunath* v *Ruplal* (1906) 33 Cal 967, *Chenvirappa* v *Puttappa* (1887) 11 Bom 708 *Sidlingappa* v *Hirasa* (1907) 31 Bom 405 *Ranimali* v *Chundru* (1897) 20 Mad 326, *Muthuraman* v *Krishna* (1906) 29 Mad 72 *Muniswami* v *Subbaryar* (1908) 31 Mad 97, *Kondeti* v *Nulamma* (1908) 31 Mad 485 See Indian Trusts Act 1882 s 84

section, therefore, must be construed strictly and not extended beyond its express terms But though the section prohibits suits against the certified purchaser to assert a benami title against him, *it does not make benami purchases illegal* The object of the stringent provisions of this section is to discourage benami purchases at Court sales, but not to render such purchases *illegal* (*f*)

Scope of the section: Suits outside the section —This section provides that no suit shall lie *against the certified purchaser* on the ground that the purchase was made on behalf of the plaintiff In other words, it is only in suits *against* the certified purchaser *as defendant* that such purchaser is to be *conclusively* deemed to be the real purchaser Hence if the real owner is actually and honestly in possession, and a suit is brought *by* the certified purchaser *as plaintiff* against the real owner for possession or for rents and profits of the property of which he is the certified purchaser, the real owner may resist the suit on the ground that the certified purchaser was only a benamidar (*g*) And since the section bars suits brought *against* the certified purchaser *as defendant*, a suit *by* such purchaser *as plaintiff* for a declaration that he purchased the property on his own behalf and not benami for another, is not barred under this section (*h*) On the same ground this section is no bar to a suit by the beneficial owner for possession against the judgment debtor pursuant to an agreement made between them after the sale of the property, provided the certified purchaser is joined as a party to the suit, and he does not claim the property (*i*) In fact, the present section applies only when a suit is instituted by a person claiming to be the real purchaser as plaintiff against the certified purchaser as defendant, on the allegation that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims This point is now made clear by the substitution of the word plaintiff for the words 'any other person' in sub section (1)

Suit by 'a third person" for a declaration that the certified purchaser is merely a benamidar —Under the corresponding s 317 of the Code of 1882, it was held by the High Court of Calcutta that the only suits barred under that section were suits brought by *the beneficial owner as plaintiff* against the certified purchaser as defendant, and that suits brought by *a third party as plaintiff* against the certified purchaser as defendant for a declaration that the property, though ostensibly sold to the certified purchaser is liable to satisfy a claim of such third party against the beneficial owner, were not barred under that section (*j*) On the other hand, it was held by the High Courts of Madras (*k*) and Allahabad (*l*) that suits even of the latter description, that is, suits brought by a *third person as plaintiff* were barred under that section The present section gives effect to the Calcutta decisions by providing in sub section (2) that 'nothing in this section shall interfere with the right of *a third person* to proceed against that (*sic*) property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner"

(*f*) *Buhuns* v *Lalla Buhooree* (1872) 14 M I A 496, *Lokhee* v *Kallypuddo* (1875) 23 W R 358 2 I A 154 *Abdul Hamid* v *Muhammed* (1920) 2 Lah L J 353 359

(*g*) *Buhuns* v *Lalla Buhooree* (1872) 14 M I A 496 *Lokhee* v *Kallypuddo* (1875) 23 W R 358 2 I A 154 *Jan Muhammad* v *Ilahi Baksh* (1876) 1 All 290 *Govinda* v *Lala Kishun* (1901) 28 Cal 370 *Vishnu* v *Paglo* (1903) 5 Bom L R 359 *Ghaus-ud din* v *Bishan Dial* (1905) 27 All 443

(*h*) *Uncovenanted Service Bank* v *Abdul Bari* (1896) 18 All 461

(*i*) *Saradindu* v *Gosta* (1922) 27 C W N 208 75 I C 196 (23) A C 302

(*j*) *Kanizak* v *Monohur* (1886) 12 Cal 204 *Subha Bibi* v *Hara Lal* (1894) 21 Cal 519

(*k*) *Rama Kurup* v *Sridevi* (1893) 16 Mad 290 But see *Kollantavida* v *Tiruwalil* (1897) 20 Mad 36?

(*l*) *Delhi and London Bank* v *Partab Bhaskar* (1899) 21 All 29 *Kishan Lal* v *Garuruddhwaja*

66.

Illustration

A obtains a decree against *B*, and attaches certain property alleged to belong to *B* *C* objects to the attachment, alleging that he is the certified purchaser of the property, having purchased the same at a Court sale held in execution of a decree obtained against *B* by *D* *A* alleges that the property was purchased by *C* benami for *B*, and sues *C* for a declaration that *C* was merely the benamidar for *B* The suit is not barred under this section, for it is a suit not by the *beneficial owner*, but by a *third person*

Suit by beneficial owner in possession for declaration of title—There is a conflict of opinion whether a suit by a beneficial owner *in possession* for a declaration of his right to the property against the certified purchaser is barred under this section It has been held by the High Court of Calcutta in a case under s 317 of the Code of 1882, that such a suit is not barred under that section (*m*) On the other hand, it has been held by the High Court of Allahabad that such a suit is barred under that section (*n*) *A* obtains a decree against *B* In execution of the decree certain property belonging to *B* is sold *B* himself purchases the property, but the purchase is made in *C*'s name The certificate of sale is granted to *C*, but *B continues in possession* of the property *After a few years C gives notice to the tenants not to pay rent to B* *B* thereupon sues *C* for a *declaration* that he is the real purchaser and for an injunction restraining *C* from interfering with his tenants The suit is not barred according to the Calcutta decision It is barred according to the Allahabad decision In the Calcutta case, the Court said 'It is not a case in which the plaintiff seeks to obtain a decree for *possession* against the ostensible purchaser Resting as it does on an *existing possession*, we do not think that it is a suit of the nature prohibited by s 317" As to this it was observed by Strachey, C J, in the Allahabad case cited above "If the learned Judges in that case meant to lay down that s 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them" Banerji, J, said "The first paragraph [of the section] is not confined to a suit for recovery of possession only" The correctness of the Calcutta decision was doubted by the same Court in the undermentioned case (*o*), but the principle of that decision was followed by the same Court in a later case (*p*) It was held in the last mentioned case that where a Mahomedan father purchases property at a Court sale with his own money in the name of one of his sons, *and then lets the property to a tenant and the tenant pays rent to him*, this section is no bar to a suit by the other sons against the tenant and the son in whose name the property was bought for recovery of rent after his father's death It is settled law, however, that where the beneficial owner has been in possession *for twelve years or more*, a suit will lie at his instance against the benamidar for a declaration of his title to the property The basis of such a suit is the plaintiff's title *by possession.* The suit is based, not on the ground that the defendant is a benamidar, but on the *title* by possession Such a suit does not come within the purview of this section (*q*)

Person claiming through beneficial owner.—This section precludes a suit by the beneficial owner or one claiming through him It does not preclude a suit by a person who does not claim through the beneficial owner, but claims through another person (*r*)

(*m*) *Sasti Churn* v *Aunopurna* (1896) 23 Cal 699

(*n*) *Bishan Dial* v *Ghazi ud din* (1901) 23 All 175

(*o*) *Hanuman Pershad* v *Jadu* (1916) 43 Cal 20, 26 29 I C 787.

(*p*) *Mahamad* v *Mahammad* (1919) 24 C W N 51, 54 I C 127

(*q*) *Karamullah* v *Nizamut* (1892) 19 Cal 193 See also *Bishan Dial* v *Ghazi ud din* (1901) 23 All 175, 178-179

(*r*) *Narain* v *Durga* (1913) 35 All 133, 18 I C. 246

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Joint purchase—The provisions of this section are designed "to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase" (*s*) It has accordingly been held that where one of several holders of a joint mortgage decree applies for execution of the decree under O 21, r 15, subject to the rights of the other decree holders, and purchases the mortgaged property at the execution sale, the other decree holders are entitled to a declaration that the purchase was made on behalf of *all* the decree holders (*t*) And this is *a fortiori* the case when the purchase money is set off against the entire amount of the debt, in other words, the purchase is made *with the use of joint funds* (*u*)

Where property is purchased at a Court sale by a member of a joint Hindu family in his name, but *with family funds*, the other members are entitled to sue him for a declaration that the purchase was made on behalf of the family, though the certificate of sale stands also in his name The provisions of the section do not apply to such a case It was so held by their Lordships of the Privy Council in *Bodh Singh* v *Gunesh Chunder* (*i*), a case under the Code of 1859 Their Lordships said '[The provisions of the section] cannot be taken to affect the rights of members of a joint Hindu family who, *by the operation of law* and not by virtue of any private agreement or undertaking [such as exists between a benamidar and the beneficial owner], are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds' The same principle applies where the parties stand in the relation of partners, and the purchase is made by one of the partners in his name with partnership funds (*u*) Suppose now that a joint Hindu family consists of *A* and his sons, and *A* purchases property at a Court sale with joint family funds without the concurrence of his sons in the name of a third person, are the sons entitled to recover their share of the property from the third person [certified purchaser]? It has been held by the High Court of Madras (*x*) that they are, the reason given being that the purchase cannot in such a case be said to have been made by the father *on behalf of* the other members of the family, and the sons are not therefore beneficial owners, and the section therefore is no bar to a suit by them On the other hand it has been held by the Allahabad High Court, that if a managing member makes a purchase in the name of a third person, though without the consent of his sons, the purchase must be deemed to have been made on behalf of all the members of the family within the meaning of this section and the sons are precluded by this section from maintaining the suit (*y*) The Allahabad High Court purports to follow the Privy Council ruling in *Suraj Narain* v *Ratan Lal* (*z*) But that case, as pointed out by the Madras High Court was a case under s 317 of the Code of 1882, which contained the words on behalf of any other person, now altered into ' on behalf of the *plaintiff* '

Waiver by certified purchaser of his right to possession—It has been held by the High Court of Madras that if after obtaining a certificate of sale, the purchaser acknowledges that his purchase is benami, and gives up possession, or does some act which clearly indicates an intention to wave his right, or restores the property to the beneficial owner, such act may, by reason of the antecedent relation between the parties, operate as a valid transfer of the property from the purchaser to the beneficial owner Thus if *A* is the *manager* of *B*'s estate

ll 545 | 349 *Natiraji* v *Ramaswamy* (19..) 45 Mad 856 73 I C 479 (22) A M 481
(*y*) *Baijnath Das* v *Bishen* (1921) 43 All 711
57 | 63 I C 676 [purchase by manager in his wife's name]
57 561 | (*z*) (1917) 44 I A 201 211 40 All 159 170,
6 Mad | 40 I C 933
0 Mad

66 [and this is the antecedent relation between the parties] and the estate is sold in execution of a decree against *B*, and is purchased by *B* in *A*'s name, a suit will lie at the instance of *B* against *A* for possession, if, after obtaining the certificate of sale, *A* delivers possession of the property to *B*, and then disturbs *B* in his possession. The reason given is that the permission to hold possession amounts to a *transfer of title* from the benamidar to the beneficial owner and the suit is thus based not on the ground that the purchase was benami but on a fresh title created by the transfer (*a*) The High Court of Allahabad has dissented from this view, and held, relying on the Privy Council case of *Lokee* v *Kallypuddo* (*b*), that the mere permission to hold possession cannot give or transfer a title from the benamidar to the real owner, and that a suit like the above would be barred under this section (*c*) The Calcutta High Court has followed the Allahabad decision (*d*)

Suit for specific performance against certified purchaser.—It has been held by a Full Bench of the Madras High Court in *Venkatappa* v *Jalayya* (*e*) that the present section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement to convey the property made *after* the purchase The decision in *Venkatappa's case* was approved by the Judicial Committee in *Ramatbai* v *Peria* (*f*) In *Ramatbai's case* it was held that the present section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement made after the purchase to transfer the property to the plaintiff in pursuance of an agreement made before it The suit in such cases is not brought on the ground that the *purchase* was made on behalf of the plaintiff within the meaning of this section

Certified purchaser.—Where a purchaser, who had not obtained a certificate was sued, and afterwards applied for and obtained a certificate, it was held that *he was* a certified purchaser within the meaning of this section (*g*)

Successor in title of certified purchaser.—This section bars a suit not only against a certified purchaser, but also against persons claiming title from him (*h*) Under the Code of 1882 there was a conflict of decisions as to whether s 317 of that Code was a bar to suits against persons claiming title from the certified purchaser On the one hand it was held by the High Courts of Madras, Allahabad and Calcutta, that the expression "certified purchaser" in s 317 of that Code *did not include* a person claiming through or under the certified purchaser, such as an heir or an assignee (*i*), and that that section therefore was no bar to a suit against such person On the other hand, it was held by the Bombay High Court that the expression 'certified purchaser *included* his successor in title (*j*) The present section contains a legislative recognition of the view taken by the High Court of Bombay (*k*) It has been held by the High Court of Calcutta that the present section does not apply to an execution purchaser whose title was perfected when s. 317 of the Code of 1882 was in force (*l*)

(*a*) *Monappa* v *Surappa* (1888) 11 Mad 234 *Sankunni* v *Narayannan* (1894) 17 Mad 282 *Kumbalinga* v *Ariaputra* (1895) 18 Mad 436 *Venkatappa* v *Jalayya* (1912) 42 Mad 615 616 51 I C 111

(*b*) (1875) 23 W R 358 2 I A 154

(*c*) *Bishan Dial* v *Ghazi ud din* (1901) 23 All 175 179-180

(*d*) *Harish* v *Nripendra* (1920) 24 C W N 1024 59 I C 719

(*e*) (1919) 42 Mad 615 51 I C 111 *Baburam* v *Dakhina* (1919) 24 C W N 27, 54 I C 726

(*f*) (1920) 47 I A 108 43 Mad 643 56 I C 395

(*g*) *Aldwell* v *Ilahi Baksh* (1883) 5 All 478

(*h*) *Sowker Kamurudeen* v *Noor Mahamad* (1915) 28 Mad L J 251 28 I C 205

(*i*) *Thejyacelan* v *Kochan* (1898) 21 Mad 7 *Sibta* v *Bhagoli* (1899) 21 All 196, *Dukhada* v *Srimonto* (1899) 26 Cal 950

(*j*) *Hari* v *Ramchandra* (1907) 31 Bom 61

(*k*) *Manji* v *Hoorbai* (1911) 35 Bom 342 347 8 I C 752

(*l*) *Promotha Nath* v *Saurav* (1920) 24 C W N 1011 58 I C 377

67. [S. 327.] (1) The Local Government may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

Sub-sec (2) was inserted in the section by the Code of Civil Procedure Amendment Act I of 1914 As to the result where no notification is issued as provided by sub-sec (2), see the undermentioned cases (m)

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. [S. 320, 1st para] The Local Government may declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules for transferring to Collector execution of certain decrees

Object of the section.—"The object of these provisions [i e, provisions relating to the execution of decrees by Collectors] is well known In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from *the old families to modern speculators A strong opinion was entertained by certain* members of the Government of India, that these results of the administration of civil justice were impolitic and inexpedient, and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land holders without the immediate sale of their

(m) *Kishore Chand v Ishar Singh* (1913) P R no 89, p 318, *Fakir v Amin Chand* (1921) 3 Lah L J 5, 66 I C 893

estates and so to preserve the old landed gentry of the country The provisions of ss 320 to 325C [now ss 68 70, 71 and 72 and schedule III] were inserted in the Code of Civil Procedure in order to give effect to these suggestions (n) See notes to O 21 r 90, 'Waiver and estoppel'

Provisions of Third Schedule to apply

69. [*New*] The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section

Rules of procedure

70. [**S 320, 2nd, 3rd and 4th paras**] (1) The Local Government may make rules consistent with the aforesaid provisions—

(*a*) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court,

(*b*) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector,

(*c*) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders, made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector

Jurisdiction of Civil Courts barred

(2) A power conferred by rules made under sub section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court

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(n) *Hiro Prosad Roy* v *Kali Prosad Roy* (1883) 9 Cal 290 at p 294

Power of Local Government to make rules.—A Local Government has power under this section to make a rule providing that no suit shall lie to set aside a sale held or confirmed by a Revenue Authority Such a rule is not *ultra vires* (o)

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector's jurisdiction—Thus if it is declared by notification that a decree for the sale of a particular kind of property, *e g*, "ancestral" property, should be transferred to the Collector for execution, a sale of the property, if made, by a Civil Court, is void Such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree (*p*) For the same reason, if the execution of a decree is transferred to the Collector, the Court transferring the decree has no power to postpone the sale (*q*), or to give leave to the decree holder to bid under O 21, r 72 (*r*), or to re sell the property where a re sale is necessary (*s*), the Collector alone has that power Similarly where a decree is transferred for execution to the Collector, and the decree is subsequently adjusted, the application under O 21, r 2 [Code of 1882, s 258] for recording the adjustment should be made to the Collector (*t*) But where a decree has been sent to the Collector for execution under this section, he holds the money which may be realized in execution of such decree at the disposal of the Court which sent the decree to him for execution, and he is not competent to distribute such money in contravention of an order of the Court indicating the mode of distribution (*u*)

It is to be noted that sub section (2) does not take away the jurisdiction of any Court other than the Court referred to in it The Court there referred to is the Court mentioned in the previous portion of the section, namely, the Court to which an application was made for execution and which as such Court transmitted the decree for execution (*v*)

Where a suit would lie to set aside an order made by a Court executing a decree the fact that such order has been made by the Collector does not deprive the Civil Courts of the jurisdiction to entertain a suit from such order (*w*)

Suit to set aside order of Collector—A suit will lie to set aside an order made by the Collector if the order is *ultra vires* Thus there is no rule made by the Government of Bombay under this section empowering the Collector to set aside a sale under O 21, r 89 [Code of 1882, s 310A] on a deposit by the judgment debtor of the amount specified in that rule, nor is there any rule empowering him to set aside a sale under O 21, r 90 [Code of 1882 s 311] on the ground of material irregularity in publishing or conducting the sale (*x*) Nor is there any rule made by the Local Government of the N W P, under this section empowering the Collector to set aside a sale under O 21, r 89 [Code of 1882, s 310A] (*y*), though there is a rule empowering him to set aside a sale under O 21, r 90 [Code of 1882, s 311] Again, there is no rule made by any of the Local Governments empowering the Collector to set aside a sale on the ground of fraud (*z*) If in any of these cases the Collector arrogates to himself the power which he has not, and sets aside the sale, the order is *ultra vires*, and it is competent to the

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[illegible] 111

(*r*) *Shrinivas* v *Jagaderappa* (1918) 42 Bom 621 46 I C 653

(*s*) *Shahzad Singh* v *Hanuman Rai* (1924) 46 All 562 83 I C 766 ('24) A A 704

(*t*) *Muhammad* v *Payag Sahu* (1894) 16 All 228 *Khushalchand* v *Nandram* (1911) 35 Bom 516

(*u*) *Tapesri* v *Deokinandan* (1894) 16 All 1

(*v*) *Shiam Behari Lal* v *Rup Kishore* (1898) 20 All 379 382 83

(*w*) *Shiam Behari Lal* v *Rup Kishore* (1898) 20 All 379

(*z*) *Pita* v *Chunilal* (1907) 31 Bom 207

Ss. 0-72.

auction purchaser to bring a regular suit in a Civil Court for a declaration that the sale was valid, and that the order of the Collector setting aside the sale was invalid (a)

Appeal —No appeal lies *to the High Court* from an order passed by the Collector in an execution proceeding transferred to him under this section The reason is that this section specially provides that an appeal shall lie from the order of the Collector *to such authorities as the local Government may by rules prescribe* (b)

Revision —An order made by the Collector in the course of execution proceedings under this section sanctioning the prosecution of a party to the suit under s 476 of the Code of Criminal Procedure is an order made by him as a Revenue Court, and is not therefore subject to revision by the High Court (c)

Collector deemed to be acting judicially

71. [**S. 320, 5th para.**] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

"Shall be deemed to be acting judicially."—The result is that the Collector and his subordinates are entitled to the benefit of the provisions of the Judicial Officers Protection Act XVIII of 1850 which are as follows —

"No Judge Magistrate, Justice of the Peace Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of, and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, *Justice of the Peace, Collector or other person* acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound to execute if within the jurisdiction of the person issuing the same

Where Court may authorize Collector to stay public sale of land

72 [S. 326.] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

"The Court may authorize the Collector."—These words are not imperative, but leave a discretion to the Civil Court That discretion can only be exer

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(a) *Mathuradas* v *Panhalal* (1895) 19 Bom 216, *Mathura Das* v *Jamna* (1903) 25 All 355

(b) *Mancherji* v *Thakurdas* (1905) 7 Bom L R 82

(c) *Emperor* v *Asharfi Lal* (1917) 39 All 91 8 C 14 All L J 1007 38 I C 419 See also *Emperor* v *Bhajan* (1915) 37 All 334 29 I C 89

ci ed upon materials placed before the Court It is therefore open to the decree holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court as well by evidence as by argument that the proposal of the Collector is not feasible or practicable The Court should not decline to receive the evidence offered by the decree holder (*d*)

Temporary alienation —This section admits only of a temporary alienation of land, and not an arrangement by which possession is to be left with the judgment debtor subject to payment of the judgment debt by instalments (*e*)

A *temporary* alienation of land belonging to a judgment debtor who is a member of an agricultural tribe does not come within the purview of s 16 of the Punjab Alienation of Land Act 13 of 1900 which prohibits a sale *out and out* (*f*)

Provisions of sections 69 to 71 to apply.—Reading this section with para 2 of schedule III [Code of 1882 s 322] referred to in s 69 it is clear that the provisions of this section cannot be applied to a decree which directs the sale of land in pursuance of a contract specifically affecting the same (*g*) Similarly reading this section with para 11, sub para (1) of schedule III [Code of 1882, s 322A] it follows that where a judgment debtor executes a mortgage of his property, while the property is in the management of a Collector under this section with an undertaking to put the mortgagee in possession the mortgagee is not entitled to claim possession (*h*) Likewise reading this section with the same paragraph, no Court can issue any process of execution against any immoveable property in the management of a Collector under this section Therefore, the period during which the property is in the management of the Collector under this Section should be excluded from the period of limitation applicable to the decree of which execution is refused by the Court by reason of the property having been in the Collector s management (*i*) see sch III, para. 11, sub para (3)

DISTRIBUTION OF ASSETS

Proceeds of execution sale to be rateably di tri buted among decr e holders

73. [S 295] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same [illegible] not obtained satisfaction thereo[illegible] the costs of realization, shall be rat[illegible] such persons :

Provided as follows —

(*a*) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

[illegible] 53 I C 603 [F B] *Sain Dulla v Nur Ahmad* (1922) 4 Lah L J 476 74 I C 194

(*f*) *Sardarni v Ram Rattan* (19 0) 1 Lah 19[illegible]

(*g*) *Bhagwan Prasad v Sheo Sahai* (1930) 2 All. 836

(*h*) *Seth Jaldayal v Ram Sahae* (1890) 17 Cal. 432 [P C]

(*i*) *Girdhar Das v Har Shankar* (1-2[illegible]) 2[illegible] All. [illegible]

3. (*b*) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold,

(*c*) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale,

secondly, in discharging the amount due under the decree,

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any), and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets

(3) Nothing in this section affects any right of the Government

Changes introduced by the section—The present section differs from the corresponding s 295 C P C, 1882 in the following respects —

1 The words where assets are held by a Court have been substituted for the words whenever assets are realized *by sale or otherwise in execution of a decree* This it is submitted introduces an important alteration though the High Court of Bombay has held otherwise See notes Assets held by a Court on p 207 below

2 The words before the receipts of such assets have been substituted for the words prior to the realization. See notes Before the receipt of the assets on p 206 below

3 The word passed has been added after the word money See notes Same judgment debtor on p. 214 below

4 The words, "interest in," in cl (b) have been substituted for the words, "right against," to bring the wording of that clause into line with the Transfer of Property Act, 1882, s 96 This is a mere verbal alteration

Rateable distribution —The object of this section is to provide a cheap and expeditious remedy for the execution of money decrees held against the same judgment debtor by adjusting the claims of rival decree holders without the necessity for separate proceedings (j) Under the Code of 1859 (s 270), the creditor who first attached property has a prior claim to have his decree satisfied out of the sale proceeds to the exclusion of other creditors, but now all judgment creditors who apply to the Court, prior to the receipt of the sale proceeds by the Court, are entitled to share rateably (k) In *Bithal Das* v *Nand Kishore* (l), Strachey, C J, said 'The object of the section is two fold The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one *separately* attaching and *separately* selling that property The other object is to secure an equitable administration of the property by placing all the decree holders in the position I have described upon the *same* footing, and making the property *rateably* divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property ' *A* obtains a decree against *B* in Court X for Rs 4 000, and applies to that Court for execution of his decree by attachment and sale of certain property belonging to *B*, and the property is thereupon attached *C* then obtains a decree also against *B* in Court X for Rs 2 000, and applies to that Court for execution of his decree by attachment and sale of the same property attached in execution of *A* s decree The property is then sold by the Court in execution of *A* s decree for Rs 3,000 *C* is entitled to share rateably in the net sale proceeds, that is to say, if the net sale proceeds amount to Rs 3,000, *A* will be paid Rs 2,000 and *C* will be paid Rs 1 000 It is not necessary to entitle *C* to participate in the assets that he should have given *notice* to *A* of the application made by him for execution of his decree (m)

Conditions for rateable distribution —To entitle a decree holder to participate in the assets of a judgment debtor the following conditions must be present —

1 The decree holder claiming to share in the rateable distribution should have *applied for execution* of his decree to the *Court by which the assets are held*

2 Such application should have been made *prior to the receipt of the assets* by the Court

3 The assets of which a rateable distribution is claimed must be *assets held by the Court*

4 The attaching creditor as well as the decree holder claiming to participate in the assets should be holders of *decrees for the payment of money*

5 Such decrees should have been obtained against the *same judgment debtor*

No rateable distribution can be claimed under the section unless all the conditions enumerated above are present We proceed to examine these conditions

1. Court to which application for execution should be made— Those decree holders alone are entitled to rateable distribution who have applied for execution of their decree in the form prescribed by O 21, r 11 [Code of 1882, s 235] *to the Court by which the assets are held* (n)

(j) See *Hasoon Arra* v *Jaoaloonnissa* (1879) 4 Cal 29

(k) *Konnachi* v *Lakker* (1897) 20 Mad 107 111

(l) (1901) 23 All 106

(m) *Chunni Lal* v *Jugal Kishore* (1905) 27 All 13

(n) *Krishnashankar* v *Chandrashankar* (1881) 5 Bom 198, 201

73. The point to be considered under this head is whether where property of the same judgment debtor is attached in execution of decrees of more Courts than one, and the property is sold by the Court of the highest grade, the holders of decrees of inferior Courts are bound, in order that they may be entitled to rateable distribution, to have their decrees transferred to the Court of the highest grade and make a fresh application for execution to that Court *A* obtains a decree against *B* in the Court of a Subordinate Judge of the First Class In execution of the decree *B*s property is attached by that Court *C* then obtains a decree against *B* in the Court of a Subordinate Judge of the Second Class and applies to that Court for execution of his decree by attachment and sale of the same property The property is then sold by the First Class Subordinate Judge in execution of *A*'s decree, and the sale proceeds are received by that Court Here the Court of the Subordinate Judge of the First Class is the Court by which the assets are held Is *C* entitled to rateable distribution? No, according to the High Court of Bombay, he not having applied to the Court of the Subordinate Judge of the First Class for execution of the decree, that being the Court by which the *assets are held* (*o*) Yes, according to the Calcutta (*p*) and Madras High Courts (*q*), the reason given being that under s 63 the Court of the Subordinate Judge of the First Class is the Court to determine all claims relating to the attached property and such claims *include* claims for rateable distribution

2 Before the receipt of the assets—The application for execution must be made *before the receipt* of the assets by the Court The corresponding s 295 of the Code of 1882 commenced as follows —

"Whenever assets are *realised by sale or otherwise in execution of a decree*, and more persons than one have, *prior to the realization*, applied to the Court by which such assets are held"

The present section begins as follows —

"Where assets are *held by a Court*, and more persons than one have, *before the receipt of such assets*, made application to the Court"

The word "realization" was rather obscure Indeed it called for several decisions in which the Courts had to define its precise meaning The word "receipt" which is now substituted for "realization" is not likely to require any judicial interpretation Cases of the character noted below which turned upon the word "realization" are not likely to arise under the present section, so clear is the meaning of the word "receipt"

A, *B* and *C* held each a money decree against the same judgment debtor In December 1892, *A* attached by a prohibitory order funds of the judgment debtor in the hands of *D* [O 21, r 46, Code of 1882, s 268] In January 1893, *B* attached the same funds in execution of his decree In February 1893, *D* paid the funds into Court On the same day, but *after* payment was made into Court, *C* applied to attach the funds as property in the custody of the Court [O 21, r 52, Code of 1882, s 272] It was held under s 295 of the Code of 1882 that the funds should be rateably distributed between *A* and *B*, and that *C* was not entitled to participate therein, as his application was made *subsequent* to the *realization* of the assets by the Court (*r*) The decision would be the same under the present section, for it is quite clear that *C*s application was made *after the receipt* of the assets by the Court

It was held under s 295 of the Code of 1882 that where property is *sold* in execution of a decree, the sale proceeds are deemed to be *realized* not when the 25 per cent

(*o*) *Nimbaji* v *Lalia* (1892) 16 Bom 683

(*p*) *Clark* v *Alexander* (1894) 21 Cal 200 *Hari Bhagat* v *Anandaram* (1897) 2 C W N 126, *Bejoy* v *Hukum* (1902) 29 Cal 773, *Girindra* v *Kedar Nath* (1924) 29 C W N 575, 87 I C 783 (25) A C 966

(*q*) *Narasimhachariar* v *Krishnamachariar* (1914) 26 Mad L J 406 23 I C 909

(*r*) *Srinivasa* v *Seetharamayyar* (1896) 19 Mad 72

is deposited by the purchaser into Court under s 306 [now O 21, r 84], but when the balance of the purchase money is paid (s) Hence a decree holder who applied for execution *before* the entire amount due from the purchaser had been paid into Court was held entitled to share in the rateable distribution, though the application was made after deposit of the 25 per cent But it was held that a decree holder who applied for execution *after* the entire amount of the purchase money had been paid into Court was not entitled to share in the rateable distribution though his application was made before the sale was *confirmed* by the Court under s 312 [now O 21, r 92], and the decision was put on the ground that the point of time when assets are *realised* is when the sale proceeds are paid into Court, and not when the sale becomes absolute (t) The result is the same under the present section as will be seen by substituting the word "received" for the word "realized" (u)

It has been held by the High Court of Madras that where immoveable property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be *realized* until the entire amount of the purchase money in respect of *all* the parcels is paid into Court (v) This decision was followed by the Calcutta High Court (u), but in a later case that Court held that where immoveable property is sold in separate parcels, the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Court (x) As regards moveable it has been held by the Lahore Court, that if the property consists exclusively of moveables, and they are sold in separate lots on different dates, the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Officer of the Court and not on the date on which the last payment is received Thus if some of the moveables are sold and the price thereof is received on January 5, and the rest are sold and the price thereof is received on January 10, a decree holder who applies for rateable distribution on January 7 is entitled to rateable distribution of the sale proceeds realized on January 10, but not of those realized on January 5 (y)

Where property is sold in execution by a person appointed by the Court under O 21, r 63, the receipt of purchase money by such person is for the purposes of this section equivalent to receipt of assets by the Court The material date, therefore, is not the date on which the Court receives the amount of the purchase money from such person, but the date on which such person receives the purchase money from the purchaser (z)

Sale by Collector —Where the sale is held by the Collector the application for execution must be made before the sale proceeds are *received* by him, though he may send the sale proceeds to the Court under Sch III, cl 9, at a later date (a)

3 Assets held by a Court —Far more important than the change effected by the word "receipt" is the change introduced by the omission of the words "whenever assets are realized *by sale or otherwise* in execution of a decree," and the substitution therefor of the words "where assets are *held* by a Court" The latter words, coupled with the words "realization" which occurs later on in the section, include,

(s) *Hafez* v *Damodar* (1891) 18 Cal 242

(t) *Vishvanath* v *Virchand* (1882) 6 Bom 16

(u) *Maharaja of Burdwan* v *Apurba* (1911) 14 Cal L J 50 10 I C 527 *Girindra Nath* v *Kedar Nath* (1924) 29 C W N 575 87 I C 783

(v) *Ramanathan* v *Subramanian* (1903) 26 Mad 179

(w) *Barendra Nath* v *Martin & Co.* (1921) 33 Cal L J 7, 12 62 I C 167

(x) *Girindra Nath* v *Kedar Nath* (1924) 29 C W N 575 87 I C 783, (25) A C 966

(y) *Surjan Singh* v *Prag Das* (1918) P R no 33 p 128 45 I C 108

(z) *Galstaun* v *Bonnerjee* (1917) 44 Cal 789, 35 I C 850

(a) *Dattatraya* v *Pundlik* (1920) 22 Bom L R 1001, 58 I C 932

73. it is submitted, several kinds of assets which were held not liable to rateable distribution under s 295 of the Code of 1882

Assets available for rateable distribution—The only kinds of assets that were held to be available for rateable distribution under s 295 were —

(a) assets realized by "sale in execution of a decree," that is, sale proceeds of property sold in execution of a decree (*b*), and

(b) assets realized "otherwise in execution of a decree These words were held to mean assets realized from the property of the judgment debtor by such modes as those prescribed by s 291 [O 21, r 69], s 305 [O 21, r 83] and s 322 [Sch III, paras 2 and 7] (*c*) This was explained in later decisions as meaning assets realized in one of the modes *expressly* prescribed by the sections of the Code (*d*) The following were held to be assets of this class —

(i) debts attached under s 268 [now O 21, r 46] and paid into Court by the garnishee (*e*),

(ii) rents of property under attachment realized by a receiver appointed under s 503 [now s 51, cl. (d)] at the instance of the decree holder (*f*) [The appointment of a receiver by the Court in such a case is a "process of execution'],

(iii) money in the custody of a public officer attached under s 272 [now O 21, r 52] and paid into Court by that officer (*g*),

(iv) money realized in execution of a decree held by the judgment debtor against another, where such decree is attached and realized under O 21, r 53 [Code of 1882, s 273] (*h*),

(v) money paid under O 21, r 69, to the officer conducting the sale to stop the sale (*i*),

(vi) money raised by the judgment debtor by private alienation under O 21, r 83, and paid into Court (*j*)

Assets not available for rateable distribution.—Assets not realized "by sale or otherwise in execution of a decree" were not liable to rateable distribution under s 295 The following are instances of assets held not to be "realized by sale or otherwise in execution of a decree" within the meaning of s 295, and therefore not subject to rateable distribution under that section —

Cases under s. 295 of the Code of 1882.

A.—*Purshotamdass* v *Surajbharthi* (1882) 6 Bom. 588—Moneys paid by a judgment debtor under arrest under s 236 of the old Code [now s 55, proviso 4] to the officer arresting him in order to secure his release were held to be assets not subject to rateable distribution. Sir Charles Sargent, C.J, said 'Section 295 must be read as if the words 'from the property of the judgment debtor' were inserted after the word 'realized.' The provisions contained in sections 291 [O XXI, r 83], 305 [O XXI, r 69] and 322 [now Sch. III, paras. 2 and 7, the latter para corresponding with

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(*e*) *Sorabji* v *Govind* (1892) 16 Bom 91 [illegible]

[illegible]

(*j*) 6 Bom 588 589 *supra*, *Thiruvvam* v *Lakshmana* (1918) 41 Mad 616 47 I C 533

s 323 of the old Code] are all modes of realizing assets from such property 'otherwise than by sale, and are sufficient to account for the introduction of that expression into section 295 The effect of the above decision is that to constitute a realization with the meaning of s 295 it must be either a realization by a sale in execution under the process of the Court, or it must be a realization *in one of the other modes expressly prescribed by the sections of the Code*

This was the leading case under the old section, and it was followed in cases B, C, D and E below

The correctness of the reasoning in *Purshotamdas* case seems to have been doubted in *Manilal* v *Nanabhai* (*k*) where Sir Lawrence Jenkins C J, said 'Prima facie the word 'realized implies that property has been *converted into* or *obtained* in cash or some other form available for immediate distribution and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution

B —*Gopal Dei* v *Chunni* (1886) 8 All 67, following case A—Money paid into Court by the judgment debtor under s 275 of the old Code [now O XXI, r 55 (a)] for payment of the amount due to the decree holder at whose instance the property was attached was held to be an asset not available for rateable distribution the reason given being that the money was not realized ' from the property of the judgment debtor

C —*Sew Bux* v *Shib Chunder* (1886) 13 Cal 225 following case A—*A* obtained a decree for money against *B* *B*s property was attached in execution of the decree *C* then obtained a decree for money against *B*, and applied for attachment of *B*'s said property, a warrant of attachment was issued but the property was not actually attached *B* then filed his petition in insolvency, and a vesting order was made The Official Assignee then paid into Court the amount of *A* s decree and the property was released from attachment *C* then applied for rateable distribution under s 295 of the amount paid into Court *Held* that *C* was not entitled to rateable distribution Trevelyan J said I do not think that in this case the money was realized out of the property of the judgment debtor I think that by sale or otherwise means by sale or other process of execution provided for in the Civil Procedure Code '

D —*Prosonnomoyi* v *Sreenauth* (1894) 21 Cal 809—In this case, Sale, J, said that the rule deducible from cases A and C was that " to constitute a realization within the meaning of section 295 it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes *expressly* prescribed by the sections of the Code

E —*Vibudhapriya* v *Yusuf* (1905) 28 Mad 380, following cases A, B, C and D—Moneys realized by a judgment debtor by a private sale of his property attached in execution of a decree against him and paid by him into Court under s 275 of the old Code [now O XXI, r 55 (a)] for payment of the amount due to the decree holder at whose instance the property was attached were held to be assets not available for rateable distribution, the reason given being that though there was a realization of assets, the

(*k*) (1903) 28 Bom 264 274

realization was not in one of the modes *expressly* prescribed by the sections of the Code

Note—The only distinction between cases B and E is that in case E the judgment debtor obtained the money by sale of the attached property, while in case B he obtained it without any sale

It is submitted that the assets in cases A, B, C and E should under the present section be treated as assets available for rateable distribution. The test under the present section is—

(1) whether the moneys of which rateable distribution is claimed are assets held by the Court, and

(2) whether they have been realized or obtained in execution. The scope of the new section is wider than that of the old one (*l*). See below notes under case F

Cases under the present section

In the following cases which were all decided under the present section it was held that the moneys held by the Court were not assets available for rateable distribution within the meaning of the section —

F—*Surabji v. Kala* (1911) 36 Bom. 156, 12 I. C. 911—Money paid into Court by a judgment debtor under O. XXI, r. 55 (a) [Code of 1882, s. 295] for payment of the amount due to the decree holder at whose instance the property was attached has been held not subject to rateable distribution under this section. (This is the same as case B above.) Sir Basil Scott, C. J. said: "In the reference to the costs of realization we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI Rule 55 was assets held by the Court within the meaning of section 73 we should be only nullifying the provisions of Rule 55, for there will be no inducement to any judgment debtor to procure a payment into Court of the amount claimed by his attaching creditor, if his money could at once be absorbed by rateable distribution amongst a number of other creditors." This assumes that the word 'realized' means realized by sale or other process of execution expressly prescribed by the sections of the Code as was held in cases A, C, D and E. It is submitted with respect that the words "sale or otherwise" which occurred in s. 295 of the Code of 1882 having been omitted in the present section the interpretation put upon those words in cases A, C, D and E can no longer govern cases arising under the present Code. All that is necessary under the present Code is that (1) there should be assets held by the Court, and (2) that such assets should have been realized *or obtained* in execution proceedings [see the observations of Sir Lawrence Jenkins cited in case A above]. It cannot possibly be said that moneys paid into Court by a judgment debtor under stress of execution under O. 21, r. 55 (a) are not assets *obtained* in execution proceedings. It is indeed difficult to see how this view of the section nullifies the provisions of O. 21, r. 55, for money paid into Court under r. 55 may be held to be assets subject to rateable distribution, and yet full effect may be given to r. 55. There is no reason why because a particular payment may operate to release the person [see case G] or property of a judgment debtor from attachment, that payment should be applied for the benefit exclusively of the decree holder at whose instance

(*l*) *Harai Saha v. Fazlur Rahman* (1913) 40 Cal. 619, 672, 19 I. C. 839

S. 73.

the person or property of the judgment debtor was attached Moreover, the object of O 21, r 55, is not to afford any inducement to a judgment-debtor as supposed by the Court in *Sorabji v Kala* All that O 21, r 55, says is that the circumstances mentioned in cls (a), (b) and (c) of that rule shall have the effect indicated in the rule As to the argument based on the costs of realization, it cannot possibly be said that no costs were incurred in obtaining the moneys from the judgment debtor The decision in *Sorabji v Kala* has been disapproved by the High Court of Madras (m) It has also been disapproved by Pratt, J, in a later Bombay case—*Nathmal v Maniram* (n) As to the first of the two grounds on which the decision in *Sorabji v Kala* was based, namely, that the money was not realized in process of execution, Pratt, J, said that it followed the cases decided on the words "sale or otherwise,' which were held to mean sale or other process of execution *expressly* provided for in the Code, but that it was too restrictive a construction under the amended section (o) As to the second ground, namely, that to allow rateable distribution of money paid into Court under O 21, r 55, would be to nullify the provisions of r 55, the learned Judge said "I also venture to doubt the correctness of the second reason Order XXI, rule 55, operates effectively where there is one decree holder If there are a number of decree holders there is no scope for the rule, for the judgment debtor has no motive for paying off one judgment creditor when the same property is liable to be re attached by the others To allow one decree holder to be paid off in full when the property is insufficient to discharge other judgment debts might possibly be undue preference and defeat the object of the section which is equal distribution of all the monies received in execution Again why should a judgment creditor, whose attachment has been removed under Order XXI, r 55, be in a better position than a judgment creditor who has taken the trouble of bringing the property to sale Lastly, if the money paid under Order XXI, rule 55, to remove an attachment is not available for rateable distribution, then *a fortiori* money paid to stop a sale under Order XXI, rule 69 would also not be so available But even under the old section it was assumed by Sir Charles Sargent in *Purshottamdas case* [case A, p 208] that money paid to stop a sale is available for rateable distribution So that the interpretation put upon the section in *Sorabji v Kala* makes the new section more restrictive than the old one, and this is not what the Legislature intended The decision in *Sorabji v Kala* has also been dissented from by the Calcutta High Court in *Noor Mahomed v Bilasiram* (p) In that case Rankin, J, said The money, paid with whatever motive, if paid to the Court, is paid upon terms of the Code whatever they may be These terms, as I read section 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in Court, are now no part of the definition of assets that are subject to distribution rateably The object of the new Code in using larger language can only be to avoid anomaly To introduce a distinction on the strength of the *voluntariness* of the payment or the purpose of the debtor is, I think, to cut down the language and intention of the Code upon a principle which is inapplicable to the subject matter and

(m) *Thavarasiam v Lakshmana* (1918) 41 Mad. 616 618 47 I C 538

(n) (1919) 21 Bom L R 975 978-79 53 I C 593

(o) See *Harai Saha v Fazlur Rahman* (1913) 40 Cal 619 622 18 I C 839

(p) (1920) 47 Cal 515 59 I C 458

73. which if applicable is very difficult to apply' The same view has been taken in later decisions of the same Court (q) In a recent Bombay case not yet reported Mirza, J, refused to follow the opinion of Scott, C J, in *Sorabji* v *Kala* on the ground that it was obiter

In the Madras case above referred to (r) it was held that moneys paid into Court under O 21, r 83 (2) were assets liable to be distributed rateably within the meaning of this section In the course of the judgment, however, the learned judges went to the length of observing that the assets referred to in the present section need not be assets obtained in execution proceedings This indeed is an extreme view and it was dissented from by Pratt, J, the learned judge holding that the reference to the costs of realization and the position of the section in the Code at the end of Part II on Execution led irresistibly to the conclusion that the assests to be available for rateable distribution must have been obtained *in execution* (s) The view taken by Pratt, J, is, it is submitted, correct In a recent Calcutta case Rankin, J, took much the same view as Pratt, J (t) The learned Judge said If for example a defendant is made to pay into Court the amount of the plaintiff s claim as a condition of getting an adjournment, it does not follow from my reading of section 73 that other creditors could claim to share Nor could they under O 21, r 52, where funds in Court are themselves the subject matter of the execution

G—*Ebji Umersey* v *W & A Graham & Co* (1917) 19 Bom L R 274 39 I C 623—Money paid by a judgment debtor under arrest under section 55 proviso 4, to the officer arresting him in order to secure his release is not an asset subject to rateable distribution [This case is the same as case A] Macleod, J, said ' It appears that the section was only intended to apply to assets *realised by the sale* of property attached This view of the section it is submitted, is not correct If this view were correct, money paid to stop a sale under O 21, r 69, and money raised by private alienation under O 21, r 83, would not be assets subject to rateable distribution. But even under the old section it was assumed by Sir Charles Sargent in case A that such monies were available for rateable distribution It cannot possibly be said that the present section is more restricted in its scope than the old section See also the observations of Rankin, J, in *Noor Mahomed s case* cited in case F above

H—*Nathmal* v *Maniram* (1919) 21 Bom L R 975, 53 I C 599—*A* obtained a decree for money against *B* and in execution of the decree took out a warrant for attachment of the moveable property of *B* under O 21, r 43 The bailiff entered *B* s shop and showed the warrant to *B* and pointed out that if the money were not paid he would seize and keep in his custody the moveable property in his shop *B* then paid the decretal amount and costs of execution and sheriff s poundage Upon these facts Pratt, J, expressed the opinion that the money having been paid under stress of the warrant (u), and the warrant being a process of execution, the money was an asset

Bilastram (1920) 47 Cal 59 See also *Surkeena* v
5) 53 Mad 221 224 29

Path Colliery Co (1979) 3
Keshub (1868) 9 W. R

supra

available for rateable distribution within the meaning of the present section The learned Judge, however, felt bound by the decision of the Appellate Court in *Sorabji* v *Kala* [case F], and held that the money was not subject to rateable distribution

I —*Ghisulal* v *Todarmull* (1921) 26 C W N 169, 70 I C 539—In a money-suit by *A* against *B*, *B*'s property was attached before judgment, and then released on *C* standing security for the amount of the claim The suit was ultimately decreed, and *A* applied for execution, whereupon *C* deposited the amount of the decree in Court On that very day just before the deposit was made *D*, another decree holder, applied for execution of his decree It was held that the moneys deposited by the surety were assets held by the Court within the meaning of this section, and *D* was entitled to rateable distribution

J —*For other cases see*—

- O 21, r 52, notes "Priority "
- O 21, r 72, notes "Amount due on the decree
- O 21, r 83, notes "Rateable distribution."
- O 21, r 89, notes "For payment to the decree holder—rateable distribution"

4. **Decrees for the payment of money**—It is only holders of *decrees for the payment of money* that are entitled to a rateable distribution under this section. What is a decree for the payment of money within the meaning of this section? We proceed to note the decisions —

(i) A decree for the payment of mesne profits is a ' decree for the payment of money within the meaning of this section, notwithstanding that the amount of mesne profits has not yet been ascertained The holder of such a decree, who has applied for attachment under O 21, r 42 [Code of 1882, s 255], is entitled to a rateable distribution with other decree holders under this section (t)

(ii) A decree upon a mortgage which enables the mortgagee to realize the amount of the mortgage debt from the mortgaged properties *and from the defendants personally* was held to be a decree for the payment of money within the meaning of the old section by the High Court of Calcutta in *Hart* v *Tara Prasanna Mukherji* (u) In that case the Court said Every decree, by virtue of which money is payable is to that extent a ' decree for money within the meaning of the section even though other relief may be granted by the decree [*e g* , sale of mortgaged property], and the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money *simpliciter* (x) Following these observations, the High Court of Madras held that "where a decree upon a mortgage directs the mortgagor to pay the mortgage-debt to the mortgagee within a period fixed by the Court, and provides that in default the mortgaged property should be sold, and *the balance, if any, should be recovered from the mortgagor,*' the decree was one ' for the payment of money" within the meaning of the old section (y) In subsequent cases, however, which turned upon the meaning of the expression "decree for the

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[illegible]

Code of 1882 which contained the expression decree for the payment of money now s 45], and approved in *Vaidhinathasamy Ayyar* v *Somasundram Pillai* (1905) 28 Mad 473 [a case under s 258 of the Code of 1882 now O 21 r 2]

3.

payment of money" which occurred in s 230 of the Code of 1882 [now s 48] the High Court of Calcutta dissented from the Madras decision, on the ground that the decree in that case was not similar to the decree in *Hari – Tara Prasanna Mukherji*, the decree in the latter case containing a distinct order upon the mortgagor personally to pay the amount of the mortgage debt (z) The decree in those cases was similar to the decree in the Madras case and it was held that the decree was not a " decree for the payment of money" within the meaning of s 230 of the Code of 1882 The decision, it seems, would have been the same if the Court had been called upon to interpret the same expression in s 295 of the Code of 1882, and the observations in *Hari's* case set out above would have been regarded as mere *obiter dicta* The Allahabad decisions, bearing on the expression "decree for the payment of money" in s 230 of the Code of 1882, are also to the same effect (a) There is little doubt that if these High Courts were called upon to decide whether a decree of the character in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not In any event the Madras decision cannot be sustained under this Code see O 21, r 20

(iii) A decree directing the payment under s 90 of the Transfer of Property Act [now O 34 r 6] of the balance of the mortgage debt remaining due after payment to the mortgagee of the nett proceeds of the sale of the mortgaged property is a "decree for the payment of money" within the meaning of this section (b)

(iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money so far as that person is concerned, merely because it directs as against another person, the realization of the money claim from mortgaged property Thus a decree against *A*, *B* and *C* which, so far as *A* and *B* are concerned is a decree for the enforcement of a mortgage by sale of their property, but which does not direct the sale of any specific property belonging to *C*, is as regards *C*, a decree for the payment of money (c)

(v) A judgment entered up under s 86 of the Insolvent Debtors Act is a money decree (d)

5 **Same judgment-debtor.**—The provisions of this section do not apply unless the judgment-debtor is the same Where the holder of a decree against *two or more persons* applies for a rateable distribution of the assets realized from property belonging *to one of such persons*, the application is one for the execution of the decree against the *same judgment debtor*

Illustration

X obtains a decree against *A*, and attaches *A's* property in execution of the decree *Y*, who holds a decree against *A* and *B*, applies for execution of his decree by attachment and sale of *A's* property attached in execution of *X's* decree *Y* is entitled under this section to share in the proceeds of the sale of *A's* property, it is immaterial that *Y's* decree is against *B* also and that the decree might have been separately executed against *B*, *Shumbhoo Nath* v *Luckynath* (1883) 9 Cal 920, *Grant* v *Subramanian* (1899) 22 Mad 241, *Delhi and London Bank* v *Uncovenanted Service Bank* (1888, 10 All 35

[illegible]

Mad 241 236-87

(c) *Delhi and London Bank* v *Uncovenanted Service Bank* (1888) 10 All 35

(d) *In re Bhagwandas* (1884) 8 Bom 311

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realized from property belonging to that person and another, such application is an application for the execution of a decree against the *same judgment debtor*

Illustrations

X obtains a decree against *A*, *B* and *C*, and attaches in execution of the decree certain property belonging to *A*, *B* and *C* jointly *Y* holds a decree against *A* alone *Y* is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property, so far as they represent the share of *A* in that property Similarly, if *Y* held a decree against *A* and *B*, he would be entitled to a rateable distribution of the assets so far as they represented the share of *A* and *B* in the property *Gonesh* v *Shiva* (1903) 30 Cal. 583, *Gatti Lal* v *Bir Bahadur* (1905) 27 All. 158, *Ramanathan* v *Subramania* (1903) 26 Mad 179, *Chhotalal* v *Nabibhai* (1905) 7 Bom L. R 567 These were decisions under s 295 of the Code of 1852 *Quaere* whether these decisions have been affected by the introduction in the present section of the word ' passed ' which did not find a place in the Code of 1882 *Balmer Lawrie & Co* v *Jadunath* (1915) 42 Cal. 1, 27 I C 644

Decree against legal representative of judgment debtor —It has been held by the High Courts of Bombay and Madras that if a decree is obtained by *X* against *B*, and by *Y* after *B*'s death against *B*'s legal representative, the judgment debtor is not the same and the present section does not apply (*e*) A different opinion has been expressed by the High Court of Calcutta (*f*)

Clauses (a), (b) and (c) —The first paragraph of this section and clauses (a) and (b) have reference to sales in execution of simple money decrees Clause (a) declares the incompetence of a mortgagee or incumbrancer as such to share in any surplus proceeds, when property is sold subject to his mortgage or charge But the alternative is afforded to him by clause (b) of consenting to the property being sold free of his mortgage or charge in which case the Court may give him the same right against the sale proceeds as he had against the property Clause (c) has reference to a sale in execution enforcing an incumbrance but in distributing the sale proceeds the discharge of subsequent (and not prior) incumbrances is alone taken into account (*g*) In cases coming under clause (c) the application for execution must be made prior to the *sale* of the property (*h*) Compare O 34 r 13

Claims for rateable distribution of assets —These claims are claims enforceable under an attachment within the meaning of s 64 See notes to s 64, " Explanation to the section, on p 185 above

Attachment before judgment —A decree holder, who has caused property to be attached before judgment, is not entitled to share in a rateable distribution of the sale proceeds of that property, unless he makes, after judgment, a fresh application for execution under O 21 r 11 [Code of 1882, s 235] O 38, r 11 [Code of 1882, s 490] does not touch the point (*i*)

Sub-sec (2): Suit for refund —The scheme of this section is to enable the Court as a matter of administration to distribute the assets according to what seem at the

(*e*) *Govind* v *Mohonraj* (1901) 25 Bom 494 *Srinivasa* v *Kanthimathi* (1910) 33 Mad 465 5 I C 917

(*f*) *Hart* v *Tara Prasanna Mukherji* (1885) 11 Cal 718 7-8

(*g*) *Jagat* v *Dhundhey* (1883) 5 All 566 See also *Mulhu* v *Kishan* (1890) 12 All 546

(*h*) *Dattatraya* v *Pundlik* (1920) 22 Bom L R 1001 1003 58 I C 99-

(*i*) *Vallonji* v *Jordan* (1888) 12 Bom 400 *Arunachellam* v *Haji Sheek Meera* (1910) 34 Mad 25 7 I C 855

3. time to be the rights of parties without this distribution importing a conclusive adjudication as to those rights, which may be subsequently re adjusted in a suit brought under the penultimate paragraph of the section (j) Such a suit is virtually a suit for money had and received and the period of limitation is three years from the date of the receipt of the assets by the defendant (l) The suit being one for money *had and received*, it would be premature if it were brought before the moneys were *actually paid* to the defendant A *mere order* for the payment of money under this section is not sufficient to found the action (l)

Suit by subsequent mortgagee to recover balance of money realised by sale under a prior mortgage —X mortgages his property to A He then mortgages the same property to B Subsequently he executes a further charge on the property in favour of A A sues X on the first mortgage, joining B as a defendant, and obtains a decree on the mortgage The property is sold in execution of the decree and a balance of Rs 12 000 which remains after satisfying A s decree is deposited in Court A then obtains a decree for sale on the further charge, and in execution of the decree draws out the balance deposited in Court B is not joined as a party to this suit nor is any notice given to him that A was drawing out of Court the balance of Rs 12 000 B then sues A to recover the amount drawn out by A that is Rs 12 000 Such a suit is not one under sub sec (2) and the period of limitation applicable to the suit is 12 years under art 132 of the Limitation Act The suit is really one to enforce payment of money charged upon immoveable property within the meaning of that article (m)

Declaratory suit —Is a decree holder claiming under this section entitled to file a suit for a declaration that another decree holder is not entitled to rateable distribution, and for an injunction restraining him from receiving payment, *before* distribution of the assets by the Court or is he bound to wait until actual distribution is made and then sue for a refund? In a Madras case (n) Sadasiva Ayyar, J, expressed the opinion that he is entitled to sue for a declaration

Inquiry as to the validity of decree —There is a conflict of opinion whether where it is alleged by a claimant that a decree obtained by another claimant is collusive, that is, obtained by the latter in collusion with the judgment debtor, the Court has power to inquire into the validity of the decree The High Court of Calcutta (o) has held that it has On the other hand, it has been held by the High Courts of Madras (p) and Bombay (q), that it has not The latter view, it is submitted, is correct If a Court executing a decree has no power to go behind the decree [see notes to s 38] much less has a Court acting under the provisions of this section (r)

Rights of Government not affected —A judgment debt due to the Crown is entitled to precedence in execution (s)

Rights created by this section not affected by insolvency —An order made under this section for rateable distribution is not affected by the insolvency of

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(j) *Shankar Sarup* v *Mejo Mal* (1901) 23 All 313 3 .. 28 I A 203

(m) *Barhamdeo* v *Tara Chand* (1914) 41 Cal 654 41 I A 45 21 I C 961

(n) *Venkatarama* v *The South Indian Bank, Limited* (1920) 43 Mad 381 392 55 I C 452

(o) *In re Sundar Dass* (1885) 11 Cal 42 *Puranchand* v *Surendra* (1912) 16 Cal L J

(p) *Saravana* v *Arunachalam* (1917) 40 Mad 841 38 I C 117

(q) *Dattatraya* v *Purshotam* (1922) 46 Bom 635 65 I C 600 (..) A B 31 [F B]

(r) See *Shankar Sarup* v *Mejo Lal* (1901) 28 I A 203 23 All 313

(s) *Secretary of State* v *Bombay Landing Co* (1868) 5 B H C 23

the judgment debtor *subsequent* to the making of the order But the order will be confined in its operation to the assets of the judgment debtor realized *up to the date of the vesting order*, assets realized *after* the date of the vesting order will vest in the Official Assignee (t)

Appeal—An order made under this section is not appealable unless all the conditions enumerated in s 47 are present (u) One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit, that is, between the judgment debtor on the one hand and the decree holder on the other (v) Hence an order made under this section determining a question between *two rival decree holders*, in which the judgment debtor had no interest does not fall within s 47 and no second appeal lies from such order (u) But if the question determined by the order arose not only between rival decree holders but also between the judgment debtor on the one hand and the decree holders on the other, the order would be within s 47, and would therefore be appealable (x)

Revision—As to revision see the undermentioned cases (y)

RESISTANCE TO EXECUTION.

74. [S. 330] Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property

Resistance to execution

See O 21, rr 97 103

(t) *Hoadson* v *Durrant* (1900) 27 Cal 351

(w) *Balmer Lawrie & Co* v *Jadunath* (1914) 42 Cal 1 27 I C 644 *Varada* v *Venkataratnam* (1922) 42 Mad L J 473 67 I C 546 (22) A M 99

(x) *Sorabji* v *Kala* (1912) 36 Bom 156 12 I C 911 *Rajah of Karvetnagar* v *Venkata Reddi* (1916) 39 Mad 570 29 I C 231

PART III.

Incidental Proceedings.

COMMISSIONS

Power of Court to issue commissions.

75. [*New.*] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

(*a*) to examine any person;

(*b*) to make a local investigation;

(*c*) to examine or adjust accounts; or

(*d*) to make a partition.

The general powers of Courts in regard to commissions have been summarised in this section. The detailed provisions are set forth in O 26.

Commission to another Court.

76. [S 385.] (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

See O 26 r 4.

Letter of request.

77. [*New.*] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Commission issued by foreign Courts

78. [S. 391] The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by—

(*a*) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor General in Council, or

(*b*) Courts situate in any part of the British Empire other than British India, or

(*c*) Courts of any foreign country for the time being in alliance with His Majesty

PART IV.

Suits in Particular Cases.

Suits by or against the Government or Public Officers in their official capacity.

Suits by or against Government

79. [S 416.] (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by Section 111 of the East India Company Act, 1813

Sub sec (2) is new

As to procedure in suits by or against Government, see O 27

Scope of the section.—This section does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of the Government of India Act, 1858, s 65 [now Government of India Act, 1915, s 32] It gives no cause of action, but only declares the mode of procedure when a cause of action has arisen (z) It is enacted by that section that "the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate, and all persons and bodies politic shall and may have and take the same suits remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company," that is, the East India Company (a)

The Secretary of State is not a proper party to a suit by an owner of land under s 42 of the Specific Relief Act 1 of 1877 against a member of the public who claims to use such land as a public road and thereby endangers the title of the owner (b)

Act of State—The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, viz, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there is express statutory provision No suit would lie against the East India Company in respect of acts of State or acts of Sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council (c)

(z) *Jehangir* v *Secretary of State* (1903) 27 Bom 189

(a) See *Doya Narain* v *Secretary of State* (1886) 14 Cal 256 271 272 *Secretary of State* v *Moment* (1913) 40 I A 48, 51 52 40 Cal 391 18 I C 22

... *Poss* v ... 31 I C ... 911) 33 ... *State* v ...

Jurisdiction—A suit against the Secretary of State for India can only be brought in the Court within the local limits of whose jurisdiction the cause of action arose The words "dwell," or "reside, or "carry on business, or "personally work for gain,' which occur in ss 16, 19 and 20 of the Code and cl. 12 of the Letters Patent do not apply to the Secretary of State in Council (*d*)

Information exhibited by Advocate General—The power of the Advocate General to exhibit information in the nature of actions at law or bills in equity was expressly declared by s 111 of the East India Company Act, 1813 [53 Geo 3, c 155] and kept alive by s 2 of the Government of India Act, 1833 [3 & 4 Will 4, c 85] and again by s 1 of the Government of India Act, 1853 [16 & 17 Vict, c 95] and by s 29 of the Government of India Act, 1858 [21 & 22 Vict, c 106] now merged in s 114 of the Government of India Act, 1915 [5 and 6 Geo 5, c 61) As the Governor General in Council was precluded by s 22 of the Indian Councils Act, 1861 [24 & 25 Vict, c 67, from legislative interference with the provisions of any of the enactments above quoted, it was thought that s 416 of the Code of 1882 [now sub section (1) of the present section] in so far as it excluded informations exhibited by the Advocate General, did not comprehend a full and accurate statement of the law on the subject Accordingly sub section (2) was added into the present section, so that the existence of the Statute therein referred to may not be overlooked As to the definition of 'information," see Wharton s Law Lexicon, p 437

80 [S. 424] No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left

Notice

Changes in the section—This section corresponds with s 424 of the Code of 1882 The words, 'any act have been substituted for the words "an act,' and the words "by such public officer, for the words 'by him" See notes, 'Notice to Secretary of State' on p 222 below

Provisions of this section imperative—The language of this section is imperative and absolutely debars a Court from entertaining a suit instituted without compliance with its provisions If the provisions of the section are not complied with, the only course open to the Court is to reject the plaint under O 7, r 11, cl (d) [Code of 1882, s 54, (c)] (*e*)

(*d*) *Doya Narain v Secretary of State* (1887) 14 Cal 256 *Podricks v Secretary of State* (1913) 40 Cal 308 15 I C 955

(*e*) *Lachelu v Secretary of State* (1907) 25 All 187

80. *A* buys land from *B* Subsequently *B* in collusion with *C* deprives *A* of possession of the land *B* then becomes insolvent and his estate vests in the Official Assignee. Sometime afterwards *A* applies to the Revenue Authorities to have the land entered in his name in the Record of Rights The Official Assignee objects, and *A* sues *B*, *C*, and the Official Assignee for a declaration of his right to possession of the land No notice is necessary to the Official Assignee, for there is no *tort* committed by him. Objection on the part of the Official Assignee to the entry of the land in *A*'s name in the Record of Rights is not such an "act" as is contemplated by this section *A*'s real cause of action is dispossession by *B* and *C* *Damodar* v. *Govindji* (1923) 25 Bom L R 378, 73 I C 240, (23) A B 392

III A suit may be one founded upon tort as stated in Rule II above, but the wrongful act complained of may have been done inadvertently or it may have been done *mala fide*, that is, maliciously or dishonestly If the wrong is done *inadvertently*, there is no doubt that notice is necessary under this section But there is a conflict of opinion whether notice is necessary under this section when a public officer acts *mala fide*, that is, maliciously or dishonestly, in the discharge of his duties, it being held in some cases that it is not (*t*), while in others that it is (*u*) The cases in which it is held that notice is not necessary proceed on the ground that an act done *mala fide* by a public officer cannot be said to be an act purporting to be done by such public officer *in his official capacity* within the meaning of this section The cases in which it has been held that notice is necessary proceed on the ground that the section makes no distinction between acts done *bona fide* and acts done *mala fide* and that notice is necessary in every case of wrong purporting to be done by a public officer *in his official capacity*. Thus where a suit was brought against a police officer, the action complained of being that he searched the house of the plaintiff, dragged him to the thana, and detained and kept him in confinement for several hours maliciously and without cause, it was held that the officer having *acted illegally and in bad faith* could not be said to have acted *in his capacity as a public officer* and therefore no notice was necessary (*v*) Similarly, where a suit was brought against a District Magistrate and two officers of Police for conspiracy and malicious arrest and search, it was held that the suit was one in which the public officer was sued in respect of an act *done in bad faith* and therefore no notice under this section was required (*w*) On the other hand, in *Jogendranath Roy* v. *Price* (*x*) where the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant, it was held that, though the act was said to be done maliciously, notice was required to be given under this section The Court said, "The section does not seem to us to warrant the drawing of a distinction between acts of this kind done inadvertently or otherwise" Following the above decision, it was held by the High Court of Allahabad in a suit against a Police Officer to recover certain books seized by him in a search, the seizure of which was denied, that notice was necessary under this section (*y*) In a case decided by a Full Bench of the Madras High Court (*z*), *A* sued *B* ... er the village

I C 72, (24)
nment Committee
7 I C 679,
Kaira (1911) 35
an Javarkar, J.,
50 Cal 992, 75

904) 26 All 220
n (1906) 16 Cal

f (1907) 29 All.

9) 41 Mad 792.

munsif sold the wood for arrears of revenue due from *B* though there was no necessity to sell the whole, and after retaining the amount due for arrears of revenue handed over the balance of the sale proceeds to *B*, although he had knowledge of the attachment. Thereupon *A* brought a suit against the village munsif for damages, alleging that the munsif had colluded with *B* and paid the balance to him. The Court found that the munsif was aware of the attachment and that he dishonestly and fraudulently paid over the balance of the sale proceeds to *B*. On the question of notice under this section, the Full Bench held that the munsif was entitled to notice under this section, although he acted *mala fide* in the discharge of his duties. The latest decisions of all the High Courts are in favour of the view that notice is necessary even if the act is done *mala fide*.

IV. Where the suit is one founded upon tort, notice must be given whether the relief sought is for damages or merely for a declaration that the act complained of is against the provisions of law and therefore illegal (*a*).

Notice in suits for injunction.—Where a suit is brought against a *public officer* for an injunction to restrain him from doing an act threatened to be done by him, no notice is necessary to be given under this section. The reason is that this section applies where a relief is sought in respect of an act *done* by a public officer, and not where relief is sought in respect of an act not yet done, but threatened *to be done* (*b*). It must, however, be noted that the words "act purporting to be done" relate to a public officer and not to the *Secretary of State*. Therefore notice must be given to the Secretary of State, even though the suit against him may be one for an injunction (*c*), unless the circumstances of the case are such that if notice has to be given and the plaintiff has to wait for two months, irreparable injury may be done to him in the mean time (*d*). Following this view, it has been held that where in a case of dispute between the plaintiff and Government as to the title of certain lands the plaintiff gave notice to the Secretary of State of an intended suit for a declaration of title as required by this section but *during the currency of the notice* Government threatened to demolish the structure on the land, the plaintiff was entitled to institute a suit even *before the expiry of two months* from the date of the notice for a declaration of title and for an injunction restraining Government from demolishing the structure. The Court said: "It is small gain to a private person to enact that he may have redress against a defendant after two months' notice if, during the currency of the two months the defendant is allowed to make redress impossible. The right of suit which is expressly granted by the Legislature, cannot, in reason, be deferred until its exercise has become illusory" (*e*). Where the primary relief claimed against a public officer is an injunction restraining him from selling the plaintiff's property, the fact that the plaintiff also seeks an award *in the alternative* of compensation equal to the value of the property does not render a notice necessary under this section (*f*).

Death of complainant after notice but before suit.—Notice is given by *A* under this section to the Secretary of State of a proposed suit. *A* dies before the institution of the suit. The notice by *A* does not enure for the benefit of his legal representative, and he must give a fresh notice under this section before instituting the suit (*g*).

(*a*) *Chhaganlal* v. *The Collector of Kaira* (1911) 35 Bom. 42, 7 I. C. 993.

(*b*) *Canoda Sundari* v. *Nalini* (1909) 36 Cal. [illegible]

(*d*) *Secretary of State* v. *Gajanan* (1911) 35 Bom. 36[illegible], 10 I. C. 639; *Sakharam* v. *Secretary of State* (191[illegible]) 14 Bom. L. R. 353, 15 I. C. 539; *Bhagchand* v. *The Secretary of State* (1924) 48 Bom. 87, ('24) A. B. 1.

[illegible]

Ss. 80, 81.

Amendment of plaint.—Where notice of a proposed suit is once given, it is not necessary to give a fresh notice of two months if the plaint has to be amended owing to discovery of facts not within the plaintiff's knowledge at the time of the institution of the suit (*h*). But no amendment will be allowed if the effect of the amendment is to convert the suit into another of a different character, *e g*, a suit based on negligence into one based on nuisance. In such a case a fresh suit must be brought after giving fresh notice as required by this section (*i*).

Notice to Collector.—A collector is entitled to notice under this section of a suit for damages in respect of an act done by him in his official capacity as agent of the Court of Wards, but he is not entitled to such notice if he is sued or joined as a party, not by reason of any act purporting to be done by him in his official capacity, but merely for the protection of a minor's title (*j*).

Notice to Cantonment Committee.—A Cantonment Committee constituted under the Indian Cantonments Act 1889 is a "public officer" within the meaning of this section (*k*).

Notice to Official Assignee.—The Official Assignee is a public officer, and he is entitled to notice under this section before a suit is filed against him in respect of any act purporting to be done by him in his official capacity (*l*). The same rule applies to a Receiver appointed under the Provincial Insolvency Act 5 of 1920 (*m*). But no notice is necessary to such officer in a suit to restrain him by an *injunction* from selling goods claimed by the plaintiff to belong to him (*n*). See notes, "Notice in suits for injunction," on p. 225 above. See also ill. (3) on p. 223 above.

Notice to Official Trustee.—By s. 16 of the Official Trustees Act 2 of 1913 it is enacted that nothing in s. 80 of the Code shall apply to any suit against the Official Trustee in which no relief is claimed against him personally.

Notice to Administrator General.—By s. 41 of the Administrator General's Act 3 of 1913 it is enacted that nothing in s. 80 of the Code shall apply to any suit against the Administrator General in which no relief is claimed against him personally.

Notice to common manager appointed under sec. 95 of the Bengal Tenancy Act 8 of 1885.—Such a manager is a public officer within the meaning of this section, and he is entitled to notice under this section (*o*).

Limitation.—In computing the period of limitation prescribed for a suit under this section, the period of the notice should be excluded (*p*).

Place of suing.—See notes to s. 79, "Jurisdiction," on p. 221 above.

81. [Ss. 427, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance.

(*a*) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

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(*h*) Ezra v. *Secretary of State* (1903) 30 Cal. 36, 72.

(*i*) *McInerny* v. *Secretary of State* (1911) 38 Cal. 797, 13 I. C. 370.

(*j*) *Ananthamman* v. *Ramasami* (1889) 11 Mad. 317; *Bhau* v. *Sand* (1889) 13 Bom. 313.

(*k*) *Cecil Gray* v. *The Cantonment Committee of Poona* (1910) 34 Bom. 583, 7 I. C. 670.

(*l*) *Joosub* v. *Kemp* (1902) 21 Bom. 8[illegible]

[illegible]

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person

"Otherwise than in execution of a decree"—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment See O 27, r 8

82. [S 429] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied, and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government

Execution of decree

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS

83. [S 430] (1) Alien enemies residing in British India with the permission of the Governor General in Council and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty

When aliens may sue

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country

Alien enemy—As to who are alien enemies see the undermentioned case (q)

Alien enemy residing in British India with permission of Government of India—A filed a petition in the Allahabad High Court for judicial separation

(q) *Janson* v *Driefontein Consolidated Mines Ltd* [1902] A C 484 p 505 *Daimler Company Ltd* v *Continental Tyre and Rubber Co Ltd* [1916] 2 A C 339 *Haji Ali* v *Abdul Jalil* (1920) 1 Lah 270 55 I C 314

against her husband The parties were Germans, and the petition was filed while England was at war with Germany At the time of filing the petition, *A* was residing in Lucknow apparently with the permission of the Government of India, while her husband was in Germany After filing the petition, *A* applied for an order directing the summons together with a copy of the petition to be sent to the Probate, Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent The Court granted the application (r)

Limitation —Where the right of alien enemies to sue is suspended by an order of the Government the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit (s)

84. [S 431] (1) A foreign State may sue in any Court of British India

When foreign States may sue

Provided that such State has been recognised by His Majesty or by the Governor General in Council:

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council

Sub section (1), proviso (2) —The second proviso to the corresponding s 431, C P C, 1882, ran as follows —

' Provided that the object of the suit is to enforce the private rights of the head or of the *subjects* of the foreign State

The language of that proviso was liable to be construed as conferring upon the head of a foreign State a general power to litigate in respect of the private rights of his subjects Such, however, was not the object, and the language has accordingly been modified to make it clear that the object of litigation by a foreign State must be the enforcement of a private right vested in the head of the State or in an officer of the State as such

Private right vested in the head of a State —That is, those private rights of a State that must be enforced through a Court of Justice as distinguished from its *political* rights (t)

Foreign State as plaintiff —A suit by a foreign State must be brought in the name by which it has been recognized by His Majesty (u)

85. [S 432] (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs

(r) *Anjelina* v *Joseph* (1917) 39 All 377 39 I C 80.

(s) *Deutsch Asiatische Bank* v *Hira Lall* (1919) 46 Cal 529 47 I C 393

(t) *Hayon* v *Zoir Singh* (1885) 11 Cal 17

(u) *United States of America* v *Wagner* (1867) 2 Ch App 582

of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

Recognized agents specially appointed under this section —This section is an enabling section. It enables a Sovereign Prince or Ruling Chief to prosecute or defend suits through recognized agents *specially* appointed in that behalf, it does not prevent the institution of a suit by a Sovereign Prince in his own name or through a recognized agent appointed under O 3 r 2 [Code of 1882, s 37] (t)

A plaint in a suit instituted on behalf of a Ruling Chief is signed by *A B* At the time of signing the plaint *A B* was not *specially* appointed to sue on behalf of the Chief under this section The plaint is nevertheless good if *A B* is subsequently appointed to sue on behalf of the Chief and if the appointment is made before the expiration of the period of limitation prescribed for the suit (u)

A Political Agent not specially appointed under this section cannot sue on behalf of a Prince (v)

Discovery —A foreign State is not exempt from giving discovery (y)

86 [S 433] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court

Suits against Princes Chiefs ambassadors and envoys

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued, but it shall not

(t) *Maharaja of Bharatpur v Kacheru* (1897) 19 All 510 *Beer Chunder v Ishan Chunder* (1884) 10 Cal 136 See also *Ganeshchandra v Maharaja Birendra* (1904) 9 C W N 237 80 I C 100 (1923) A C 513

(u) *Maharaja of Rewah v Swami Saran* (1903) 25 All 635

(v) *Venkatrao v Madhavrao* (1887) 11 Bom 53

(y) *United States of America v Wagner* (1867) 2 Ch App 590 *Republic of Peru v Wagnelin* (1875) L R 20 Eq 140

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Style of Princes and Chiefs as parties to suits

87. [S 434] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name

INTERPLEADER

Where interpleader suit may be instituted

88. [S 470, R S C, O. 57, rr. 1-2.] Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted

See O 35 below

Changes in the Section—This section corresponds with s. 470 of the Code of 1882 except in the following particulars —

(1) The words the same debt, sum of money or other property, moveable or immoveable, have been substituted for the words the same payment or property

(2) The words who claims no interest therein other than for charges or costs have been borrowed from R S C, O 57, r 2 and have been substituted for the words whose only interest therein is that of a mere stakeholder

What is an interpleader suit—An interpleader suit is one in which the real dispute is between the defendants only and the defendants *interplead* that is to say plead against each other instead of pleading against the plaintiff as in an ordinary suit In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only, and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the Court to be entitled to it Thus suppose certain property is claimed by *A* as well as by *B*, and *X* is in possession of that property and claims no interest in the property himself and is ready and willing

to deliver it to such party as may be declared by the Court to be the rightful owner of it, *X* as plaintiff may institute an interpleader suit against *A* and *B* as defendants In such a case *X* will, as a rule, be dismissed from the suit at the first hearing after his costs are provided for, and *A* and *B* will be left to interplead and to fight the matter out between themselves as if one of them was plaintiff and the other was defendant (O 35, r 4) But before the plaintiff is dismissed from the suit, he must deposit the property in dispute in Court (O 35 r 2)

Who claims no interest other than for charges or costs—A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage, demurrage and freight may institute an interpleader suit, where the goods are claimed by two persons adversely to each other (*n*)

A holds in his hands a sum of Rs 5 000 which is claimed by *B* and *C* adversely to each other *A* institutes an interpleader suit against *B* and *C* It is found at the hearing that *A* had entered into an agreement with *B* before the institution of the suit that if *B* succeeded in the suit he should accept from *A* Rs 4,000 only in full satisfaction of his claim Here *A* has by virtue of the agreement an interest in the *subject matter* of the suit, and he is not therefore entitled to institute an interpleader suit The suit must be dismissed (*o*)

A suit is not necessarily an interpleader suit and subject to the provisions of this section, merely because *one* of the reliefs claimed by the plaintiff requires the defendants to interplead together concerning certain claims The Court must have regard to all the prayers of the plaint to determine the exact nature of the suit (*p*)

(*n*) *Bombay and Baroda Ry Co* v *Sassoon* (1894) 18 Bom. 231 *Allenborough* v *St Katharine s Docks* (1878) 3 C P D 450.

(*o*) *Murrietta* v *South American Co* (1893) 62 L J Q B 396

(*p*) *Juggannath* v *Tulla Kera* (1908) 32 Bom 592

91. (c) he is liable to damages in a suit at the instance of a private individual who suffers *special damage* by reason of the nuisance, that is, damage *beyond* what is suffered by him in common with other persons affected by the nuisance (s)

These remedies, it is conceived, are concurrent The institution of a criminal prosecution does not bar a suit under this section (*t*), nor does the institution of a suit under this section bar a criminal prosecution, though cases can be conceived where the Advocate General may in the exercise of his discretion, refuse his consent under this section where a criminal prosecution is pending in respect of the same act or omission

Illustrations — *A* keeps his horses and waggons standing for an unreasonable time in the highway

(*a*) This is a public nuisance for which a criminal prosecution may be instituted against *A*

(*b*) Further, a suit may be instituted against *A* under the present section by the Advocate General or by two or more persons with the consent in writing of the Advocate General, though no special damage has been caused for an order requiring *A* to abate the nuisance and for an injunction restraining him from continuing the nuisance If the nuisance is repeated or continued, notwithstanding the injunction, he is liable for contempt where the decree granting the injunction is passed by a High Court (*u*) or he may be proceeded against under O 21 r 32 below, or he may be punished with imprisonment or fine or both under s 291 of the Penal Code

(*c*) If the horses and waggons are kept standing opposite a man s house, so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, a suit may be brought against *A* by the occupiers for damages, the damage so caused being sufficiently *special* to entitle them to maintain the action (v). The mere fact that a suit has been instituted under this section against *A* by the Advocate-General at the relation of the occupiers, or by the occupiers themselves as plaintiffs with the consent of the Advocate General, will not preclude the occupiers from maintaining a *private action* against *A* for the *special* damage caused to them *Quaere* whether they can claim damages for the special damage in a suit brought under this section? It is conceived they cannot It is submitted that the words "such other relief as may be appropriate" do not include such damages. In England, however, persons who have suffered special damage from a public nuisance may join the Attorney General as a co plaintiff in a suit brought by the Attorney General at their relation and the Attorney General may claim an injunction, and the persons specially damnified by the nuisance may claim damages (*w*) The present section does not warrant such a procedure in India. The suit contemplated by this section is a suit of a public nature exclusively brought to vindicate a *public* right The section finds its place in the Part headed *Special* Proceedings ' under the division "Suits relating to *public* matters, and this affords a sufficient indication of the object of the section

Nature of proceedings under this section —Proceedings for a public nuisance in England were formerly commenced by an *Information* filed by the

(*t*) Compare *Attorney General v Proprietor of the Bradford Canal* (1866) L R Eq 71

(*u*) See *Kochappa v Sachi Devi* (1903) 26 Mad 494

[illegible] (1874) L R 9 C P

Attorney General in the High Court of Chancery They are now instituted by action in the High Court of Justice [See R S C, O 1, r 1] The action may be brought like the Information—

(1) by the Attorney General acting *ex officio*, or
(2) by the Attorney General at the relation of a private individual

Under the present section, a suit for a public nuisance may be instituted—

(1) by the Advocate General acting *ex officio*, or
(2) by the Advocate General at the instance of relators, or
(3) by two or more persons having obtained the consent in writing of the Advocate General

Difference between suit by Advocate General acting ex officio and suit by him at the relation of private individuals —Except for the purposes of costs, there is no difference between an *ex officio* suit and a suit at the relation of private individuals In both cases the Sovereign, as *parens patriae*, sues by the Advocate General (*x*) " When the Attorney General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown, and the Crown through the Attorney General is really a party to the litigation It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator, and to make him responsible for the costs but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant, who brings an action, is responsible for the costs of it If I am right, it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant, but of the Crown" (*y*) " When once the matter is in the hands of the Attorney General it becomes substantially a public proceeding, in which the Attorney General, if there be no relator, becomes as prosecutor responsible for the costs, while if a relator is introduced, the responsibility for costs is upon the latter (*z*)

Relator's interest in the suit — ' A relator need not have a personal interest in the matter except as one of the public, he need not, in fact, be himself damaged at all (*a*)

Interest of persons suing with consent of Advocate General —Persons suing for a public nuisance with the consent of the Advocate General under the section need not have any personal interest in the matter of the suit, except as members of the public They are entitled to sue under this section, though, ' to use the words of the section, ' no special damage has been caused [to them] " In the other words, they need not have a cause of action in themselves

Injunction —The following are some of the leading principles by which the Courts are guided in granting injunctions —

1 The injury complained of must be either irreparable or continuous (*b*) The remedy by way of injunction is therefore not appropriate for damage which is in its nature temporary and intermittent (*c*), or is accidental and occasional (*d*), or for an interference with legal rights which is trifling in amount and effect (*e*)

2 " Apprehension of *future* mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an

(*b*) *Attorney General* v *Cambridge Gas Consumers Co* (1868) L R 4 Ch 71, 81

(*c*) *Attorney-General* v *Sheffield Gas Consumer Co* (1853) 3 D M G 304, *Attorney-General* v *Cambridge Gas Consumers Co* (1868) L R. 4 Ch 71

(*d*) *Cooke* v *Forbes* (1867) L R 5 Eq 166

(*e*) *Gaunt* v *Fynney* (1872) L R 8 Ch 8 Cr *Llandunno Urban District Council* v. *Woods* [1899] 2 Ch. 705.

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injunction" (f) "There must, *if no actual damage is proved*, be proof of *imminent* danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial" (g)

3 Though no substantial damage is proved, the Court may grant an injunction if the defendants claim the right to continue doing that which the Court has held they are not entitled to do (h)

4 Where an illegal act is committed which *in its nature tends to the injury of the public*, an injunction will be granted to restrain the act without proof of *actual injury* to the public (i)

5 Where the plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to enquire in what way the defendant can best remove it, the plaintiff is entitled to an injunction at once, and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to But where the difficulty of removing the nuisance is considerable, the Court may suspend the operation of the injunction for a time (j)

6 No length of time can legalize a public nuisance Though twelve years user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance apart from the length of time for which it may have continued (k)

7 A public nuisance is not excused on the ground that it causes some convenience or advantage [Indian Penal Code s 268]

"Declaration"—A suit may be instituted under this section by two or more Mahomedans for a declaration that they are entitled to carry *tabuts* in procession along a public road for immersion in the sea, against persons who obstruct them in doing so, and for an injunction restraining them from interfering in the exercise of their right (l)

"Other relief"—The *removal* of a public nuisance, *e g*, encroachment on a public street, may be directed by the Court under this part of the section (m)

Sub-section (2)—The Code of Criminal Procedure contains provisions for the removal of a public nuisance by summary proceedings before a Magistrate (n) It has been held by the High Court of Calcutta that where special damage is caused to a private individual by a public nuisance, he has a right of suit against the person causing the nuisance for a *removal* of the nuisance, and a Civil Court may pass a decree for removing the nuisance, notwithstanding that an order for the like purpose might be made by a Magistrate (o) This right is saved by sub section (2)

Instances of public nuisance.—"Public or common nuisance affect the King's subjects at large or some considerable portion of them, such as the inhabitants of a town, and the person therein offending is liable to criminal prosecution A private nuisance affects only one person out of a determinate number of persons, and is

(h) *Attorney-General* v *Acton Local Board* (1882) 22 Ch. D 221

(i) *Attorney-General* v *Shrewsbury Bridge Co* (1882) 21 C D 752

(j) *Attorney-General* v *Colney Lunatic Asylum* (1868) L. R. 4 Ch 146

(k) *Municipal Commissioners of the Suburbs of Calcutta* v *Mahomed Ali* (1871) 7 B L R 499 *Weld* v *Hornby* (1806) 7 East 195 199

(l) See *Balku* v *Ibrahim* (1878) 2 Bom 457, *Kandasami* v *Subroya* (1909) 32 Mad 478 1 I C 716

(m) *Manilal* v *Ishrarbhai* (1925) 27 Bom L R 421 87 I C 934 (25) A B 367

the ground of civil proceedings only (*p*) Building over any part of a public street is a public nuisance, for such act *must necessarily cause obstruction* to persons who may have occasion to use their public right over the part encroached upon The public is entitled to the full width of the public street however wide it may be, and whoever appropriate any part of the street by building over it infringes the right of the public *quoad* the part built over (*q*) An obstruction is not the less a nuisance because it is on a part of the street not commonly used or otherwise leaves room enough for the ordinary amount of traffic (*r*) On the other hand it has been held by the High Court of Calcutta as regards tidal navigable rivers that it is not any encroachment however slight that would constitute a public nuisance It seems to us rather the Court said that there must be some evidence that such encroachment *causes* one of the results specified in section 268 [of the Indian Penal Code] (*s*)

Acts which merely offend the sentiments of a class do not amount to a public nuisance In India it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds Upon this principle it has been held that the placing of a Mahomedan symbol in the neighbourhood of a Hindu temple is not a public nuisance though likely to cause annoyance to Hindus (*t*) Similarly it is not a public nuisance to expose on the verandah of a house meat cut up for a dinner, though it may annoy the feelings of Jains frequenting a temple close by the house (*u*) But wilfully slaughtering cattle in a public street so that the groans and blood of the animals could be heard and seen by the passers by is a public nuisance for it must necessarily cause annoyance to every one of the passers-by Hindu, European Mahomedan or other who was not utterly devoid, not merely of refinement, but also of all proper feelings (*v*)

Public charities

92. [S. 539] (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(*a*) removing any trustee ;
(*b*) appointing a new trustee ;
(*c*) vesting any property in a trustee ;
(*d*) directing accounts and inquiries ,

(*p*) Pollock on Torts 11th ed p 405
(*q*) *Queen-Empress* v *Virappa Chetti* (189) 20 Mad 433
(*r*) *Turner* v *Ringwood Highway Board* (1870) L R 9 Eq 418
(*s*) *Jugal Das* v *Queen Empress* (1893) 20 Cal 665 dissenting from *dicta* to the contrary in *Umesh Chandra Kar in the matter of* (1887) 14 Cal 656
(*t*) *Muttumira* v *Queen-Empress* (1884) 7 Mad 590
(*u*) *Queen-Empress* v *Byramji* (1888) 12 Bom 437
(*v*) *Queen-Empress* v *Zakhiuddin* (1888) 10 All 44

92.

(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section

Changes introduced by the section —This section corresponds with s 539 of the Code of 1882 except in the following particulars

1 The words, "public purposes of a charitable or religious nature," have been substituted for the words public, charitable or religious purposes," to remove the misconception that public is merely co ordinate with ' charitable or " religious '

2 The words, whether contentious or not, have been added to give effect to a Calcutta decision See notes, " Whether contentious or not," on p 243 below

3 The words, in the principal Civil Court of original jurisdiction, ' have been substituted for the words, " in the High Court or the District Court "

4 The words, or any other Court empowered in that behalf by the Local Government, have been added in order to invest *Courts subordinate to District Courts* with power to try cases under this section

5 Clause (a) is new It is intended to supersede a Madras decision, and give effect to the Calcutta, Bombay and Allahabad decisions cited in note, " Clause (a) removing any trustee," on p 244 below

6 Clause (d) is also new. It gives legislative recognition to a Bombay decision cited in note, " Clause (d). directing accounts and inquiries," on p 245 below

7 Sub-section (2) is new It is intended to give effect to the view of the section taken by the Bombay High Court that this section is mandatory, and to supersede the decision to the contrary of the other High Courts See notes, Sub section (2) this section is mandatory," on p 251 below

Object of the section — The real object of the special provisions of this section seems to us to be clear Persons interested in any trust were, if they could *all* join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District and this condition was imposed to prevent an indefinite number

of reckless and harassing suits being brought against trustees by different persons interested in the trust' (u)

Representative suit and res judicata—The suit contemplated by this section is a representative suit, that is, a suit which is prosecuted by individuals not for their own interests, but as representatives of the general public (x) That being so, it is conceived that the provisions of s 13, Expln VI as to res judicata, apply to a decision in a suit under this section (y)

Jurisdiction—Where the trustees and the trust fund are within the jurisdiction of a Court, but the charity is to be founded in a territory out of the jurisdiction of that Court, the Court has jurisdiction to pass a decree declaring the trusts upon which the fund is to be held, but it cannot go further in the way of settling a scheme, and it will leave it to the Court of the place in which the charity is to be carried out to settle the scheme (z)

Who may sue under this section—A suit under this section may be brought—

(1) by the Advocate General, and outside the Presidency towns, by the Collector or such officer as the Local Government may appoint in that behalf [see s 93], or

(2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General

"Interest in the trust"—When a suit under this section is not instituted by the Advocate General, it must be brought by at least two persons, and such persons must have "an interest" in the trust S 539 of the Code of 1877 contained the words a direct interest" Those words seem to have been taken from the judgment of Lord Eldon in *In re the Bedford Charity* (a) Those words also occurred in s 539 of the Code of 1882 That section was amended by s 44 of Act 7 of 1888, and the words ' an interest ' were substituted for the words a direct interest ' It must have appeared to the Legislature that the limitation of a direct interest was not expedient in India, and hence the section must have been amended (b) The effect of the amendment has been to widen the class of persons who are entitled to institute a suit under this section (c) Thus persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit under this section against the trustees of the temple (d) Similarly persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf, were held to have a sufficient interest to entitle them to sue the shevaks or ministers of the idol under this section (e) Likewise worshippers at a mosque have "an interest" within the meaning of this section in the trusts of the mosque (f) But the interest must be an existing interest and not a mere contingency, the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue (g) It has been held by a Full Bench of the Madras High Court that the interest ' contemplated by this section must be a present and substantial interest and not sentimental or remote Thus public Hindu temples are

(u) *Sajedur Raja* v *Gour Mohun Das* (1897) 24 Cal 418 425 *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 804 *D Cruz* v *D Silva* (1909) 32 Mad 131 135 1 I C 995

(x) *Anand Rao* v *Ramdas* (1921) 48 I A 12 16 48 Cal 493 497 498 62 I C 737 *Gopu* v *Jayammal* (19..) 43 Mad L J 449 69 I C 15 (..) A M 394

(y) *Dinsha* v *Jamsetji* (1909) 33 Bom 509 per [illegible]

(b) *Vaidyanatha* v *Swaminatha* (1924) 51 I A 28? 288 47 Mad 884 891 82 I C 804 (24) A I C 221

(c) *Shailayananda* v *Umeshanunda* (1905) 2 Cal L J 460 470

(d) *Sajedur* v *Gour Mohun* (1906) 24 Cal 418 *Jugalkishore* v *Lakshmandas* (1899) 23 Bom 659 *Chintaman* v *Dhondo* (1888) 15 Bom 612 6..2 623, *Ram Churn* v *Prolab* (1905) 2 Cal L J 449

[illegible]

(g) [illegible] v [illegible] (1893) 20 Cal 810

92. prima facie to be taken to be dedicated for the use of all Hindus resorting to them But the bare possibility, however remote, that a Hindu might desire to resort to a particular temple does not give him ' an interest " in the trust sufficient to entitle him to sue under this section. Hence where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry, and it appeared that the former had gone to worship in the temple on one or two occasions *in the past and might go there to worship in the future if business took him to* Tellicherry, it was held that though he had a right as a Hindu to worship in the temple, he had not such an interest in the trust as to entitle him to sue under this section (*h*) A different view has been taken by the Lahore High Court (*i*) It has been held by the Judicial Committee that *descendants of the founder* of a public Hindu *chattiram*, although only in female lines of the founder, are "persons having an interest in the trust," and consequently they are entitled to maintain a suit under this section, even though they might never themselves make use of the chattiram (*j*)

Consent of the Advocate General —The " consent in writing " required by this section must be a specific permission given to two or more persons *by name*, a permission given to one applicant by name and another is not a sufficient compliance with the terms of this section (*k*) The High Court of Bombay has held that a suit under this section brought by only one plaintiff with the consent of the Advocate General is bad at its institution, and the plaint cannot be amended by the addition of a second plaintiff, though the Advocate General may consent to the amendment, the reason given being that the section nowhere speaks of the consent of the Advocate General to an *amendment* of the plaint, and that a suit which was bad at its inception is not bettered by its amendment (*l*) On the other hand, it has been held by the High Court of Madras that persons interested may be added as parties to the suit with the consent of the Advocate General under O 1, r 10 It has thus been held by that Court that if a suit is brought by *A* alone under this section (*m*), or by *A* and *B* of whom *B* has no interest in the trust (*n*), the plaint may be amended by adding *C*, a person interested, as a party plaintiff in either case with the consent of the Advocate General. Similarly it has been held by that Court that if a suit be brought by *A* and *B*, and neither of them has any interest in the trust, the plaint may be amended by adding the Advocate General as a plaintiff on his application (*o*)

The "consent in writing" required by this section is a condition precedent to the institution of the suit to which such consent relates. If, therefore, no valid consent is given before the institution of the suit, the suit must be dismissed, or the plaintiff may be allowed to withdraw the suit with liberty to bring a fresh suit. The defect cannot be rectified *after* the institution of the suit (*p*) And where such consent is given, the suit must be confined to the matters included in the consent, it is not competent to the Court to grant reliefs other than those included in the terms of the consent (*q*) Further, where a suit is brought under this section, no amendment should be permitted without the sanction of the Advocate General. Where a plaint in a suit brought under this section is amended without the consent of the Advocate General, *e g*, where a new party is added as a defendant and possession

(*h*) *Ramacha* [illegible] Mad 360 50 [illegible] 887) with approval [illegible] 43 (1924) 51 I A 804 (24) A [illegible]

(*i*) *Narinjan* v *Kirpal* (1924) 5 Lah 453, 85 I C 111 (25) A L 189

[illegible]

(*o*) *Ambalavana* v *The Advocate-General* (1920) 43 Mad 707, 55 I C 546

(*p*) *Tricumdass* v *Khimji* (1892) 16 Bom 626, *Gopal Dei* v *Kanno Dei* (1904) 26 All 162

(*q*) *Sayad Hussein* v *Collector of Kaira* (1897) 21 Bom 257, *Nizam ul Haq* v *Muhammad* (1919) P R no 144 p 370, 51 I C 611

of the trust property is claimed from him the Court must dismiss the suit (r) It is an invariable practice in the Bombay Presidency for the Advocate General to endorse his consent upon the plaint (s)

The Advocate General in giving his consent has to exercise his judgment in the matter and see not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the character defined in the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust (t) Where the sanction given by the Advocate General is so worded as to indicate that the Advocate General has not exercised his judgment it is *not a defect fatal to the suit* but a mere irregularity falling within the scope of s 99 hence the decree in the suit will not be interfered with in appeal unless the irregularity is shown to have affected the decision of the suit on the merits (u)

Public purposes —This section relates to those charities only in which the public are interested A trust for a public Hindu temple is a trust for a public purpose of a religious nature within the meaning of this section (v) A *mutt* that is otherwise private does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the *mutt* during the hot season (w) But where a number of the public had always used a temple and there was attached to it a *dharmashala*, and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature (x) A trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of a *particular* sect and the propagation of the tenets of that sect (y)

"Any alleged breach of trust"—These words are not equivalent to "any alleged breach of any *admitted* trust It is not therefore a condition precedent to the applicability of the section that the trust alleged by the plaintiffs must be one admitted by the defendants (z)

"Where the direction of the Court is deemed necessary for the administration of any such trust"—To bring a suit within this section there must either be a breach of trust *or* the directions of the Court are necessary for the administration of the trust The directions referred to in this section are such as are necessary for the carrying out of the trust and as are given to a *trustee* either the existing trustee, where there is one or the new trustee where one is to be appointed The nature of the reliefs (specified in the section) shows what is meant by the words deemed necessary for the administration of any such trust (a) The view thus expressed derives support from the language of sub sec (2) which implies that it is only a suit claiming *one or more of the reliefs specified in sub-sec* (1) that requires to be instituted in conformity with the provisions of sub sec (1)

"Whether contentious or not"—These words are new They are intended to give effect to a decision of the Calcutta High Court under s 539 of the Code of 1882 that the section was not confined to non-contentious proceedings and that it applied to contentious suits also (b) and the opinion to the same effect of Best and Weir, JJ, in an earlier Madras case (c)

(r) *Abdul Rehman* v *Cassam* (1912) 36 Bom 169 11 I C 726

(s) *Suleman* v *Shaikh Ismail* (1915) 39 Bom 580 30 I C 17

(t) *Sajedur Raja* v *Gour Mohun Das* (1897) 24 Cal 418 428

(u) (1897) 24 Cal 418 428 *supra*

(v) *Manohar* v *Lakhmiram* (1888) 12 Bom 247

(w) *Sathappayyar* v *Periasami* (1891) 14 Mad 1 6-7

(x) *Jugalkishore* v *Lakshmandas* (1899) 23 Bom 659

(y) *Mahant* v *Darshan* (1912) 34 All 469 14 I C 698

(z) *Jafar Khan* v *Daud Shah* (1911) 13 Bom L R 49 53 9 I C 358

(a) Per Woodroffe J in *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 at p 809 But see *Amritram* v *Ramji* (1908) 10 Bom L R 87

(b) *Mohiuddin* v *Sayiduddin* (1893) 20 Cal 810

(c) *Subbaya* v *Krishna* (1891) 14 Mad 186 208 271

Who may be sued under this Section — A defendant in a suit under this section need not be either a de jure or de facto trustee, otherwise no suit can be brought under this section in a case in which all trustees are dead or refuse to act (*l*) Thus a suit may be brought under this section against persons in possession of the trust property who claim adversely to the trust that is claim to be the owners of the property (*e*) or against persons who deny the validity of the trust (*f*) But a suit against one who is merely a servant for misappropriation of the trust property does not fall under this section (*g*) See notes Trustee on p 245 below

Clause (a) removing any trustee —This clause is new Though this clause did not occur in the corresponding s 539 of the Code of 1882, it was held by the High Courts of Calcutta Bombay and Allahabad (*h*), following an earlier decision of the Madras High Court (*i*) that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee came under that section though the *removal* of a trustee was not one of the reliefs specified in that section Such a relief it was said was either covered by the words such further or other relief as the nature of the case may require, or it was implied in the clause providing for the appointment of new trustees On the other hand it was held by the Madras High Court in a later case that such a suit did not come under that section (*j*) sub s (1) cl (a) of the present section gives effect to the Calcutta Bombay and Allahabad decisions A suit for the removal of a trustee must therefore be instituted in conformity with the provisions of this section It has been held by the High Court of Madras that a suit by the trustees of a temple for a declaration that the appointment by the Devastanam Committee of the defendant as a trustee in place of a deceased trustee is invalid and for an injunction to restrain him from interfering with the management of the temple, is *in effect* a suit for the removal of the defendant from the office of trustee, and it cannot be instituted without the sanction required by this or the next section (*k*) A similar view has been taken by the Patna High Court (*kk*) This view has been dissented from by the High Court of Bombay on the ground that to bring a suit within this section there must either be an alleged breach of trust or the direction of the Court must be deemed necessary for the administration of the trust and that, neither of these conditions was present in the Madras case The Bombay case was similar to the Madras case, and it was held that the case did not fall within this section (*l*)

In a suit under this section by two trustees of a temple against a co trustee for his removal the Court has the power to investigate charges of misconduct made by the defendant against the plaintiffs and even to remove them (*m*)

In framing a scheme of management under this section [see clause (g)] it is desirable to include a provision for the removal of trustees for breach of trust, for where such a provision is included, the removal of a defaulting trustee may be

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Bom 48 *Huseni Begam* v *Collector of Moradabad* (1898) 20 All 46 *Girdhari Lal* v *Ram Lal* (1899) 21 All 200

(*i*) *Subbayya* v *Krishna* (1891) 14 Mad 186

(*j*) *Rangasami* v *Varadappa* (1894) 17 Mad 462 See also *Narayana* v *Kumarasami* (1900) 23 Mad 537

[illegible]

[illegible] 101 64 I C 353 ('23) A B 67

(*m*) *Balkrishna* v *Jagannadha* (19 5) 48 Mad L J 534 87 I C 194, (25) A M 820.

obtained by an *application* in execution of the decree and the costs and trouble of a *regular suit* which would otherwise be probably necessary may thus be avoided (*n*)

In connection with the removal of a trustee, it may be noted that there is no hard and fast rule that because a manager of a shrine has arrogated to himself the position of owner he should be removed from the office of trustee Each case must be decided with reference to its circumstances (*o*) Thus it has been held that mere lax and improvident management on the part of the manager of a shrine, fostered by the belief that he was entitled to manage the trust property free from control and very much as though he was its absolute owner, is no ground for removing him from the trust (*p*)

"Trustee"—A person appointed trustee by the Court, though his appointment may be impeached as being illegal, is a trustee within the meaning of clause (a), and not a trespasser (*q*) So also is a trustee de *son tort*, that is, a person who is not appointed a trustee but who takes charge of the trust property and purports to manage it as trust property (*r*) The Acharya of a temple is a constructive" trustee within the meaning of this section and he may be sued as such (*s*)

Clause (b): appointing new trustee—A suit for the appointment of new trustees of a temple on the ground that the defendants are not lawful trustees and that the office of trustees is therefore vacant, is a suit under clause (b) of this section (*t*)

Under this section, the Court in sanctioning a scheme may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it (*u*)

Clause (d) directing accounts and inquiries—This clause is new Under the corresponding s 539 of the Code of 1882 it was held by the High Court of Bombay, that a suit to remove the trustees of a public charity, and to compel them to account, and to make good the losses sustained by the charity by reason of default on the part of the trustees, and for the appointment of new trustees, was a suit within that section though a relief for *accounts* was not one of the reliefs specifically mentioned in that section Such a relief, it was said was covered by the words further or other relief (*v*) The present clause gives legislative recognition to the above decision

Clause (e): apportionment of income—A suit for a declaration as to what proportion of the trust property [*e g*, offerings placed by devotees before an idol] should be allocated to the pujaris (officiating priests) and what to the guravs (temple servants) relates to a relief covered by cl (e) of the section (*u*)

Clause (f): authorizing trust property to be let—A mutawali asking merely for sanction of the Court to grant a lease of the wakf property is not bound to bring a suit under this section (*x*)

Clause (g): settling a scheme.—This section vests a very wide discretion in the Court as regards directions to be given for the administration of public trusts

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(*n*) *Damodarbhat* v *Bhogilal* (1900) 24 Bom 45
(*o*) *Damodar Bhatji* v *Bhat Bhogilal* (1898) 22 Bom. 493
(*p*) *Annaji* v *Narayan* (1897) 21 Bom 556
(*q*) *Saiyid Ali* v *Ali Jan* (1913) 35 All 98 18 I C 573
(*r*) *Jugal Kishore* v *Lakshmandas* (1899) 23 Bom 659 *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 805-806 *Ram Bilas* v *Nityanand* (19..) 44 All 632 69 I C 990 (22) A A 542, *Bihari Lal* v *Shiva* (1925) 47 All 17, (24) A A 884
(*s*) *Shripatprasad* v *Lakshmidas* (1923) 25 Bom L R 747 84 I C 808 (24) A B 193
(*t*) *Veli Rama* v *Venkatacharulu* (1903) 26 Mad 450
(*u*) *Prayag Doss* v *Tirumala* (1905) 28 Mad 319
(*v*) *Syad* v *Collector of Kaira* (1897) 21 Bom 48, *Amritram* v *Ramji* (1908) 10 Bom L R 87
(*w*) *Sakharam* v *Ganu* (1921) 45 Bom 683, 690 60 I C 924
(*x*) *Fakrunnessa* v *District Judge* (1920) 47 Cal 592, 56 I. C. 47..

92 In giving effect to the provisions of the section and in appointing new trustees and settling a scheme the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management is carried on theretofore, in conjunction with other existing conditions that may have grown up since its foundation (*y*) The Court may refuse to frame a scheme where no mismanagement is proved (*z*)

A scheme framed by the Court may be varied, if good cause is shown (*a*) But where a scheme is once settled it precludes a suit to establish a private right to manage the property [*e g*, hereditary trusteeship] which, if established, would interfere with the scheme settled by Court (*b*)

The Court has power under this section to frame a scheme in respect of a public temple though it be under the control of a Temple Committee constituted under the Religious Endowments Act 20 of 1863 (*c*) But where a trust is a *private* trust, *e g*, for a family idol, the settlement of a scheme under this section is inappropriate (*d*)

In decrees passed under this section liberty is generally reserved to the parties to apply to the Court as occasion arises As to the effect of such a clause, see the under mentioned case (*e*)

Where it is quite clear that a public trust has been properly constituted by will, it is not necessary that there should be first a suit for the administration of the estate of the testator before the trust could be the subject of a suit under this section But it is otherwise where it is doubtful whether there would be funds sufficient for the charitable bequest In the latter case an administration suit may become necessary before any scheme can be framed under this section (*f*) Where the trust funds are not ascertained and the defendants are accountable for their management of the trust pro perty, the proper course is to take the accounts before a scheme is framed (*g*)

Clause (h) further or other relief—' The words ' granting such further or other relief as the nature of the case may require must be read with what has prece ded as referring to further relief to which the party may be entitled which arises out of the *existence of the trust* in respect of which the suit has been brought ' Therefore, where the *only* relief claimed in a suit is for a *declaration* that certain property is wakf property, the suit does not come within the purview of this section Such a relief does not come within the words ' further or other relief ' (*h*) " The general clause dealing with 'further or other relief ought to be read with the [seven] preceding specific clauses, and the nature of the reliefs which may be properly granted under it is of the same character as the reliefs which may be granted under the preceding clauses The [seven] specific clauses are not merely illustrative, but furnish an indication of the nature of the relief which may be granted in a suit under this section " Thus it has been held that the mere fact that the plaintiffs sue for a *declaration* that they are the trustees of a temple and of the properties attached thereto, does not bring the suit within this section, such a relief does not come within the words " further or other relief " (*i*)

[illegible] A [illegible] 24 [illegible] d [illegible] l
304 L I C 449

(*b*) (1913) 36 Mad 364 12 I C 449 *supra* *Sakharam* v *Ganu* (1921) 45 Bom 683 60 I C 974

(*c*) *Sitharama* v *Subramania Iyer* (1916) 39 Mad 700 32 I C 211

(*d*) *Gopal Lal* v *Purna Chandra* (1922) 49 I A 100, 49 Cal 459 67 I C 561 ('22) A PC 253

(*e*) *Manadananda* v *Taraknanda* (1923) 37 Cal L J 231, 76 I C 220 ('24) A C 330 See also *Narayanamurthi* v *Achayya* (1924) 47 Mad L J 714 85 I C 193 ('25) A M 411

(*f*) *Venkatanarasimha* v *Subba Rao* (1923) 46 Mad 300 320 321, 73 I C 991 ('23) A M 376

(*g*) *Chotalal* v *Manohar* (1900) 24 Bom 50 26 I A 199

(*h*) *Jamal uddin* v *Mujtaba Husain* (1903) 25 All 631 635 *Saliq Ram* v *Bassao Mal* (1919) 1 Lah L J 150

(*i*) *Budree Das* v *Chooni Lal* (1906) 33 Cal. 789, 810

There is a conflict of opinion as to whether a prayer that a deed of trust may be construed by the Court and the true scope and object of the trust fund may be determined by the Court comes within the words ' further or other relief ' (j) [See notes, " Suits merely for a declaration of trust, ' on p 250 below]

Conditions of applicability of the section —This section does not apply, unless—

(1) there is a trust created for public purposes of a charitable or religious nature,
(2) there is a breach alleged of such trust, *or* the direction of the Court is deemed necessary for the administration of such trust, and
(3) the relief claimed is one or other of the reliefs mentioned in the section (k) [see notes, " sub sec (2)," on p 251 below]

Where a suit is instituted in the ordinary manner, the question frequently arises whether it ought to have been instituted in conformity with the provisions of this section The answer is that if all the three conditions mentioned above are present, the suit *must* be instituted in conformity with the provisions of this section, that is to say, it must be instituted either by the Advocate General *or* by two or more persons interested in the trust with the consent of the Advocate General [see sub section (2) and notes thereto] If the suit is not brought in conformity with the provisions of this section, it should be dismissed [see notes above " Consent of the Advocate General "] But if any one of these three conditions is absent, the suit is outside the scope of the present section, and it is to be instituted in the ordinary manner The mere fact that a suit *relates* to a public charitable or religious trust, or that it *relates* to property held on such trust, is not sufficient to bring it within the scope of this section [see notes below " Suits to enforce private rights," and " Suits for possession of trust property against trespassers and against alienees from trustees "] At the same time it must be noted that a suit which is clearly within the scope of this section cannot be treated as one outside its scope, because besides the reliefs permissible by this section reliefs not allowed by the section are claimed in the suit [see notes ' Suits for removal of trustees, etc " p 249, *post*]

Suit to enforce private rights —The suit contemplated by this section is a *representative* suit [see notes, Representative suit,' on p 241 above] Suits brought not to vindicate or establish the right of the *public* in respect of a public trust, but to remedy a particular infringement of an *individual right* or to vindicate a *private right*, do not fall within this section (l) Such suits are to be instituted in the ordinary manner and not under this section The following are instances of suits of this character —

(1) A suit by a person claiming to be a co trustee of a certain *darga* and entitled as such to a share with the defendant trustee in the management and profits thereof *Miya Vali Ulla* v *Sayad Bava* (1898) 22 Bom 496
(2) A suit by the trustees of a fire temple for the vindication of the right of management which was vested in and actually being exercised by them at the date of the obstruction by the defendants *Navroji* v *Dastur Kharshedji* (1904) 28 Bom 20, 54
(3) A suit between two individuals each claiming certain rights as *mutawali* over *wakf* property · *Manjan* v *Khadem Hossein* (1905) 32 Cal 273
(4) A suit between two persons as to which of them is the lawful trustee of a charity, *Budree Das* v *Chooni Lal* (1906) 33 Cal 789, 808; *Muhammad* v *Ahmed* (1913) 35 All 459, 20 I C. 37, *Niamat Ali* v *Ali Reza* (1914) 37 All 86, 26 I C 778, *Puttu Lal* v. *Dayanand* (1922) 44 All 721, 68 I C

(j) *Dinsha Petit* v *Jamsetji* (1909) 33 Bom 509 *per* Davar J, at pp 526-531, *per* Beaman, J, at pp 562 568, 2 I C 701

(k) See the judgment of Woodroffe, J, in *Budree Das* v *Chooni Lal* (1906) 33 Cal 789

(l) See *per* Davar J, in *Dinsha Petit* v *Jamsetji* (1909) 33 Bom 509, 529-530, 2 I. C 701

786, (22) A A 499, *Ayatunnessa* v *Kulfu* (1914) 41 Cal 749 22 I C 677, *Giyana* v *Kandasami* (1887) 10 Mad 375 The High Court of Bombay has held that where the defendant is in management of the trust property and the plaint also contains a relief for accounts against him the suit is one under this section *Narayan* v *Vasudeo* (1924) 26 Bom L R 950 (24) A B 518 This view, it is submitted, is not correct See 45 *Mad 113 69 I C 304 (22) A M 17, cited in ill (6) below*

(5) It has been held by the High Court of Allahabad that the right of a Mahomedan to use a mosque is not a public but a *private* right It is like the right to use a private road, *any one* who has the right may maintain a suit in respect of it [*Jawahra* v *Hussain* (1885) 7 All 178, at pp 182 183] To such a suit the provisions of this section do not apply Thus it has been held that *any* Mahomedan entitled to frequent a mosque may, if property belonging to the mosque has been sold by the person managing the same for the time being for his private debts, maintain a suit for a declaration that the property is *wakf* property, and to set aside the sale and evict the purchaser [*Zafaryab Ali* v *Bakhtawar Singh* (1883) 5 All 497] Similarly if land attached to a mosque is encroached upon *any* Mahomedan entitled to use the mosque may sue to eject the trespasser And if the mosque be in a dilapidated condition and a Mahomedan frequenting the mosque or one looking after it is desirous of repairing it but is obstructed by a third person he may maintain a suit to establish his right to repair the mosque [*Jawahra* v *Akbar Husain* (1885) 7 All 178] The contrary however, has been held by the High Court of Calcutta in *Jan Ali* v *Ram Nath* (1882) 8 Cal 32 and *Lutfunnissa Bibi* v *Nazirun Bibi* (1885) 11 Cal 33 According to these decisions, the right sought to be established in such suits as the above is not a private but a *public* right and it can only be *enforced by a suit brought in conformity* with the provisions of this section But in a later Calcutta case [*Mohiuddin* v *Sayiduddin* (1893) 20 Cal 810] it was pointed out that the reasoning of the Allahabad cases, showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment was an *independent* right wholly irrespective of the rights of the other worshippers, was correct The view taken in the earlier Calcutta decisions is, it is submitted, not correct (*m*)

(6) A suit by a trustee against a co trustee for accounts *Appanna* v *Narasinga* (1922) 45 Mad 113, 69 I C 304 (22) A M 17 [F B], *Bapuji* v *Govindlal* (1916) 40 Bom 439, 34 I C 167

(7) A suit by an idol as a juristic person against persons who interfere unlawfully with the property of the idol of the income thereof *Darshan Lal* v *Shibji* (1923) 45 All 215, 71 I C 420, (23) A A 120

Suit for possession of trust property against trespassers and against alienees from trustees—Suits against strangers to the trust that is against trespassers and against transferees of trust property from trustees for recovery of possession of trust property from them, do not fall within this section Such suits are to be instituted in the ordinary manner and not under this section (*n*) The following are instances of suits of this character —

(1) A suit by the disciples of a *mutt* for a declaration that the defendant was not the duly appointed successor to the late head of the *mutt*, and that

(*m*) See *Vaidyanatha* v *Swaminatha* (1924) 51 I A 282 288 47 Mad 884 891 82 I C 804 (24) A PC 221

(*n*) *Budree Das* v *Chooni Lal* (1906) 33 Cal 789 805

he was in possession under a false claim of title, and for ejecting the defendant from the *mutt* properties *Srinivasa* v *Srinivasa* (1893) 16 Mad. 31 [Here the claim against the defendant is as against a *trespasser*]

(2) A suit for a declaration that a certain piece of land of which it was alleged the defendants had taken wrongful possession was a public graveyard, and for the ejectment of the defendants from the land *Muhammad* v. *Kallu* (1899) 21 All 187 *Ghazaffar* v *Yawar Husain* (1906) 28 All 112, 117, 120, 121, *Dasondhay* v *Muhammad* (1911) 33 All 660, 11 I C 36, *Muhammad Baksh* v *Musammat Piari* (1921) 19 All L J 236, 62 I C 744 [Here also the claim against the defendant is as against trespassers] Compare *Latifunissa Bibi* v *Nazirun Bibi* (1885) 11 Cal 33, where the suit was for a declaration that certain property was *wakf* property and for recovery of possession thereof from a third party, and where the Court held that the suit ought to have been instituted in conformity with the provisions of this section This decision would appear to be no longer law see *Mohiuddin* v *Sayidud lin* (1893) 20 Cal 810 p 816

(3) *A suit to set aside an alienation of trust property alleged to have been* wrongfully made by the trustees, and for the recovery of property from the alienee *Kazi Hassan* v *Sagun* (1900) 24 Bom 170, *Lakshmandas* v *Ganpatrav* (1884) 8 Bom 365, *Vishvanath* v *Rambhat* (1891) 15 Bom 148, *Ghelabhai* v *Uderan* (1911) 36 Bom 29, 12 I C 577 [Here the defendants are transferees from trustees]

(4) A suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts *Malhar* v *Narasinha* (1912) 37 Bom 95, 17 I C 665

(5) A suit by two of the worshippers of a temple with the leave of Court under O 1, r 8, against the committee of management (not being trustees) and *archakas* of the temple for a declaration that a transfer made by the committee to the *archakas* of the right to collect and receive offerings made by the pilgrims is invalid *Venkataramana* v *Kasturiranga* (1917) 40 Mad 212 38 I C 73 [F B]

(6) A [illegible]

such a case is a trespasser] *Ganga Puri* v *Mohan Lal* (1923) 4 Lah 295, 73 I C 645, (24) A L 131

See notes above, Trustee

Suits for removal of trustees for unlawful alienation of trust property and against alienees from such trustees —A common type of suits under this section is a suit against the trustee of a charity for his *removal* on the ground that he has unlawfully alienated the trust property treating it as his private property, and for the appointment of a new trustee in his place It is clear that such suit is within this section for the relief claimed is one under cl (a) of this section, and the ground on which the relief is claimed is a breach of trust in alienating the property *It is also clear that the Court cannot remove the trustee unless it finds that the property* is trust property and that it has been wrongfully alienated by the trustee The question we have to consider is, whether the Court has the power, in the absence of the alienee, to declare that the property is trust property and that the alienation is unlawful It has been held by the High Court of Madras that an alienee is *not a proper party* to a suit under this section, and that if he is joined as a party by the plaintiff, the suit as against him should be dismissed But this, it has been held, does not preclude the Court from

S. 92. they now find a place in sub s (1) of the present section But neither the Code of 1877 nor the Code of 1882 contained any provision such as is contained in sub s (2) Before the enactment of the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the *ordinary* Courts by certain persons as plaintiffs Thus—

(1) *persons appointed supervisors over trustees* could sue in any *ordinary Court* competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (e) similarly,

(2) *one or more of the members* of a defined class of the general public [such as the Satchasi community of Chitra] could sue on behalf of the whole class, *with the leave of the Court under s* 30 [now O 1, r 8] in any *ordinary Court* competent to hear the suit, to obtain a declaration of their right to take part in the management of the worship of a goddess (f)

It will at once be seen that the above suits fall within the purview of the present section They also came within the terms of s 539 of the earlier Codes In the absence of any provision in s 539 similar to that contained in sub s (2), the question arose whether these suits were to be instituted in the special Courts mentioned in s 539 and by the Advocate General as plaintiff, or whether they could be instituted as before in ordinary Courts and by persons who could have sued if s 539 had not been enacted It was held by the High Court of Bombay that s 539 was mandatory in other words that *every* suit of the character mentioned in that section must be brought in accordance with its provisions and not otherwise That is to say, the suits referred to above could no longer be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other, but they must be instituted either by the Advocate General or by two or more persons interested in the trust after obtaining the sanction of the Advocate General, and further, that these suits could only be brought in the *special Courts* indicated in that section namely, the High Court or the District Court, as the case might be (g) On the other hand it was held by the other High Courts that section 539 was permissive, and that it did not take away the right of suit which existed prior to and independently of it According to these Courts suits of the character mentioned above could, notwithstanding the enactment of section 539, be brought as before by the *abovenamed parties* as plaintiffs in *any Court* competent to entertain those suits, and it was not obligatory to institute them in accordance with the provisions of s 539 (h) Sub section (2) gives effect to the Bombay decisions, and supersedes the decisions of the other High Courts It provides in distinct terms that no suit claiming any of the reliefs specified in sub section (1) shall be instituted except in conformity with the provisions of that sub section At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section We proceed to consider the provisions of that Act and their bearing on the present section

"Save as provided by the Religious Endowments Act, 1863"—After the downfall of the Mogul Empire in India, it was discovered that the income of many endowments granted in land by the presiding Governments of this country and by

(e) *Nellaiyappa* v *Thangama* (1898) 21 Mad 406 *Ram Das* v *Batri Narain* (1907) 29 All 27

(f) *Monmotho* v *Harish Chandra* (1906) 33 Cal 905

(g) *Tricumdass* v *Khimji* (1892) 16 Bom 626 *Syud Hussein* v *Collector of Kaira* (1897) 21 Bom 48

(h) *Nellaiyappa* v *Thangama* (1898) 21 Mad 406 *Budree Das* v *Chooni Lall* (1906) 33 Cal 789 800-804 *Monmotho* v *Harish Chandra* (1906) 33 Cal 905 *Ram Das* v *Badri Narain* (1907) 29 All 27

individuals for the support of mosques, temples, colleges and for other pious and beneficial purposes was misappropriated by persons managing the endowments It was therefore deemed expedient that the British Government should take charge of these endowments, and for that purpose and the purpose also of providing for the maintenance of bridges, serais, uttaras and other buildings erected for the use of the public, Regulation 19 of 1810 was passed, whereby the general superintendence of all *religious and charitable* endowments referred to above was vested in the Board of Revenue That Regulation applied to endowments in Bengal A similar Regulation, being Regulation 7 of 1817, was subsequently passed to provide for like endowments in the Madras Presidency (i) Several years after the passing of these Regulations, it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahomedans was inexpedient, and a report was therefore called for by the Government of India in the year 1841 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments, and transfer the management to properly qualified individuals As a result Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to *religious* endowments were repealed, and provision was made for the transfer of all such endowments, in certain cases to trustees, and in others to committees (ss 3 8) But the duty of superintending over *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact, express care is taken in the Act to declare that this duty over *charitable* endowments is not intended to be affected or interfered with (ss 21, 23)

The Religious Endowments Act applies only to *public* religious endowments, as did the old Regulations It does not apply to *private* religious endowments S 14 of the Act provides that any person interested in any mosque, temple, or religious establishment may sue the trustees or members of a committee *for any misfeasance, breach of trust, or neglect of duty* committed by them in respect of the trust vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a committee A suit which does not charge the trustees or member of a committee with misfeasance, breach of trust, or neglect of duty does not fall under that section (j) S 18 provides that *no suit under the Act shall be instituted without the leave of the Court*

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only But it does not apply to Presidency towns, so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under s 18 of the Act (k)

After the passing of the Regulations above referred to, the Board of Revenue took over the management of some endowments, but in the large majority of cases they did not take charge of endowments created by private individuals The operation of the Act, however, is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations The Act applies, to every public religious endowment to which the provisions of the old Regulations applied, that is to say, to every public religious endowment

(i) Sri *Sithārama* v. *Sitramania Iyer* (1916) 39 Mad 700, 703 32 I C 211

(j) *Subramania* v. *Krishnaswamy* (1919) 42 Mad 668 53 I C 605

(k) *Pinch Cowrie Mull* v. *Chumroo Lall* (1878) 3 Cal 563 *Annasami Pillai* v. *Rama Krishna Mudaliar* (1901) 24 Mad 219

92. created "by the preceding Governments of this country and by individuals," whether the management of the endowment was taken over by the Board of Revenue or not (*l*)

Reading s 92 of the Code and the Religious Endowments Act together we have the following result —

(1) No suit in respect of *charitable* endowments of a public nature, claiming any of the reliefs specified in sub section (1) of section 92, can be brought except in conformity with the provisions of that sub section

(2) In the case of *religious* endowments of a public nature *to which the Religious Endowments Act applies*, a suit charging the trustee, manager, superintendent, or a member of a committee of a mosque, temple, or religious establishment, with *misfeasance, breach of trust or neglect of duty*, may be brought under the provisions of that Act with the leave of the principal Civil Court of original civil jurisdiction in the District in which the mosque, temple, or religious establishment is situate as provided by s 18 of the said Act, or it may be brought under the provisions of the Code with the consent of the Collector as provided by s 92 of the Code (*m*)

(3) No suit in respect of *religious* endowments of a public nature *to which the Religious Endowments Act does not apply*, claiming any of the reliefs specified in sub section (1) of section 92, can be brought except in conformity with the provisions of that sub section

Death of either plaintiff pending suit.—It has been held by the High Court of Allahabad, that where a suit is brought by two persons under this section, and one of them dies pending the suit, the suit abates unless some other person is brought on the record in place of the deceased Such person must be one who has an interest in the trust and he must have obtained the consent of the Advocate General as required by this section (*n*) On the other hand, it has been held by the High Court of Madras that a suit brought under this section being a representative suit, there is no question of abatement and the Court has power under O 1, r 10 (2), to add other persons interested in the trust as parties not because they are the legal representatives of the deceased plaintiff, but because they had become parties to the representative suit by the very fact of its being instituted on behalf of all persons interested in the trust, from this point of view, the consent of the Advocate General is not necessary to add another person interested in the trust as a party (*o*) The Chief Court of the Punjab has followed the Madras decisions (*p*) It has since been held by the Judicial Committee that where one of the two plaintiffs dies, the suit does not abate, as a suit under this section is a representative suit (*q*) The Allahabad decision, it is submitted is not correct

Death of defendant-trustee pending suit —Where a suit is brought under this section against a trustee not only for his removal, but for framing a scheme, and the scheme is one of the main reliefs sought, the suit does not abate on the death of the trustee and his successor in office may be brought on the record as a party defendant (*r*) The suit, of course would abate, if it was solely for the removal of the trustee

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110 34 I C 384 *Sayyed* v *Dost* (1924) 47 Mad L J 745, 85 I C 666 (25) A M 244

(*p*) *Gopi Das* v *Lal Dast* (1918) P R no 97, p 321 47 I C 983

(*o*) *Parameswaran* v *Narayanan* (1917) 40 Mad

Specific Relief Act, 1877, s 42 —Where a suit falls within this section the plaintiffs cannot evade the requirements of the Code by framing the suit as one under s 42 of the Specific Relief Act (s) At the same time it is to be noted that where a suit is maintainable under this section and the plaintiff seeks any of the reliefs specified in the section s 42 of the Specific Relief Act does not apply Thus if a suit is brought under this section for a *declaration* that the defendants are not the lawful trustees and for the appointment of new trustees the suit will not be dismissed because no consequential relief is claimed namely delivery of the trust property to the new trustees that may be appointed by the Court (t) [Sec 42 of the Specific Relief Act provides in effect that where a suit is brought for a declaratory decree and the plaintiff is able to seek further relief than a mere declaration but omits to do so the suit should be dismissed]

Limitation Act —The de jure managers and trustees of a public charity losing their right by limitation to oust the de facto trustees does not confer on the latter immunity from a suit on the part of the Advocate General under this section (u)

A suit for accounts under this section against a trustee de son tort is governed by art 120 of the Limitation Act Such a trustee is therefore liable to render accounts only for 6 years preceding the suit (v)

Relators cannot appeal in their own right —Where a suit instituted under this section by the Advocate General at the instance of relators is dismissed, and the Advocate General does not think fit to appeal it is not competent to the relators to file an appeal on their own account against the decree dismissing the suit (w) The reason is that relators are not parties to the suit (x)

Cy pres doctrine —Though the section does not expressly empower the Court to apply the cy pres doctrine in the settling of schemes, it would seem that the Court has the power to apply the doctrine (y)

93 **[S. 539, last para.]** The powers conferred by sections 91 and 92 on the Advocate General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf

Exercise of powers of Advocate General outside presidency towns

Collector —An Assistant Collector has no power under this section to give his consent to the institution of a suit of the kind contemplated by s 92 [for s 91] in the absence of the Collector Where such a suit is instituted with the consent of the Assistant Collector but not with the consent of the Collector the plaint must be rejected under O 7 r 11 (z)

(s) [illegible] Fa al (192-) 44 All 6[illegible] 57 I C 6[illegible]9 [illegible] A 349

(t) [illegible] Ra a v Venkatacharulu (1903) 26 Ma[illegible]

(u) [illegible] 50 Srinivasa v Srinivasa (1893) 16 Ma[illegible] 31

(w) *Jan Mahomed v Syed Nurud n* (1908) 32 Bom 155

(x) *Attorney General v Wright* (1841) 3 Beav 447 *Attorney-General v Logan* [1891] 2 Q B 100 106

(y) *Mayor of Lyons v Advocate General of Bengal* (1876) 1 Cal 303 3 I A 3[illegible]

(z) *Somchand v Chhaganlal* (1911) 35 Bom 243 10 I C 803

PART VI

Supplemental Proceedings

94. [*New*] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

Supplemental proceedings

(*a*) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison,

(*b*) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property

(*c*) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold,

(*d*) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property,

(*e*) make such other interlocutory orders as may appear to the Court to be just and convenient

This section summarizes the general powers of the Court in regard to interlocutory proceedings The details of procedure have been relegated to Schedule I

Clauses (a) and (b) Arrest and attachment before judgment—See O 38 below

Clauses (c) and (e) Temporary injunctions and interlocutory orders—See O 39 below

Clause (d) Appointment of receiver—See O 40 below See also notes to s 51 Receiver in execution proceedings

95 [Ss 491, 497.] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

Compensation for obtaining arrest attachment or injunction on insufficient grounds

(*a*) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

Changes introduced by the section—This section corresponds with ss 491 and 497 of the Code of 1882 except that the words by its order have been substituted for the words ' in its decree ' The words by its order indicate that the award should no longer form part of the decree, but should be embodied in a separate order The order is now made appealable by s 104

Scope of the section—This section provides for compensation to the defendant in the two following cases —

I (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted* (see Orders 38 and 39), and

(2) such arrest attachment or injunction was *applied for on insufficient grounds*

II (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted*

(2) the plaintiff *fails* in the suit, and

(3) there was *no reasonable or probable ground for instituting the suit*

In case II it is not necessary to show that the arrest, attachment or injunction was applied for on insufficient grounds It is enough if the plaintiff *fails* in the suit, and there was no *reasonable or probable ground* for instituting the suit The principle is that a plaintiff who has obtained an arrest attachment or injunction by instituting a *suit* without any probable ground should be punished as much as a plaintiff who has obtained the *process* on insufficient grounds

This section is no bar to a regular suit—This section provides a summary remedy for an injured defendant and enables him to seek compensation for the injury done to him by the plaintiff by instituting proceedings by an *application* to the Court instead of by a *suit* But the remedy under this section is optional [illegible] an injured defendant may, if he so choses institute a regular suit against the p[illegible] for compensation for wrongful arrest, attachment or injunction This clearly [illegible] from sub section (2) which impliedly recognizes the right of a defendant to [illegible] regular suit for compensation (a) In a *suit*, however for compensation th[illegible] must prove malice in fact in addition to the facts required to be proved by th[illegible] But whether the proceedings is by way of suit or by an application un[illegible]

(a) See [illegible] v [illegible] (1909) 3[illegible] Mad 1[illegible] I C 345

(b) Sanjappa v [illegible] (19[illegible]) [illegible] 12 I C 507

S. 95. the defendant is not entitled to any compensation unless the attachment has been effected" Merely procuring an order for attachment before judgment however maliciously is not sufficient to entitle the defendant to compensation (c) As to the period of limitation for a suit, see Limitation Act, 1908, sch I, arts 19, 29, 36 and 42, and also the undermentioned cases (d) As to suits for damages for temporary injunction improperly obtained, see the undermentioned cases (e)

"On insufficient grounds"—These words are equivalent to 'without reasonable and probable cause (f)

An award under this section is a bar to a regular suit—Once an application is made by a defendant under this section for compensation for wrongful arrest, attachment or injunction and an order is made under this section the defendant cannot institute a regular suit for compensation for the *same wrong* whether any compensation is awarded to him or not In other words, the disposal of an application under this section has the effect of res judicata so as to bar any subsequent suit in respect of the *same cause of action* Note that it is the disposal of the application and not the *mere presenting* of the application, that is a bar to a regular suit

Amount of compensation—The amount of compensation that may be awarded under this section cannot exceed Rs 1,000 Where a defendant claims a larger amount of compensation he must institute a regular suit

Right of defendant not served with summons to apply for compensation under this section—If a defendant is arrested before judgment he is entitled to apply for compensation under this section, though he has not been served with the writ of summons in the suit (g)

Counter-claim for compensation in a summary suit—If a defendant who is arrested before judgment in a summary suit brought against him on a negotiable instrument under O 37, claims compensation for arrest under this section, he is entitled on that ground to apply for leave to defend the suit under O 37, r 3, and if a *prima facie* case is made out, leave to defend should be given (h)

Provincial Small Cause Courts—A Provincial Small Cause Court has jurisdiction under this section to award compensation to a defendant for wrongful attachment (i) See s 7, cl (b)

Appeal—An appeal lies from an order under this section see sec 104 sub-sec. (1), cl (X) (g)

S 491 of the Code of 1882 provided for compensation for a wrongful arrest and attachment S 497 provided for compensation for wrongful injunction An order under s 497 was appealable under that Code (j), but as to orders under s 491 it was held that they were not appealable (k) The present section combines the provisions of ss 491 and 497, and s 104 gives a right of appeal from all orders under this section, whether they are orders made on an application for compensation for wrongful injunction, or for wrongful arrest or attachment

(c) *Rama* v *Govinda* (1916) 39 Mad 952 32 I C [illegible] 448

[illegible]

(e) *Nand Coomar* v *Gour Sunkur* (1870) 13 W [illegible]

Undertaking—Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the undertaking is to be enforced by an application under this section to the Court which granted the injunction. *A* attaches a house in execution of a decree against *B*. *C* sues for a declaration that the house belongs to him, and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the value of the house if his suit be dismissed. *C*'s suit is dismissed. In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree, but to the Court which granted the injunction (*l*)

Chartered High Court—Where a temporary injunction has been granted by a Chartered High Court on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the Court, it is submitted, has the power to award compensation to the defendant exceeding Rs 1,000 on an *application* by the defendant in that behalf. The case of an "undertaking" is a case outside the scope of this section

(*l*) *Varajlal* v *Kastur* (1898) 22 Bom 42

PART VII.

Appeals.

Appeals from Original Decrees

96. [S 540 **Jud. Act, 1873, s 49**] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

Appeal from original decree

(2) An appeal may lie from an original decree passed *ex parte*

(3) No appeal shall lie from a decree passed by the Court with the consent of parties

Changes introduced by the section—Sub section (3) is new In other respects this section corresponds with s 540 of the Code of 1882 As to the effect of sub section (3) see notes below under the head Sub section (3) consent decrees not appealable

Compare Judicature Act 1873 s 49 which provides that no order made by the High Court or any judge thereof by the consent of parties shall be subject to any appeal except by leave of the Court or judge making such order

Letters Patent appeals—The *right of appeal* from a decree of a single Judge of a High Court to the High Court is governed not by this section but cl 15 of the Letters Patent The Code makes no provision for an appeal within the High Court that is to say, from a single Judge of the High Court This right of appeal depends on clause 15 of the Charter (m) But as regards *procedure* the Code and the rules therein contained especially the rules contained in O 41 apply to proceedings in a High Court under the Letters Patent, save so far as the Code expressly provides to the contrary (*mm*)

Right of appeal—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court such right must be given by statute or by some authority equivalent to a statute (n) Unless a right of *appeal* is clearly given by statue it does not exist whereas a litigant has independently of any statue a right to institute any *suit* of a civil nature in some Court or another (o) No right of appeal can be given except by *express* words (p) Note in the present section the express words an appeal shall lie from every decree

(m) *Debendra Nath v Bibhendra* (1916) 43 Cal 90 93-94 33 I C 745 *Sabhapathi v Narayanasami* (1902) 25 Mad 555 558 *Nawab Ikhram Jung v Haji S Hanali* (1913) 37 Bom 572 17 I C 739 *Surajmal v Horniman* (1918) 20 Bom L R 185 217 218 47 I C 449

(mm) *Satrughna Thakurain v Sari* (1921) 48 I A 76 48 Cal 481 60 I C 74

(n) *Minakshi v Subramanya* (1888) 11 Mad 26 33 14 I A 16 *Ia a v Seshie* (1904) 27 Mad 504 *Ranjoo Bol o ng Co v Collector of Rangoon* (1913) 40 Cal 21 27 39 I A 197 200 16 I C 188

(o) *Zair Husain Khan v Khurshed Jan* (1906) 28 All 545 550

(p) *Narayan v Secretary of State* (1896) 20 Bom 803

Agreement not to appeal—An agreement whereby the parties agree not to appeal from a decree is binding upon the parties thereto if it is for a lawful consideration and is otherwise valid (*q*) But an agreement by the next friend of a minor not to appeal is not binding on the minor (*r*)

Decree—As to the distinction between a decree and an order, see p 4 above All decrees are appealable, unless the appeal is barred under this Code or any other law But all orders are not appealable The only orders appealable are those specified in s 104

Where decree not drawn up—No appeal can be entertained from a decree unless the decree has been drawn up (*s*) See notes to s 33, also notes to s 97, 'Where preliminary decree not drawn up

Appeal from ex parte decree—S 540 of the Code of 1882 as it originally stood did not contain any clause allowing appeals from ex parte decrees The clause allowing such appeals was added by s 45 of the Civil Procedure Code Amending Act 7 of 1888 Prior to that Act it was doubted in some cases whether an appeal lay from an ex parte decree As to the powers of an appellate Court in the matter of ex parte decrees, see notes to O 9, r 13, Whether remedies concurrent

Forum of appeal—The value a of suit, that is, the amount or value of the subject matter thereof, determines the forum of suit, that is, the Court in which the suit is to be filed It also determines the forum of appeal, that is, the Court to which the appeal lies What then is the value of a suit for the purposes of appeal? Now a plaintiff may in his plaint fix a sum *definitively* as the amount of his claim as in a suit for debt, or he may fix it *approximately or tentatively* as in a suit for accounts or for mesne profits [O 7 r 2] Where the plaintiff fixes a sum *definitively*, it is that sum that determines the forum of appeal, and not the amount affected by the decree and involved in the appeal (*t*) Where the plaintiff fixes a sum *approximately*, there is a difference of opinion as to the forum of appeal According to the Calcutta High Court it is the amount decreed by the first Court as the amount due to the plaintiff that determines the forum of appeal (*u*) According to the Bombay (*v*) and Allahabad (*w*) High Courts it is the amount determined by the first Court as the amount due to the plaintiff *and* accepted by the plaintiff by payment of additional court fee that determines the forum of appeal According to the Madras High Court, it is the amount or value of the subject matter as fixed in the plaint, *though* approximately, that determines the Court to which the appeal lies and not the amount decreed *It has accordingly been held by that Court that where in a suit for account filed* in the Court of a District Munsif whose jurisdiction is limited to suits of which the value does not exceed Rs 2,500 the plaintiff fixes his claim approximately at Rs 2 000, and the Munsif passes a decree for more than Rs 5 000, the appeal from the Munsif's decree lies not to the High Court, but to the District Court (*x*) Where a suit is *dismissed* by the first Court—in which case the mesne profits remain undetermined—

S. 96. the sum stated in the plaint determines the forum of appeal (y) It has been recently held by a Full Bench of the High Court of Calcutta that where a suit is properly brought in the Court of a Munsif for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction The value of such a suit for purposes of jurisdiction is the value of the immoveable property plus mesne profits *up to the date of the suit* where such profits are claimed If a suit is rightly entertained as within the jurisdiction of the Munsif and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit The forum of appeal is determined by the value of the suit and not by the amount decreed (z) The undermentioned decisions (a) of the same High Court must be taken to have been overruled by the Full Bench case See notes to s 6 on p 15 above, also notes to s 15, "Over valuation and Under valuation on p 79 above

A decree is passed by Court *M* in respect of a cause of action which arose at Kadiri Appeals from decrees of Court *M* lie to Court *C* Subsequently Kadiri is transferred to the territorial jurisdiction of Court *P* from which appeals lie to Court *B* To which Court does the appeal from the decree lie, to Court *C* or to Court *B*? The answer is, to Court *B* The reason is that a transfer of territorial jurisdiction *ipso facto* effects a transfer of venue (b)

Who may appeal—An appeal under this section may be preferred by any of the following persons —

1 Any party to the suit *adversely affected by the decree* (c), or, if such party is dead, by his legal representative (d) [see s 146]

2 Any transferee of the interest of such party, who, so far as such interest is concerned is bound by the decree, provided his name is entered on the record of the suit (e) [See notes to s 47, "Representative," on p 135 above]

3 An auction purchaser may appeal from an order in execution setting aside the sale on the ground of fraud [See notes to s 47, "Appeal," on p 144 above]

No person, unless he is party to the suit, is entitled to appeal under this section (f)

We have said above that any party to a suit adversely affected by a decree may prefer an appeal from the decree The question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances It is clear that if a plaintiff's claim is decreed in its entirety and all the issues are found in his favour, the plaintiff cannot appeal from the decree Suppose now that the plaintiff's claim is decreed in its entirety, but that one of the issues is found against the plaintiff, can the plaintiff appeal from the finding adverse to him in such a case? It has been held that he cannot (g) The reason is that the very fact that the decree is entirely in the plaintiff's favour notwithstanding a

(y) *Satya Kinkar v Raja Prasad Singh* (1919) 4 Pat L J 447 52 I C 45
(z) *Bidhindhar v Manindra Nath* (1925) 29 C W N 869
(a) *Bhupendra v Purna* (1910) 43 Cal 650 *Baikuntha v Mohananda* (1919) 24 C W N 342 58 I C 170
(b) *Subbayya v Pachayya* (1914) 37 Mad 477 26 I C 19
(c) *Krishna v Mohesh Chandra* (1905) 9 Cal W N 584
(d) *Gajadhar v Ganesh* (1871) 7 B L R 149
(e) *Moreshwar v Kushaba* (1878) 2 Bom 248 250
(f) *Rustomji v Official Liquidator* (1919) P R no 79 p 196 49 I C 881
(g) *Secretary of State v Saminatha* (1914) 37 Mad 25 12 I C 167

finding adverse to him on one of the issues shows that such finding was unnecessary to the determination of the plaintiff's suit We have seen in the notes to s 11, pp 62 63 above, that when a finding on an issue is not necessary to the determination of a suit, such finding does not operate as *res judicata*, and it is an elementary principle that an appeal is not admissible on any point that does not operate as *res judicata* Similarly, if a suit is brought by *A* against *B*, and the suit is dismissed in its entirety *B* cannot appeal from the decree And even if one of the issues is found against *B*, *B* cannot appeal from the finding, for such finding does not *operate* as *res judicata* for the reason stated above (*h*) See notes to s 11, Decision in the former suit must have been necessary to the determination of that suit, on p 62 above and the cases there cited

It sometimes happens, where there are *two or more* defendants, that although a suit is dismissed as against one of them, in other words the decree on the face of it is entirely in his favour, the decree impliedly negatives the right claimed by such defendant as against the plaintiff and the other defendants In such a case it has been held that an appeal lies at the instance of such defendant on the ground that he is adversely affected by the decree *X* owes Rs 2 000 to *A* *A* assigns the debt first to *B* and then to *C* *C* sues *A* and *B* to recover the debt, alleging that the assignment to *B* had become void through non fulfilment of the conditions upon which it was made A decree is passed against *A*, but the suit is dismissed as against *B* Here the decree *necessarily implies* the finding that the assignment to *B* had become void, inasmuch as but for such a finding the decree could not have been passed in favour of *C* who admittedly was the *second* assignee of the debt *B* may therefore appeal from the decree, though as against him the suit was dismissed (*i*)

In some cases an appeal may be preferred by a defendant against his co defendants *A* sues two Hindu brothers *B* and *C* on a promissory note passed by *B* for money borrowed by him (*B*) as manager of the family, alleging that *B* and *C* were joint, and that the loan was obtained by *B* for family purposes *B* does not appear at the hearing *C* appears and admits that he and *B* are joint, but denies that the loan was obtained for family purposes An issue is raised as to whether the debt contracted by *B* was for family purposes It is found by the Court that the loan was obtained by *B* for family purposes, and a decree is passed against *B* and *C* Here *C* can appeal from the decree as between himself and *B* The rule is that when a Court deals with a case as raising not only a question between the plaintiff and the defendants, but also as between the defendants, one of the defendants can appeal from the decree as between himself and the other defendants (*j*) See notes to s 11, Res judicata between co defendants,' on p 49 above

Joinder of appellants—It is irregular for defendants with different defences to a suit and with different grounds for appeal to join in a single appeal (*k*)

Sub-section (3): consent decrees not appealable—Sub section (3) is new It declares that no decree passed by consent of parties shall be appealable Under the Code of 1882 consent decrees were passed under s 375 Under the present Code (*l*) a consent decree may be passed under O 23, r 3 This rule corresponds with

(*h*) *Latchayya* v *Kolamma* (1924) 47 Mad L J 431 84 I C 945 (25) A M 264

(*i*) *Jamna Das* v *Udey Ram* (1899) 21 All 117 *Krishna Chandra* v *Mohesh Chandra* (1905) 9 Cal W N 584 *Yusuf Sahib* v *Durgi* (1907) 30 Mad 447 *Venkateswarlu* v *Lingayya* (1924) 47 Mad 633 83 I C 960 (24) A M 659, *Venkobacharlu* v *Ladhabayamma* (1924) 47 Mad L J 612 (24) A M [illegible]

(*j*) *Soiru* v *Narayanrao* (1894) 18 Bom [illegible]

(*k*) *Hodges* v *Delhi and London Bank* (1900) [illegible] Cal W N 1

(*l*) See *Curchaman* v *Shibler* (19[illegible]) 3 Lah [illegible] 66 I C 2[illegible] ([illegible]) [illegible]

S. 96. s 375 of the Code of 1882 except that certain words which occurred at the end of s 375 have now been omitted S 375 ran as follows —

'If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith so far as it relates to the suit, *and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction*

Compromise of suit

O 23 r 3, is a reproduction of s 375 with the omission of the words italicized above (*m*) This omission has been supplied by sub section (3) of the present section The said words barred an appeal from a consent decree *only so far as* such decree related to so much of the *subject matter of the suit* as was dealt with by the agreement, compromise or satisfaction on which the decree was based If a consent decree dealt with any matter extraneous to the suit that is matters that *did not relate to the subject matter of the suit* it was held that the decree *though passed with the consent of parties* was appealable and that it should be modified by omitting therefrom such terms as did not relate to the subject matter of the suit (*n*) As regards the terms so excluded it was held that they might be enforced in a separate suit as a *contract* (*o*) It would be so also under the present Code See in this connection the observations of the Judicial Committee in *Hemanta Kumari Debi* v *Midnapur Zamindari Company* (*p*)

Both under O 23 r 3 and the corresponding s 375 of the Code of 1882 the agreement or compromise in terms of which the Court is invited to pass a consent decree must be lawful It was accordingly observed by the High Court of Bombay in *Goculdas* v *James Scott* (*q*), a case under s 375, that notwithstanding the declared finality of the decree, an appeal against it would be maintainable, where the party against whom the decree was passed alleged that there had been in fact no 'lawful agreement' come to, in which case the condition precedent to the making of the decree would not be fulfilled These observations were mere *obiter dicta*, but they were adopted by the High Court of Madras in *Sridharan* v *Puramathan* (*r*), where it was held that an appeal would lie from a consent decree if the agreement in terms of which the decree was passed was not lawful The present Code does not allow an appeal from a consent decree in *any* case But it is competent to either party to appeal from the *order* recording the compromise where the compromise is not a lawful compromise on the ground that the Court had no power under O 22 r 3, to record a compromise that was not lawful [O 43, r 1, cl (m)] See notes to O 22, r 3, "Appeal

Plaintiffs sued upon an alleged account stated, by the Court found that it was fraudulent and fabricated Plaintiffs being thus compelled to rely on items of claim contained in the general account it was found that each of those items was barred by limitation The defendant nevertheless consented to a decree being passed in the plaintiff s favour for such of the items as were proved, and the trial Court passed a decree upon that basis It was held that the finding on the question of limitation standing, the decree was a consent decree and the plaintiffs were not entitled to appeal from the decree (*s*)

(*p*) (1919) 46 I A 240 246 47 Cal 485 495 53 I C 534
(*q*) (1892) 16 Bom 202 at p 212 See also *Iragdas* v *Girdhardas* (1902) 26 Bom 76 79
(*r*) (1900) 23 Mad 101
(*s*) *Ramachandra* v *Chaitana* (1920) 39 Mad L J 68 56 I C 539 [P C]

Procedure for setting aside consent decrees —Sub section (3), in so far as it bars an appeal from consent decrees, gives effect to the principle that a judgment by consent acts as an estoppel (*t*) But a consent decree can be set aside on any ground, that would invalidate an agreement such as misrepresentation, fraud or mistake (*v*) This, however, cannot be done by an appeal, but it must be done by a *fresh suit* brought for the purpose (*t*) In some cases it may be done by an application for a review (*u*) But it cannot be set aside by a rule (*x*) See notes to s 11, Consent decree and estoppel, ' on p 65 above

"**By consent of parties**"—To constitute consent there must be an agreement between the parties Mere acceptance by a party of an order offered by the Court does not amount to consent (*y*)

Appeal from final decree where no appeal from preliminary decree.

97. [*New*] Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Preliminary decree —For definition of preliminary decree, see s 2 (2) above

Appeal from preliminary decree —This section is new The object of the section is to estop parties aggrieved by a preliminary decree, who do not appeal from such decree within the period of limitation, from afterwards disputing its correctness in any appeal which may be preferred from a decree

This section enacts that where a party aggrieved by a preliminary decree does not appeal from such decree within the period of limitation, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree The reason of this enactment is that it is unreasonable that a party aggrieved by a preliminary decree should allow proceedings to be carried on to their final stage and large costs to be incurred and then object to the preliminary decree in an appeal from the final decree Recent Calcutta decisions under the Code of 1882 were quite the other way According to these decisions a party aggrieved by an order in the nature of a preliminary decree was not bound to appeal from the order though the order was appealable as a decree, he was at liberty to wait until the final decree was passed and then to dispute the correctness of the order in an appeal from the final decree, though the period of limitation for an appeal from the order had then expired Thus it was held that when an order was passed in a suit for dissolution of partnership and accounts, declaring the shares of the parties, and referring the case to a commissioner for taking accounts, it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order, and the period prescribed by the law of limitation for appealing from the order had then expired (*z*) In a subsequent case it was held by a Full Bench of that Court in *Khadem Hossein* v *Emdad Hossein* (*a*) [Maclean, C J, and Rampini, J, dissenting], that where an order was passed in a suit

imoobloy (1891) 15 Bom 594
Ushootosh v *Tara* (1884) 10 Cal 612 615
atmabai v *Sonbai* (1912) 36 Bom 77, 11
58

Ss. 97, 98.

for partition declaring the rights of the parties (*b*), it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order within the time allowed by law. The contrary had been laid down in an earlier case decided by the same High Court (*c*), but that decision was dissented from by a majority of the Full Bench in *Khadem Hossein's* case Under this section omission to prefer an appeal from a preliminary decree precludes objections to it in an appeal from the final decree (*d*) It is to be noted that the present section applies only to preliminary decrees passed after the commencement of this Code For preliminary decrees, see O 20 below

Where preliminary decree not drawn up.—A right of appeal under this section only arises when a preliminary decree is "passed," that is, drawn up It is the duty of the Court, and not of the parties, to see that a decree is drawn up Unless a decree is drawn up, there is no appeal The provisions of this section do not therefore apply unless the preliminary decree is drawn up (*e*) See notes to s 33, and notes to s 96, "Where decree not drawn up," on p 261 above

Two preliminary decrees.—The Code, it seems, contemplates only one preliminary decree (*f*) The High Court of Calcutta, however, has held that there may in an exceptional case be more than one preliminary decree (*g*)

Final decree passed prior to or during pendency of appeal from preliminary decree.—Under the Code of 1882 it was held that where *after the passing of the final decree* a party appealed from an order in the nature of a preliminary decree, but did not also appeal from the final decree, that circumstance was a bar to the hearing of the appeal from the order in the nature of a preliminary decree (*h*) Under the present Code it has been held by the High Courts of Madras and Allahabad that the mere fact that no appeal has been preferred from the final decree is no ground for not hearing the appeal from the preliminary decree, whether the latter appeal is filed before or after the final decree, if the preliminary decree is set aside, the final decree falls with it (*i*) On the other hand, it has been held by the High Court of Calcutta that where an appeal has been preferred only from the preliminary decree after the final decree has been passed, the appeal is incompetent, the reason given being that if the preliminary decree were to be reversed at the instance of the appellant, the final decree would still remain unaffected, as no appeal was preferred from the final decree But it has been held by the same Court that the appellate Court may in a proper case allow the appellant to amend the memorandum of appeal so as to turn the appeal against the preliminary decree into one against both the preliminary and final decrees (*j*).

Decision where appeal heard by two or more judges

98. [S. 575.] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(*b*) See O 20 r 18 below

(*c*) *Boloram Dey* v *Ram Chundra Dey* (1896) 23 Cal 270

(*d*) *Ahmed* v *Hashim* (1915) 42 I A 91 42 Cal 914 28 I C 710 [preliminary decree dissolving partnership]

(*e*) *Vamanacharya* v *Govind* (1923) 25 Bom L R 826 76 I C 1014 ('24) A B 33 *Sakharam* v *Sadasiv* (1913) 37 Bom 480 19 I C 894 *Laluram* v *Gangaram* (1914) 16 Bom L R 67, 23 I C 605

(*f*) *Vamanacharya* v *Govind* (1923) 25 Bom L R 8 6 8 4 835 76 I C 1014 ('24) A B 33

(*g*) *Raja Peary Mohan* v *Manohar* (1923) 27 Cal W N 989 992 74 I C 373

S. 98.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it.

Difference between the old and new section.—This section corresponds with s. 575 of the Code of 1882 except that the proviso to sub section (2) of the present section differs in several material respects from the proviso to the second paragraph of s. 575 The proviso to the second paragraph of s. 575 ran as follows —

"Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, *the appeal may be referred to one or more of the other Judges of the same Court and shall be decided* according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it."

As to the points of distinction between the old and the new section, see notes below, "The appeal shall then be heard upon that point only," and "By whom appeal to be heard upon the point of law stated."

"Differ in opinion on a point of law."—No reference can be made under this section if the Judges differ on a question of *fact*. The power to refer can only be exercised if there is a difference of opinion on a point of *law* (*k*)

"The appeal shall then be heard upon that point only."—Under the old section it was the *appeal* that was referred to a third Judge when the Judges hearing the appeal differed in opinion on a point of law and it was held that on such reference *the whole appeal* was open for argument, and not only the point of law on which the Judges had differed in opinion (*l*) Under the present section the Judges have to state the point of law upon which they differ, and the appeal is to be heard *upon that point only*

By whom appeal to be heard upon the point of law stated.—Where a point of law on which the Judges hearing the appeal differ has been stated, the appeal is to be heard upon that point by one or more of the *other* Judges of the Court This was, in fact, the practice followed in Bombay under the Code of 1882 (*m*) In Allahabad the appeal was heard by a Bench *including* the Judges who first heard it (*n*) It is to be noted that while the appeal upon the point of law is under this section to be heard by a Judge or Judges other than those who first heard it, the point is to be *decided* according to the opinion of the majority (if any) of the Judges who have heard the appeal *including those who first heard it*

(*k*) *Gossami* v *Romanlalji* (1890) 17 Cal 3
(*l*) *Seshairi* v *Nataraja* (1898) 21 Mad 179
(*m*) *Vaju* v. *Salu* (1891) 15 Bom 424, *Jehangir* v *Secretary of State* (1904) 6 Bom L. R. 131
(*n*) *Rohilkhand Bank* v. *Row* (1884) 6 All. 468.

Where Judges differ on a point of law, but do not state the point.—*A* obtains a decree in a District Court against *B* *B* appeals to the High Court The appeal is heard by a Bench of two Judges The Judges differ in opinion on a point of law, but they do not state the point of law, and deliver judgments as judgments of the Court without any reservation, one Judge holding that the appeal should be allowed with cost, and the other that the appeal should be dismissed with costs In such a case the Judges are not competent subsequently to state the point of law (o), and their dissentient judgments will operate as confirming the decree of the District Court under para 1 of sub sec (2) (p) But it is competent to *B* to appeal from the confirming decree under the Letters Patent (q)

Appeal to High Court from awards under Land Acquisition Act.—This section applies to land acquisition appeals by virtue of the provisions of s 54 of the Land Acquisition Act, 1894 (r)

Letters Patent appeal—Where an appeal is heard by a Bench of two Judges of a Chartered High Court and the Judges differ, then, if the appeal is from the Original Side of the High Court (that is, an appeal under cl 15 of the Letters Patent), the procedure is governed by cl 36 of the Letters Patent, and the opinion of the senior Judge prevails (s) but if the appeal is from a Subordinate Court, the procedure is governed by the present section (t) See s 4 above and notes to cl 36 of the Letters Patent

It is clause 36 of the Letters Patent that applies to a reference to the High Court under s 66 of the Income Tax Act 1922, and not sec 98 of the Code (u)

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

99. [S 578] No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Changes introduced by the section—This section corresponds with s 578 of the Code of 1882, except in the following respects —

1 The words "any misjoinder of parties or causes of action" are new As to the effect of these words see notes to O 2, r 3, "Procedure in case of misjoinder of plaintiffs and causes of action, and "Procedure in case of multifariousness," and notes to O 2, r 4, "Leave of the Court"

2 The words "in any proceedings in the suit, have been substituted for the words, "whether in the decision or in any order passed in the suit or otherwise As to the effect of this alteration, see notes below, "In any proceeding in the suit"

Scope of the section—The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit is no ground for reversing or varying a decree

(o) *Lal Singh* v *Chansham* (1887) 9 All 625
(p) *Devachand* v *Hirachand* (1889) 13 Bom 449 459
[illegible]

Horniman (1918) 20 Bom L R 185, 218, 47 I C 449, *Lachman Singh* v *Ram Lagan* (1904) 26 All 10, *Justin Hull* v *Arthur* [illegible] 58 I C 421 [illegible] 433, 59 I C [illegible] 1 Rang 584, [illegible], *Praful* [illegible] v [illegible] C 897, (26) [illegible]

(u) *Emperor* v *Probhat* (1924) 51 Cal. 504, 84 I C 31, (24) A C 668

in appeal But if it appears that the error, defect or irregularity affected the merits of the case or the jurisdiction of the Court, it would be a ground for reversing or varying the decree Where an irregularity is one which affects the merits of a case or the jurisdiction of a Court, it is said to be a *material* irregularity Where it does not, it is usually spoken of as a *mere* irregularity This section cures a *mere* irregularity, error or defect It does not cure a *material* irregularity, error or defect

"Misjoinder of parties or causes of action" —*This expression may be* analysed and the rule contained in this part of the section may be stated as follows —

No decree shall be reversed or substantially varied nor shall any case be remanded in appeal, on account of—

(1) misjoinder of plaintiffs (O 1 r 1)

(2) misjoinder of defendants (O 1 r 3)

(3) misjoinder of plaintiffs and causes of action (O 2 r 3) [The practice was different under the Code of 1882 see notes to O 2, r 3, Procedure in case of misjoinder of plaintiffs and causes of action]

(4) misjoinder of defendants and causes of action (O 2 r 3) [The practice was different under the Code of 1882 see notes to O 2, r 3 Procedure in case of multifariousness]

(5) *misjoinder of causes of action (t) (O 2, rr 3 4 and 5) See notes to O 2, r 4,* Leave of the Court

The words, on account of any misjoinder of parties or causes of action, have been inserted in the section to make it clear that such a misjoinder is to be treated as a *mere* irregularity

Non-joinder—The Madras High Court has held that the expression 'misjoinder' in this section includes "non joinder (*u*) But this was doubted in a later Madras case (*uu*) See O 1, r 9, and notes thereto

Error, defect or irregularity not affecting the merits of the case.—A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped (*x*) or for admitting a document declared invalid where the judgment is not based on that document (*y*), or because the wrong side was allowed to begin (*z*) or because the suit was decided on a Sunday (*a*) or because the suit was instituted by an agent under a defective power of attorney (*b*) [O 3, r 2], for these are irregularities that could not affect the merits of the case or the jurisdiction of the Court All these irregularities are cured by the present section The exclusion of evidence by the lower Court is an irregularity which may or may not affect the merits of the case if it does not, the irregularity is condoned under this section (*c*), see Indian Evidence Act 1872 s 167 For other cases see—

1 notes to s 15, Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade,'

2 notes to s 92, Consent of the Advocate General,

3 notes to O 6 r 14, Omission to sign plaint,

4 notes to O 16, r 1 ' Remedy of party when witness summons refused,

5 notes to O 21, r 13 Omission to verify inventory,

6 notes to O 26, r 4 May issue,'

7 notes to O 32, r 1, Objection to authority of next friend,'

(t) *Midnapore Zemindary Co Ltd* v *Nares Narain* (1921) 33 Cal L J 317 63 I C 161 *Khub Lal* v *Jhapsi* (1924) 3 Pat 244 78 I C 885 (24) A P 613

(u) *Lakkanath* v *Manakkat* (1910) 33 Mad 436 5 I C 774

(uu) *Shanmuga* v *Subbayya* (1922) 42 Mad L J 133 138, 70 I C 645 (22) A M 317

(x) *Devachand* v *Hirachand* (1889) 13 Bom 49

(y) *Womes Chunder* v *Chundee Charn* (1881) 7 Cal 293 *Girdhar* v *Ganpat* (1874) 11 B H C 129

8 notes to O 32, r 3, ' Irregular appointment of guardian ad litem,"
9 notes to O 41, r 23, " Effect of erroneous order of remand,'
10 notes to O 41, r 26, ' Sending back case for a revised finding,"
11 notes to Sch II, para (1), " Application shall be in writing "

" In any proceedings in the suit "—These words have been substituted for the words, ' whether in the decision or in any order passed in the suit or otherwise, which occurred in s 578 of the Code of 1882 The latter words were held to apply only to irregularities in proceedings *subsequent to* the institution of the suit, and not to irregularities in the frame or institution of the suit (*d*) The present section applies to irregularities in *any* proceedings in the suit

Irregularity affecting the jurisdiction of the Court.—See s 21 and notes thereto

Suits Valuation Act VII of 1887, section 11, modifies the provisions of the present section in cases where an objection is taken in appeal that by reason of the over valuation or under valuation of a suit a Court which had not jurisdiction with respect to the suit exercised jurisdiction with respect thereto The said section runs as follows —

> (1) Notwithstanding anything in section [99] of the Code of Civil Procedure an objection that by reason of the over valuation or under valuation of a suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—
>
> (a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, and
>
> (b) the appellate Court is satisfied, for reasons to be recorded by it in writing that the suit or appeal was over valued or under valued, and that the over valuation or under valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits
>
> (2) If the objection was taken in the manner mentioned in clause (a) of sub section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court
>
> (3) If the objection was taken in that manner, and the appellate Court is satisfied as to both those matters, and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeal; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal

Appeals from Appellate Decrees.

100. [s. 584] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed

Second appeal

(*d*) *Varajlal* v *Ramdat* (1902) 26 Bom 259, 266

in appeal by any Court subordinate to a High Court, on any **S. 100** of the following grounds, namely —

(a) the decision being contrary to law or to some usage having the force of law,

(b) the decision having failed to determine some material issue of law or usage having the force of law,

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed *ex parte*

The word specified in the expression specified law or usage which occurred in cl (a) of s 584 of the repealed Code has been struck out see the undermentioned case (e)

Scope of the section —This section deals with second or special appeals A second appeal can lie only to the High Court A Court of first appeal is competent to enter into questions of fact and decide whether the findings of facts by the lower Court are or are not erroneous But a Court of second appeal is not competent to entertain questions as to the soundness of a finding of *fact* by the Court below (*f*) A second appeal can only lie on one or other of the grounds specified in the present Section (*g*) A judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case and if they do not to reject the appeal summarily (*h*) The limitations to the power of the Court imposed by ss 100 and 101 in a second appeal ought to be attended to and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (*i*) Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100] No Court in India or elsewhere has power to add to or enlarge those grounds (*j*)

No second appeal lies on the ground of an erroneous finding of fact —There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of *fact* however gross or inexcusable the error may seem to be No doubt a second appeal does lie where there is a substantial error or defect in procedure [see

r defect in
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(e) *Ram Gopal v Shamskhaton* (189?) 19 I A 228 233 20 Cal 93 99 100

(f) *Ram Gopal v Shamskhaton* (1893) 20 Cal 93 19 I A 288

(g) *Lachman v P a* (1889) 16 Cal 753 16 I A 125

(h) *Rudr Prasad v Baij Nath* (1893) 15 All 367

(i) *Pertab Chunder v Mohendranath* (1890) 17 Cal 291 16 I A 233

(j) *Durga Chowdhrani v Jewahir Singh* (1891) 18 Cal 23 30 17 I A 122

100. *its consideration in support of the finding* (*k*) The mere fact that the High Court would have upon the documents and evidence placed before the Court of first appeal come to a different conclusion, is no ground for a second appeal, it is precisely this revision of evidence which is excluded by the limited character of a second appeal This section was enacted for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision (*l*) Hence the High Court is not entitled in second appeal to go behind the findings of fact of the lower appellate Court, which do not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case (*m*) Similarly there is no ground for a second appeal upon a question of fact unless it can be shown that the lower appellate Court misdirected itself in point of law in dealing with the question upon the evidence (*n*) In *Ramratan Sukul* v *Mussamat Nandu* (*o*), their Lordships of the Privy Council said 'It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court, if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final' In another case, that of *Nafar Chandra Pal* v *Shukur* (*p*), their Lordships said

Questions of law and of fact are sometimes difficult to disentangle The proper *legal effect* of a proved fact is necessarily a question of law, so also is the question of *admissibility of evidence* and the question of whether any evidence has been offered on one side or the other, but the question whether the fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact "

Decision being contrary to law —A second appeal will lie where the decision of the lower appellate Court is contrary to law The term law in cl (a) is not limited in its meaning to statute law, it means general law (*q*)

When the question is one of a right *construction* of a document (*r*), or of a *legal inference* from a document (*s*), the question is one of law, and a second appeal will lie Thus where in a suit for a declaration of the plaintiff's proprietary title to the land in suit the lower appellate Court found on a construction of the wajib ul arz and other documentary evidence relating to the land that the plaintiffs were proprietors, their Lordships of the Privy Council held that the right construction of the documents was a question of law which the High Court was not precluded from considering in second appeal In the course of the judgment their Lordships said "That finding (namely, that the plaintiffs were proprietors of the lands) of the Subordinate Judge was the result of his having misconstrued the wajib ul arz The right construction of documents is a question of law which Judges in second appeal are not by ss 584 and 585 of the Code of Civil Procedure (now ss 100 and 101) precluded from considering by any finding of the lower appellate Court based upon such documents The Subordinate Judge

(*q*) *Ram Gopal* v *Shamskhaton* (1893) 20 Cal [illegible]

arrived at his finding by inference drawn upon an incorrect construction of the wajib ul arz and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the land (*t*) Similarly the question whether a writing which is ostensibly a deed of absolute sale and an agreement by the purchaser to reconvey the property to the vendor constitute an out and out sale and an agreement for reconveyance or a mortgage by conditional sale, is a question of construction of documents, and the High Court is entitled to interfere in second appeal (*u*) In a recent Privy Council case where the question was whether the possession of properties by a Hindu widow was merely in lieu of maintenance and not adverse to the plaintiffs, their Lordships held that the question was one of inference from documents and not one of fact, and that they were therefore entitled to draw their conclusion notwithstanding the concurrent opinions of the Court in India (*v*) But where the question is not one of construction of a document or of legal inference to be drawn from a document, but is one as to the effect to be given to a document *as evidence of a fact or facts in issue*, a second appeal is not admissible Thus where a suit involves a question of the *fact* of adoption, and documents are produced *as evidence of the fact of adoption*, the question whether the documents do or do not support the alleged adoption is a question of fact, and no second appeal will lie (*w*) The law on the subject was thus stated by Mookerjee, J, in *Valand Deb* v *Gopi Nath* (*x*) 'We hold accordingly that unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court.'

Where the lower appellate Court arrives at a conclusion which is an inference based upon an erroneous view of the law, the judgment is open to question in second appeal (*y*) A judgment is also open to question in second appeal where a defect in the judgment is due to an error as to the admissibility of evidence (*z*), or where secondary evidence is admitted in contravention of the provisions of ss 65 and 66 of the Indian Evidence Act (*a*) The question of burden of proof is a question of law, and the High Court is entitled to interfere in second appeal if the lower appellate Code has placed the burden on the wrong party (*b*) A second appeal will also lie where an unregistered document which requires registration is admitted in evidence (*c*)

Where the Court of first instance grants a mandatory injunction for the demolition of a building, and the decree is reversed in appeal on an erroneous view of the law, a second appeal will lie (*d*) Though a person may not have been duly appointed executor he may render himself reponsible as executor if he intermeddles with the estate of the deceased misapplication of law on this point is a good ground for a second appeal (*e*) The question whether a stipulation in a contract is by way of penalty is a question of law which renders a second appeal competent (*f*)

(*t*) (1912) 34 All 579 585 39 I A 247 255 256 16 I C 67

(*u*) *Ganesa* v *Gnanasikhamani* (1921) 47 Mad L J 385 286 84 I C 505 (25) A M 37

(*v*) (1919) 46 I A 197, 201, 42 All 152-156, 55 I C 486 *supra*

(*y*) *Ishan Chander* v *Bishu* (1897) 24 Cal 825

(*z*) *Tara* v *Arun* (1922) 36 Cal L J 389, 395 74 I C 383 (23) A C 261, *Balvant* v *Baldev* (1921) 2 Lah 271

(*a*) *Lachman Singh* v *Musummat Puna* (1889) 16 I A 125 16 Cal 753

(*b*) [illegible]

(*d*) *Ram Bahadur* v. *Ram Shankar* (1905) 27 All 688

(*e*) *Maniram Seth* v *Seth Rupchand* (1906) 33 Cal 1047 33 I A 165

(*f*) *Rajagopala* v *Vardaraja* (1924) 47 Mad L. J 605 606, 82 I C 751, (25) A M 84.

100. Where an appeal which ought to have been preferred to the High Court is preferred to a District Court and the latter Court hears and decides the appeal, the decision is contrary to law, and a second appeal will lie from the decree of the District Court (*g*)

A second appeal will lie to impeach legal conclusions drawn from findings of fact.—Though a second appeal does not lie upon a finding of fact, yet where a *legal* conclusion is drawn from the finding, a second appeal will lie under cl. (a) of the section on the ground that the legal conclusion was erroneous Thus the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question of law and fact Where the question is one of simple fact, no second appeal will lie But a second appeal will lie on the finding of adverse possession when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts (*h*) Similarly the question whether a Hindu family is joint or separate is generally a question of fact, but in certain circumstances it may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal (*i*) Where the question in a suit was whether the defendant was bound by a mortgage executed by his mother, and it was held that he was, their Lordships of the Privy Council held that the judgment was substantially one of law, and that it was therefore open to question in second appeal. In the course of their judgment their Lordships said ' The *facts* found (by the lower appellate Court) need not be questioned It is the *soundness of the conclusions from them* that is in question and this is a matter of law " (*j*) As stated by their Lordships of the Privy Council in another case, ' the proper legal effect of a proved fact is necessarily a question of law, and the High Court is therefore entitled to interfere in second appeal (*k*) It has thus been held that the question whether a transfer was made with intent to defeat creditors within the meaning of s. 53 of the Transfer of Property Act (*l*), or whether the plaintiff has made out his title to the property in suit (*m*), or whether a railway company took as much care of the goods delivered to the company as a man of ordinary prudence would under similar circumstances take of his own goods within the meaning of ss 151 and 152 of the Contract Act (*n*), or whether a lumbardar was guilty of negligence or misconduct (*o*), or whether the plaintiff is entitled to the easement claimed by him (*p*), or whether certain property is ancestral or self acquired (*q*), or whether a decree was obtained by fraud (*r*), is a question of law, and a second appeal will lie to the High Court It has been held by the High Court of Calcutta that where from a certain set of facts a Court infers a lost grant, the process is one of inference of fact, and not of legal conclusion, and that it is not a ground for a second appeal (*s*)

Usage having the force of law—The words, "usage having the force of law, mean a local or family usage as distinguished from the general law (*t*)

(*g*) *Bandiram* v *Purna Chandar* (1918) 45 Cal 9?6 43 I C 758

(*h*) *Lc* [illegible] 19 I A [illegible] 24 Cal [illegible] v *Faje* [illegible] 63 I C [illegible]

(*i*) *Sa* [illegible] 602 67 [illegible] I A [illegible]

(*j*) *Ram Gopal* v *Shamskhaton* (1893) 20 Cal 93 98 19 I A 228

(*k*) *Nafar Chandra Pal* v *Shukur* (1918) 45 I A 183 187 46 Cal 189 19? 51 I C 760

(*l*) *Ishan Chunder* v *Bishu* (1897) 24 Cal 825

(*m*) *Pajaram* v *Ganesh* (1897) 21 Bom 91

(*n*) *Luxmi Naran* v *Secretary of State* (1923) 27 Cal W N 1017, 80 I C 219 (24) A C 92

(*o*) *Chhabraji* v *Ganga* (1921) 43 All 29 60 I C 643

(*p*) *Diwan* v *Jagta* (1920) 1 Lah 20, 6 I C 728

[illegible] *Tehar Kaur* (1922) [illegible]

[illegible] vations of Petheram C J, in *Aurath Singh* v *Bhikhi Singh* (1885) 7 All 649 at p 653

If the decree appealed from is based on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court may interfere in second appeal (u) It has been laid down by the Judicial Committee that "questions of the existence of an ancient custom are generally questions of mixed law and fact (v) The present section precludes the High Court from interfering in second appeal with the *findings* arrived at by the lower appellate Court *on all actual facts* from which the existence of the custom has been inferred But the *inference* as to the existence and the decision as to the validity of the custom are matters of law, and these may therefore be revised by the High Court in second appeal (w) Similarly where the question is as to the existence of a custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom (x), or has based its judgment on irrelevant matters (y), or has proceeded upon a wrong construction of a document (z) the error is one of law, and the High Court is entitled to interfere in second appeal As to certificates under s 41 (3) of the Punjab Court Act VI of 1918, in cases of custom, see the undermentioned cases (a)

Clause (c): substantial error or defect in procedure—

No evidence to go to a jury—Case not raised by parties—Misconception of evidence—Evidence misread or misunderstood—Overlooking material evidence—Irrelevant matters — A second appeal will lie where there is, as an English lawyer would express it, no evidence to go to the jury, because that does not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the judge (b) Thus where the lower appellate Court found that a deed of compromise was not for the benefit of a certain infant, and there was no evidence in the case upon which that Court could found its judgment, it was held by the Judicial Committee that the case was one of a substantial error or defect in the procedure of the first appellate Court and that it was a ground for a second appeal to the High Court (c) Similarly where the lower appellate Court disposes of a suit upon a case not raised by the parties and to which the evidence has not been directed, it is a substantial error or defect in procedure within the meaning of this section, and a second appeal lies to the High Court (d) A second appeal will also lie where the finding of the lower appellate Court is based on a misconception of what the evidence is (e) or on evidence which has been misread or misunderstood (f), or the lower appellate Court has misdirected itself in point of law in dealing with the

(u) *Desai Ranchoddas* v *Rawal* (1897) 21 Bom 110 (custom excluding widows and daughters from inheritance)

100. question upon the evidence (*g*), or has overlooked or ignored material documentary evidence (*h*) On the same principle a second appeal will lie where the finding of the lower appellate Court, *e g*, a finding on the existence of a usage, is based on irrelevant matters (*i*)

Where the Courts below have misconceived the real question they had to try —The High Court has jurisdiction under this section to set aside the decree of the trial Judge in favour of the plaintiff, affirmed on the facts by the first appellate Judge, on the ground that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should have been answered in favour of the defendant (*j*)

Other cases of error or defect in procedure —Omitting to decide a material issue (*k*), omitting to examine witnesses tendered (*l*) refusing to receive documentary evidence which ought to have been accepted (*m*), allowing the plaintiff in the lower appellate Court to change the nature of his suit (*n*), deciding an appeal without waiting for the return of a commission directed to be issued by the first appellate Court (*o*), have all been held to be good grounds for special appeal But disregard of an Amin s second report as to a boundary line does not constitute a substantial error or defect of procedure within the meaning of this section and is no ground for second appeal (*p*) The refusal by a lower appellate Court to exercise the discretion vested in it by O 41, r 27, with respect to the admission of additional evidence, is a substantial error or defect in procedure and affords a ground of special appeal But where the Court *has exercised its discretion* in a sound and reasonable way, and in the exercise of its discretion refused to admit additional evidence, the case is not one of substantial error or defect in procedure (*q*) Admission by the lower appellate Court of additional evidence tendered by the respondent without the consent of the appellant and without recording the reasons for its admission as required by O 41 r 27, is a substantial error in procedure, and is a good ground for second appeal (*r*)

Refusal by Court of first appeal to extend time for filing an appeal— Where an application is made to a Court of first appeal to admit an appeal from the original decree after the expiration of the period of limitation, that Court has the power, on sufficient cause being shown to admit the appeal [Limitation Act, s 5] If the lower appellate Court refuses to admit the appeal, holding *in the exercise of its discretion* that there was no sufficient cause for not presenting the appeal within the prescribed time, there is no ground for a second appeal The principle is that where a Court has exercised its discretion in a sound and reasonable way, the High Court has no power to interfere in second appeal But if the lower appellate Court does not exercise its discretion at all, or exercises it capriciously and arbitrarily, or without proper legal material to support its decision, a second appeal will lie under cl (a) of the section (*s*)

Dismissal of appeal for default.—Though a second appeal may lie from an appellate decree passed ex parte, no second appeal lies from an order dismissing an appeal for default Such an order is not a decree (*t*); see O 41, r 11 (2), and s 2, cl (2), sub cl (b)

(*n*) *Terielpit* v *Sudersan Das* (1879) 4 Cal 46

(*o*) *Madho Singh* v *Kashi Singh* (1894) 16 All 342

(*p*) *Lukhi Narain* v *Jodu Nath* (1894) 21 Cal 504 21 I A 39

(*q*) *Ram Piari* v *Kallu* (1901) 23 All 121 *Durga Prasad* v *Jai Narain* (1911) 33 All 379, 9 I C 265

(*r*) *Kebal* v *Pajini* (1924) 39 Cal L J 261, 81 I C 999 (25) A C 98

(*s*) *Parvati* v *Ganpati* (1899) 23 Bom 513, *Tulsa* v *Gajraj* (1903) 25 All 71, *Hamid* v *Gajadhar* (1904) 26 All 327

(*t*) See *Anwar Ali* v *Jaffer Ali* (1890) 23 Cal 827

New case in second appeal—An appellant should not be allowed to set up a new case in second appeal (*u*), nor should he be allowed to raise a new issue not supported by the evidence on the record (*v*) See notes below

Pleas which may be taken for the first time in special appeal—An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower Court But if the objection is one which goes to the very root of the case, it may be allowed to be taken for the first time in second appeal (*w*) Thus an objection to jurisdiction may be taken for the first time in special appeal, if it is patent on the face of the record (*x*), except it is submitted, in those cases which fall within s 21 above Similarly, the plea of *res judicata* may be taken for the first time in second appeal, provided it can be decided upon the record before the Court (*y*) So also the plea of want of notice in an ejectment suit (*z*) As to the plea of limitation, see notes to O 41, r 2, ' Leave of Court Limitation,' which refer to first appeals, apply also to second appeals (*a*)

The High Court will entertain in second appeal a point of law although it has not been raised in any of the lower Courts, provided the point of law arises on the findings of the lower Court *or* on the issues as framed and on the evidence already recorded Thus where the lower appellate Court awarded to the plaintiff a *third* share of the property in suit on the ground that remoter *gotraj sapindas* inherited *per stirpes* and the defendant preferred a second appeal to the High Court on the ground that the plaintiff was *not entitled to any share at all*, the defendant was allowed to contend *at the hearing* of the second appeal that the plaintiff was not entitled in any event to more than *a sixth share* as remoter *gotraj sapindas* inherited *per capita* and not *per stirpes* (*b*) But the High Court will not entertain a point of law raised for the first time in second appeal, if the point cannot be decided without remanding the case for further evidence (*c*) Nor can a point of law be taken for the first time in second appeal if it sets up a new right differing in *kind* from that asserted throughout the trial, and not merely *in degree* as in the above case Thus where the right claimed by one of the defendants was treated as one of *maintenance* only in the Courts below, she was not allowed to contend in second appeal that besides maintenance, she was entitled to a half *share* in the property (*d*)

Second appeal on no other ground

101. [S 585.] No second appeal shall lie except on the grounds mentioned in section 100.

No second appeal in certain suits

102. [S. 586] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

(*u*) *Gopal* v *Hanumant* (1882) 6 Bom 107 *Mahomed* v *Sitaramayyar* (1892) 15 Mad 50 *Kanhia* v *Mahin Lal* (1888) 10 All 495 *Naranjan Singh* v *Charn Das* (1922) 3 Lah 239 68 I C 557, (22) A L 363

(*v*) *Chandbhai* v *Hasanbhai* (1922) 46 Bom 213 217 64 I C 205 (22) A B 150

(*w*) *Kuppa* v *Dorasami* (1883) 6 Mad 76

All 440

(*z*) *Dodlu* v *Mallarrao* (1893) 18 Bom 110

(*a*) See *Shivapa* v *Dod Nagaya* (1887) 11 Bom. 114

(*c*) (1923) 25 Bom L R 245 72 I C 320, (23) A B 254 *supra*, (1924) 26 Bom L R 494, (24) A B 469 *supra* , *Janip* v *Jogendra Nath* (1919) 24 Cal W N 53 54 I C 719

(*d*) *Rachawa* v *Shivajogapa* (1894) 18 Bom 679.

)2. **Suits of the nature cognizable by Courts of Small Causes.**— Whether a suit is or is not of the nature cognizable by a Court of Small Causes is to be determined by a reference to the provisions of the Provincial Small Cause Courts Act 9 of 1887 [see ss 15, 16 and 27] If a suit is of the nature cognizable by a Small Cause Court, and the value of the subject matter of the suit does not exceed Rs 500, no second appeal will lie, even though for special reasons the suit cannot be or has not been tried in a Small Cause Court, or though the Small Cause Court to which the plaint was presented returns the plaint under s 23 of the said Act to be presented to another Court on the ground that it involves a question of title, and is not therefore cognizable by that Court The reason is that it is the nature of the suit, and not the Court in which it is tried that determines the right of appeal (e) The words ' any suit of the nature cognizable by Courts of Small Causes mean any suit relating to a subject matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction (f) In determining whether a second appeal lies under this section, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court (g) Nor should regard be had to the mode of trial of the suit, thus a suit which is of the nature cognizable by a Court of Small Causes is none the less so because instead of being tried under the summary procedure it has been tried in the ordinary manner (h) In applying this section it does not make any difference that the decree sought to be appealed from was passed by the lower appellate Court *in review* (i)

Suit for mesne profits —Section 15 of the Provincial Small Cause Courts Act gives jurisdiction to Courts of Small Causes to take cognizance of all suits of a civil nature of which the value does not exceed Rs 500 except such suits as are specified in the second schedule of the Act That schedule consists of several articles of which article 31 is the most important for the purposes of the present section. That article excludes from the jurisdiction of Small Cause Courts any other suit for an account including a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant This article contemplates cases in which the plaintiff claims an *account* of monies which the defendant *has received* and to an account of which the plaintiff is entitled, because the monies received belonged to him It has been held by a majority of the Full Bench of the Calcutta High Court that a suit for mesne profits does not fall under this article, in other words it *is* cognizable by a Small Cause Court Such a suit is not a suit ' for the profits of immoveable properties belonging to the plaintiff which have been wrongfully received by the defendant." A suit for mesne profits is a suit for damages in which the defendant would be liable *even if no profits have been actually received* by him during the period of dispossession For it will be seen, on referring to s. 2, sub s. (12), of the Code, that mesne profits are defined as profits which the person in wrongful possession of such property actually received or *might* with ordinary diligence *have received* therefrom (j) On the other hand, it has been held by a Full Bench of the Madras High Court (k), that a suit for mesne profits does come within art 31 of the said Act, and is therefore not cognizable by a Small Cause Court As regards recent Bombay decisions, if we are to reconcile them

Bombay Court, a ' suit

Lane (1908) 32 Bom 356
Srish Chandra (1913) 40
Shankarbhai v *Somabhai*

v *Karam Narain* (1921)
C 2.9
ingh v *Madhub Chundra*

Aithurusu (1902) 25 Mad

for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant" within the meaning of art 31 (*l*), but, that it does not come within the said article, if the amount claimed is an *ascertained* sum so that *no account has to be taken* (*m*)

Suit for rent.—The High Courts of Madras and Rangoon have held that a suit for rent is a suit of the nature cognizable by Courts of Small Causes (*m*2) The High Court of Calcutta has held that it is not (*m*3)

Suit for title.—A Small Cause Court has no jurisdiction to entertain a suit for title relating to immoveable property A suit, however, which is otherwise cognizable by a Small Cause Court, does not cease to be so, because it incidentally involves a question of title (*n*)

Suit for a declaration—A Small Cause Court has no jurisdiction to entertain a suit for a declaratory decree The mere fact, however, that there is a prayer for a declaration will not prevent a suit from being of the nature cognizable by a Small Cause Court, if the other reliefs claimed in the suit could be obtained without asking for a declaration (*o*)

Execution—The expression "suit" in this section includes execution proceedings (*p*), from which it follows that if a suit is of the nature cognizable by a Small Cause Court, no second appeal will lie from an order made in execution of the decree passed in the suit, unless the value of the suit exceeds Rs 500 It is immaterial that the order in execution is made by a Court other than a Court of Small Causes or a Court vested with the powers of a Small Cause Court, as where the property attached in execution of the decree is immoveable property and the order in execution is made by a First Class Subordinate Judge in his *ordinary* jurisdiction The test is, what was the nature of the *suit* in which the decree sought to be executed was passed, and not the nature of the *proceedings in execution* (*q*) It is also immaterial that the amount sought to be recovered in execution exceeds Rs 500 The test is not the amount claimed in execution proceedings, but the amount of the subject matter of thé suit (*r*) An order of remand made by an appellate Court in an appeal from an order of the Court executing a decree in a suit of the nature cognizable by a Small Cause Court is also not appealable (*s*)

Where the plaintiff decree holder *applied* under O 21, r 71, to recover Rs 360 being the deficiency of price from a defaulting purchaser, and both the lower Courts disallowed the plaintiff's claim, it was held that no second appeal lay to the High Court, the reason given being that but for the provisions of r 71, a *suit* would have to be filed for that amount in which case it would have been a Small Cause Court suit, and the application therefore must be treated as one made in execution of a Small Cause Court decree (*t*)

Power of High Court to determine issues of fact

103 [*New.*] In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary

(*l*) *Antone* v *Mahadev* (1901) 25 Bom 85

(*m*) *Girjabai* v *Raghunath* (1906) 30 Bom 147 *Vinayak* v *Krishnarao* (1901) 25 Bom 625 as explained in *Vasudev* v *Damodar* (1904) 6 Bom L R 370

(*m*2) *Soundaram* v *Sennia* (1900) 23 Mad 547 *Ma Pan* v *Moung Ne U* (1925) 3 Rang 390 91 I C 639 (26) A R 19

(*m*3) *Sahadara* v *Nabin* (1915) 42 Cal 638, 27 I C 258

(*n*) *Vinayak* v *Krishnarao* (1901) 25 Bom 625 *Kesrisang* v *Naransang* (1904) 32 Bom 560

(*o*) *Ramachendrarayar* v *Noorulla Sahib* (1907) 30 Mad 101

(*p*) *Coracland* v *Baylanto* (1874) 12 Beng L R 261 [F B] *Din Dayal* v *Fatrakhan* (1896) 18 All 481, *Aithala* v *Subbanna* (1889) 12 Mad 116 *Muthukaruppa* v *Paiya* (1923) 45 Mad L J 210 73 I C 956 (24) A M 32

103 for the disposal of the appeal *which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section* (1) *of section* 100.

Changes in the section.—The words italicized above were substituted by Act 6 of 1926 for the words "but not determined by the lower appellate Court" which occurred after the words "of the appeal".

Scope of the section.—This section is new. It was further altered by Act 6 of 1926 as stated above. The section as it now stands empowers the High Court in second appeal to determine issues of *fact* (1) where such issues *have not been determined* by the lower appellate Court or (2) where they *have been wrongly determined* by that Court, provided the evidence on the record is *sufficient* to enable the High Court to determine such issues. If the evidence on the record is not sufficient, the proper course is to refer the issues for trial under O. 41, r. 25.

In the absence of any provision such as is contained in the present section, there was a conflict of decisions under the Code of 1882 as to the power of the High Court to determine in second appeal issues of *fact* which had not been determined by the lower appellate Court. On the one hand it was held that where the evidence on the record was sufficient to enable the High Court to deliver judgment, the High Court had the power at *the hearing of a second appeal itself to fix and determine issues of fact necessary for the* disposal of the appeal but not determined by the lower appellate Court, as a remand in such a case would merely cause delay and increase costs (*u*). On the other hand, it was held that even if the evidence on the record was sufficient the High Court had no such power, and the only course open to it was to remand the issues for a finding to the lower appellate Court, the ground of the decisions being that the High Court had no power in second appeal to determine any issue of *fact* (*v*). The present section gives effect to the former view. It has been held under this section that where the High Court has framed issues and referred the same for trial to the lower Court under O. 41, r. 25, and the findings of the lower Court on those issues are incomplete, the High Court has power under this section to determine those issues if there are materials on which the High Court can come to a conclusion (*w*).

Under the section as it stood before it was amended by Act 6 of 1926, it was held that where a question of fact had been determined by the lower appellate Court, but *the decision could not be supported because it was based in part on evidence improperly admitted*, the High Court could not look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, was sufficient to warrant the finding of the Court below, and the proper course, it was held, was to remand the case to the lower Court (*x*). This resulted in unnecessary remands and the section has now been amended to enable the High Court itself in second appeal to come to the necessary finding of fact in all cases where the finding of the lower appellate Court is vitiated by an error or illegality such as is described in s. 100 (1). Since the amendment the High Court may itself determine the necessary issues of fact without remanding the case to the lower Court in cases such as the above.

— ı ᵃl ... (1920) 47 I. A.

Appeals from Orders

104 [S. 588] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders — **S 104.**

Orders from which appeal lies

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court,

(b) an order on an award stated in the form of a special case,

(c) an order modifying or correcting an award,

(d) an order filing or refusing to file an agreement to refer to arbitration,

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration,

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court,

(ff) an order under section 35 A,

(g) an order under section 95,

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,

(i) any order made under rules from which an appeal is expressly allowed by rules

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made

(2) No appeal shall lie from any order passed in appeal under this section

Appealable orders —This section and O 43 r 1 contain a full list of appealable orders The words save as otherwise expressly provided in the body of this Code or by any law for the time being in force are new See notes below under the head ' Letters Patent appeal

Clause (a)—See Schedule II paragraph (8) and notes thereto

Clause (b)—See Schedule II paragraph (11) and notes thereto

Clause (c)—See Schedule II paragraph (12), and notes thereto

Clause (d)—See Schedule II paragraph (17) and notes thereto

Clause (e)—See Schedule II paragraph (18)

Clause (f)—See Schedule II paragraph (21) and notes thereto It has been held by the High Court of Calcutta that this clause does not apply to proceedings under cl (2) of s 11 of the Arbitration Act, 1899 and that no appeal therefore lies under this

04 clause from an order refusing to set aside an award made and filed under that Act, but [illegible] tters Patent (*y*) [illegible] arty dissatisfied [illegible] the practice is to apply *to the Court* for an order *to file* the award Hence it has been held by the Allahabad High Court that if the District Judge refuses to file the award, an appeal lies to the High Court under cl (f) from the order refusing to file the award (*z*)

Clause (ff)—This clause was inserted in the section by Act 9 of 1922

Clause (h)—An appeal lies from an order of arrest or attachment before judgment (*a*)

Clause (h)—See O 16, rr 10, 12, 17 and 21 (summoning and attendance of witnesses), O 26, r 17 (attendance and examination of witnesses before Commissioner), O 38, r 4 (arrest before judgment), O 39, r 2, sub r (3) (disobedience of injunction)

Clause (i)—See O 43, r 1

Proviso—The proviso was inserted in the section by Act 9 of 1922

Sub-section (2)—Thus if an appeal is preferred under O 43, r 1 (a), from an order under O 7, r 10, returning a plaint to be presented to the proper Court and an order is made in appeal remanding the case under O 41, r 23, no appeal lies from such order (*b*) This sub section, however does not take away the right of appeal conferred by cl 15 of the Letters Patent (*b2*) The High Court of Allahabad is the only Court that has held that it does (*b3*) See notes below, 'Letters Patent Appeal." See also notes to O 41, r 23, 'Appeal.

Section 154—There are some orders which were appealable under sec 588 of the repealed Code, which are not appealable under this section. As to these it is provided by s 154 that where the right to appeal has already accrued to a party before the commencement of this Code, such right shall not be affected by anything contained in this Code

Letters Patent appeal.—Clause 15 of the Letters Patent provides that an appeal will lie from every "judgment' of a single Judge of the High Court in the exercise of civil jurisdiction to other Judges of the Court Now an order refusing to set aside an award is a ' judgment within the meaning of the said clause (*c*) It is clear that if such an order is made by a Munsif s Court, or by the Court of a Subordinate Judge, or by District Court, no appeal will lie from it, for it is not an order specified in the present section It is equally clear that if such an order is made by a Judge of the High Court, an appeal will lie from it *under the Letters Patent*, for the present section *expressly saves the right of appeal given by any law for the time being in force* Upon this point there was a conflict of decisions under the Code of 1882 The conflict arose from the provision contained in s 588 of that Code that an appeal lay from orders specified in that section, *and from no other orders* [see sub sec (2) of the present section] The question accordingly arose whether s 588, by declaring that no appeal would lie from any order other than those specified in that section, took away the right of appeal given by the Letters Patent It was held by the High Courts of Calcutta, Madras and Bombay, following a decision of the Privy Council (*d*), that s 588 did not take away the right of appeal given by cl. 15 of the Letters Patent (*e*), and that an appeal therefore lay

(*y*) *Campbell & Co* v *Jeslay* (1918) 45 Cal 502, 46 I C 687

(*z*) *Nainsukh* v *Gajanand* (1921) 43 All 348, 61 I C 69

(*a*) *Syed Hoosen* v *Chettiar* (1924) 2 Rang 362, 84 I C 70 (24) A R 361

(*b2*) *Puldu Singh* v *Sanwal Singh* (1922) 3 Lah 188 67 I C 388 (22) A L 380

(*b3*) *Piari Lal* v *Madan Lal* (1916) 39 All 191, 39 I C 460

(*c*) *Toolsee Money* v *Suderi* (1899) 26 Cal 361

(*d*) *Hurrish Chunder* v *Kali Sunderi* (1883) 9 Cal 482 10 I A 4

(*e*) *Toolsee Money* v *Suderi* (1899) 26 Cal 361, *Sabhapathi* v *Narajanasami* (1902) 25 Mad 555, *Chappan* v *Moidin* (1899) 22 Mad 68 *Secretary of State* v *Jehangir* (1902) 4 Bom L R 342

from an order of a single Judge of the High Court refusing to set aside an award to the other Judges of the Court On the other hand, it was held by the Allahabad High Court, on a different reading of the Privy Council case referred to above, that s 588 took away the right of appeal given by the Letters Patent (*f*), and that no appeal therefore lay from an order refusing to set aside an award, though the order might be made by a Judge of the High Court It is submitted, that the words "save as otherwise expressly provided by *any law for the time being in force* include the Letters Patent, and that they were added into the present section to give effect to the Calcutta, Madras, and Bombay decisions This is the view taken by the High Court of Lahore (*ff*) The High Court of Allahabad, however, has adhered to its previous view in cases under the present Code (*fff*)

Privy Council appeal.—The provision in sub sec (2) deals with internal appeals within the limits of British India It does not take away the general right of appealing to the Crown given by s 109 *A* applies to the District Judge of East Berar under Sch II, para 20, to file an award in Court *B* opposes the application The District Judge makes an order refusing to file the award *A* appeals from the order [see cl (f)] to the Judicial Commissioner The Judicial Commissioner makes an order filing the award *B* appeals to the King in Council from the order of the Judicial Commissioner Does the appeal lie to the King in Council? Yes, for though no second appeal lies to the High Court by reason of the provision in sub sec (2), an appeal does lie to the King in Council under s 109 of the Code (*g*) Similarly though no second appeal lies from an order passed on appeal from the order specified in O. 43, cl (j), an appeal lies to the King in Council under s 109 of the Code (*h*)

105. [S 591] (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

Other orders

(2) Notwithstanding anything contained in sub section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Changes introduced by the section—This section corresponds with s 591 of the Code of 1882 except in the following particulars —

1 Sub-section (2) is new See notes below, "Sub section (2) appeal from order of remand"

2 S 591 contained the words, "in any *such* order," after the word "irregularity" The word "such has been omitted, as the expression "such order" gave rise to the contention in some cases before the Privy Council that s 591 applied to non appealable order only, a contention that was overruled by the Privy Council (*i*)

(*f*) *Banno Bibi* v *Mehdi Husain* (1889) 11 All 375 *Muhammad* v *Ishan ullah* (1897) 14 All 226 [F B]

(*ff*) *Ruldu Singh* v *Sanwal Singh* (1922) 3 Lah 188 67 I C 388 (22) A L 380

(*fff*) *Piari Lal* v *Madan Lal* (1916) 39 All 191, 39 I C 460

(*g*) *Ramlal* v *Kishanchand* (1924) 51 I A 72 51 Cal 361 83 I C 531 (24) A PC 95

(*h*) *Tekait Krishna* v *Moti Chand* (1913) 40 I A 140, 148-149, 40 Cal 635, 647 648, 19 I C 296

(*i*) See the three Privy Council cases cited in note (*k*) below

105. **Scope of the section**—An interlocutory order made in a suit is either appealable (s 104) or not appealable. This section, like the corresponding s 591, applies to *any* order, that is, to appealable as well as non appealable orders. Where an interlocutory order is appealable, the party against whom the order is made is not bound to prefer an appeal against it, but he may make the irregularity in the order a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made. In other words, s 105 allows an appealable order which has not been appealed from to be made the subject of appeal in an appeal from the decree. There is no law prevailing in India which renders it imperative upon a party to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a party the necessity of appealing whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. It was so observed by their Lordships of the Privy Council in *Moleshur Singh* v *The Bengal Government* (j) and in subsequent cases (k), and it is this principle that underlies the present section. The present section makes it quite clear that an order appealable under s 104 may be questioned under s 105 in an appeal from the decree in the suit, although no appeal from the order has been preferred under s 104 (l). And even where the interlocutory order is one *from which no appeal lies*, an error, defect or irregularity in that order may be set forth as a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made (m).

"Affecting the decision of the case"—It may now be taken as established that the words "affecting the decision of the case" mean affecting the decision of the case *on its merits*. It has accordingly been held that an order cannot be attacked in appeal from a final decree, unless the error, defect or irregularity in the order is one affecting the decision of the case *on the merits* (n). It has thus been held by the High Courts of Allahabad, Calcutta and Lahore that an order under O 9, r 13, setting aside an ex parte decree, is not an order that affects the *merits* of the case, such an order merely ensures a hearing upon the merits. Hence the alleged wrongfulness of the order cannot be urged as a ground of objection in an appeal from the decree in the suit (o). But the High Court of Madras has held that such an order may be attacked in appeal from the final decree (p). In that case, however, the ex parte decree was set aside as to one of two defendants who had not applied to set it aside, and it was held that the order setting aside the ex parte decree as against that defendant may be attacked in an appeal from the final decree. This decision was approved by the same High Court in a later case where also the facts were peculiar. The point of the decision in that case was that an order under O 9, r 13, may be challenged in an appeal from the final decree in the peculiar circumstances of a case (q).

(j) (1859) 7 M I A 83.

(k) *Forbes* v *Ameeroonissa Begum* (1865) 10 M I A 340; *Sheonath* v *Ramnath* (1865) 10 M I A 413; *Shah Mukh n Lall* v *Sree Kishen Singh* (1868) 12 M I A 157.

(l) See *Sheo Nath* v *Ram Din* (1896) 18 All 19.

(m) See *Jamsetji* v *Dadabhoy* (1900) 24 Bom 302, and *Kodiram* v *Gajapati* (1900) 23 Mad 494.

(n) *Tasadduq* v *Hayatunnissa* (1903) 25 All 280; *Siddha Lal* v *Collector of Bulandshahr* (1916) 14 All L J 610, 614, 35 I C 209; *Chintamoni* v *Raghoonath* (1895) 22 Cal 981; *Mohamed* v *Monohar* (1924) 40 Cal L J 588, 85 I C 100, (25) A C 473; *Nishi Kanta* v *Umar Lal* (1925) 41 Cal L J 186, 86 I C [illegible]

(q) *Athamsa* v *Ganesan* (1924) 47 Mad L J 641, 645, (24) A M 890.

An order under O 41, r. 19, re admitting an appeal which has been dismissed for default, is not one which affects the decision of the case on the merits, and it cannot therefore be attacked in an appeal from the final decree (r)

It has been held by the High Courts of Bombay, Madras, and Allahabad, that an order setting aside an award and directing the case to be tried by the Court may be attacked in appeal from the final decree (s), the reason given in the Allahabad case being that such an order affects the decision of the case on the merits (t) The High Court of Lahore has taken a different view (u), but the attention of the Court was not drawn to the decisions of the other High Courts

An order setting aside an abatement under O 22, r 9, does not affect the decision of the case on the merits Rather, it re opens the hearing of the case on the merits, and it cannot therefore be challenged in appeal from the final decree (v) But there is a difference of opinion whether an order setting aside an abetment may be so attacked if it is made *simultaneously* with the final decree in the suit It has been held by the High Court of Allahabad that it may be so attacked if passed simultaneously with the final decree (w) On the other hand, it has been held by the High Court of Calcutta, that an order setting aside an abetment cannot be challenged in an appeal from the final decree, whether it is passed before or simultaneously with the final decree (x)

An order refusing leave under s 20 (b) cannot be attacked in an appeal from an order returning a plaint for presentation to the proper Court (y)

"Error, defect or irregularity"—The error, defect or irregularity referred to in this section must be an error, defect or irregularity in law or procedure, and not in matters of fact (z)

Application of the section—This section contemplates two things, namely, (1) a regular appeal from a decree and (2) the insertion in that appeal of a ground of objection relating to an interlocutory order Hence it has been held by the High Court of Allahabad that no appeal will lie where the appeal is *ostensibly* against the decree passed in the suit, but the grounds of appeal are solely directed against an interlocutory order made in the suit (a) On the other hand, it has been held by the other High Courts that an appeal will lie, though the only reason for the appeal is the erroneous decision in regard to an interlocutory order (b)

It should be noted that in order to take advantage of the provisions of this section, the ground of objection must be set out in the memorandum of appeal (c)

Sub-section (2): appeal from order of remand—An order under O 41, r 23, remanding a case, is appealable, where an appeal would lie from the decree of the Appellate Court [O 43, r 1, cl (u)] Such an order was also appealable under the Code of 1882 [see s. 588, cl (28)] Under s 591 of the Code of 1882, it was held that a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under s. 588

... (25) A A 300

(t) 37 All 456 460, 29 I C 411, *supra*

(u) *Badlu Ram* v *Ramzan* (1921) 3 Lah L J 59 59 I C 606

(v) *Mohamed* v *Monohar* (1924) 40 Cal L J 588 85 I C 100 (24) A C 473 *Babu Ram* v *Banke* (1925) 47 All 555, 87 I C 211, (25) A A 426

(w) *Hem Kunwar* v *Amba Prasad* (1900) 22 All 430

(x) *Mohamed* v ... [illegible]

... *Ram Din* (1896) 18 All 19, *Sher Singh* v *Diwan Singh* (1900) 22 All 366

(b) *Raja Dhamara* v *Bukkapatnam* (1911) 34 Mad 228 6 I C 239, *Cooglee* v *Premlall* (1881) 7 Cal 148

(c) *Tilak* v *Chakardhari* (1893) 15 All. 119

and had not done so (*d*) Sub section (2) has been added to preclude an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand (*e*).

Privy Council appeal—This sub section does not apply to Privy Council appeals (*f*) See notes to s 109, "Final Order"

106. [S. 589.] Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

What Courts to hear appeals

Forum of appeal—See notes under the same head to s. 96 above

General Provisions relating to Appeals.

107. [S. 582.] (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

Powers of Appellate Court

(*a*) to determine a case finally;
(*b*) to remand a case;
(*c*) to frame issues and refer them for trial;
(*d*) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

"Prescribed."—"Prescribed" means prescribed by the Rules contained in the First Schedule or made under s 122 or s 125 of the Code. see s 2, cls (16) and (18)

Sub-section (1)—Sub-section (1) is new. Note that the powers of the appellate Court referred to in cls (a) to (d) are limited by the Rules as is shown by the opening words of the section (*g*)

Clause (a)—See O 41, rr. 24, 33.
Clause (b)—See O 41, r 23
Clause (c)—See O. 41, r 25
Clause (d)—See O 41, rr 27, 28

Sub-section (2)—This sub section corresponds to s 582 of the Code of 1882, The Appellate Court has power under this section to add persons as parties to a suit (*h*) or appeal (*i*), also to give leave to a plaintiff to withdraw from a suit under O 23, r 1 (*j*)

(*f*) Ahmad Husain v Gobind Krishna (1911) 33 All 391 9 I C 932, Venkataranga v Narasimha (1915) 38 Mad 509 21 I C 842

(*g*) Mani Mohan v Ramratan (1916) 43 Cal 148, 33 I C 329

(*h*) Uzir Ali v Sarat (1916) 43 Cal 938, 32 I C 791

(*i*) Sri Mati Hemangini v Haridas (1918) 3 Pat L J 409, 46 I C 398

(*j*) See notes to O 23, r 1

108. [Ss 587, 590.] The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Com para O 42, r 1, and O 43, r 2

APPEALS TO THE KING IN COUNCIL.

109. [S. 595] Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Ss. **109 and 110** are to be read together See also cl 39 of the Letters Patent For rules of procedure in appeals to the King in Council, see O 45 below

Difference between the old and the new section—This section corresponds with s 595 of the Code of 1882 except that in cls (a) and (b) the words "decree or final order" have been substituted for the words "final decree," and in cl (c) the words "or order" have been added after the word "decree" This, however, does not introduce nay change in the law The Code of 1882 contained a section, being section 594, which ran thus "In this chapter (that is, chapter XLV) unless there be some thing repugnant in the subject or context, the expression 'decree' includes also judgment and order" Chapter XLV of the Code of 1882 relating to appeals to His Majesty in Council has been split into two parts in this Code, ss 595, 596, 597 and 610 being retained in the body of the Code [now ss 109 112], and the remaining sections being relegated to O 45 S 594 has been reproduced with slight alterations in O 45, r 1 But it is not reproduced in this part of the Code, as four only out of the twenty three sections of that chapter are retained in the body of the Code What has been done instead is that the words "decree or final order" have been substituted where the words "final decree" occurred in the four old sections, and the words "decree or order" have been substituted where the word "decree" occurred in those sections

Right of appeal to the Privy Council.—*Appeal in cases under the Provincial Insolvency Act*—The right of appeal from the High Courts to the Privy Council now rests on cl. 39 of the Letters Patent, and this is elaborated in the Code of Civil Procedure,

109. ss. 109 and 110 *Therefore, though there is no express provision in the Provincial* Insolvency Act (III of 1907) for appeal to the Privy Council from orders of the High Court made under that Act, an appeal to the Privy Council is competent, if the case comes under ss 109 and 110 of the Code (*k*)

"Decree"—For definition of decree, see s 2 (2) above. An act of State is not a decree Hence no appeal lies to the King in Council from an order of the Viceroy and Governor General of India in Council deposing the Maharajah of a Native State in India, such an order being an act of State (*l*)

Preliminary Decree—An appeal lies to the King in Council from a preliminary decree, *e g*, *a decree declaring the liability of a party and directing accounts to* be taken (*m*)

"Final order"—*A final* order within the meaning of clauses (a) and (b) of the section is an order which finally decides any matter which is directly at issue in the case in respect to the rights of the parties An order comprising the decision of a High Court upon *a cardinal issue in a suit*, that issue being one that goes to the foundation of the suit, *and one that can never, while the decision stands, be questioned again in the suit* is final within the meaning of this section, notwithstanding that there may be subordinate inquiries to make (*n*) The expression final is used in contradiction to "interlocutory" (*o*) To determine whether an order is final or not, it is necessary in each case to ascertain the nature of the proceedings (*p*)

In *Rahimbhoy* v *Turner* (*q*), which is the leading case on the subject their Lordships of the Privy Council held that where an order directing the taking of accounts which the defendant contends ought not to be taken at all, decides in effect that if the result should be found to be against the defendant, he *is liable* to pay the amount, the order is final within the meaning of this section. In the course of the judgment their Lordships said "Now that question of *liability* was the sole question in dispute at the hearing of the cause, and it is the *cardinal* point in the suit The arithmetical result is only a consequence of the liability The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that *in this suit it is final* The Court can never go back upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of section 595 of the Code' But an order refusing to appoint a receiver in a suit is not a final order, and no appeal lies from it to the Privy Council (*r*) Similarly an order made in revision under s. 115 of the Code deciding that the applicant should be allowed to sue in *forma pauperis* is not a final order (*s*) An order of the High Court directing the lower Court to proceed with the execution of a decree which the lower Court had *refused to execute on the ground that* it had no jurisdiction is not a final order (*t*) An order refusing an application to be brought on the record as the legal representative of a deceased party to a pending appeal is not a final but an interlocutory order (*u*) But where after a preliminary decree had been passed in a suit for partition declaring that the plaintiff was entitled to a one fourth share in the joint properties, the lower Court dismissed

(*l*) *Chatrapat* v *Kharag Singh* (1913) 40 Cal 685 | 112 115 22 I A 1 2 [illegible] 19 I C 435

(*n*) *Rahimbhoy* v *Turner* (1891) 15 Bom 155 18 I A 6 *Muzhar Hossein* v *Bodha* (1895) 17 All 112 22 I A 1

(*o*) *Radha Kishan* v *Collector of Jaunpur* (1901) 23 All 220 227 28 I A 28 34

(*p*) *Muzhar Hossein* v *Bodha* (1895) 17 All

(*s*) *Babu Salan Singh* v *Gopal* (1904) 8 Cal W N 296

(*t*) *Rajkumar* v *Rameswar* (1919) 4 Pat L J 461 52 I C 401

(*u*) *Gangappa* v *Gangappa* (1914) 38 Bom 421, 23 I C 373

the suit on the ground that the plaintiff had failed to prosecute the suit, and the High Court on revision reversed the order, it was held that the order of the High Court was a final order, as the effect of the order was to restore the preliminary decree whereby the plaintiff was declared to be entitled to a one fourth share, and the order was to that extent a decision upon a *cardinal* point in the case (t)

An order made on appeal setting aside or confirming a sale under O 21, rr 90 and 92, is appealable to His Majesty in Council Such an order is clearly one which deals *finally* with the rights of parties It is true that no second appeal lies from such an order having regard to the provisions of s 104 (2) read with O 43, r 1 (j) But s 104 (2) cannot restrict the provision of the present section which allows an appeal to the King in Council from final orders (w) Similarly though no second appeal lies from an order passed in appeal from an order filing an award [see s 104 (1) (f)], an appeal lies to the King in Council from such an order under this section, the order being a final one (x) But an order refusing a stay under s 19 of the Arbitration Act 9 of 1899 is not a final order, as such an order does not finally dispose of the rights of the parties, but leave them to be determined by the Court in the ordinary way (y) For the same reason an order made by a High Court reversing an order passed by the lower Court under O 23, r 3, recording a compromise [see O 43 (1) (m)], and directing the lower Court to proceed with the suit in the ordinary course, is not a final order (z)

An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory ordinarily and not being final within the meaning of this section, but it would be a final order and therefore capable of appeal if it has the effect of deciding finally the *cardinal* point in the suit (a) Thus where the cardinal issue in a suit was as to the validity of a will, and the lower Court held that there was no valid will and dismissed the suit, but the High Court held on appeal that the will was valid and remanded the case under O 41, r 23, for the decision of subordinate points, it was held that the order of the High Court was a final order, as the order comprised a decision upon the cardinal issue in the suit and it was one that could never, while the decision stood, be questioned again in the same suit (b) Similarly where the cardinal point in a suit was whether notice under s 167 of the Bengal Tenancy Act 8 of 1885 to annul certain encumbrances was properly served or not, and the High Court reversing the decision of the lower Court held that it was properly served and remanded the case to be tried on the other issues it was held that the order of the High Court was a final order (c) Where the lower Court held that the matter in issue in a suit was res judicata, and the High Court held that it was not and remanded the case for trial on the merits, it was held by the Calcutta High Court on an application for leave to the Privy Council that the order was final (d) The contrary has been held by the High Court of Allahabad (dd) But where the lower Court refused to set aside an ex parte decree without investigating under O 9, r 13, whether the defendant had sufficient cause for his non appearance and remanded the case *for an inquiry* under O 9, r 13, it was held that the order of the High Court was not a final order, but a *purely interlocutory order directing*

(t) *Lachmi* v *Balmakund* (1921) 6 Pat L J 116, 60 I C 479

(w) *Krishna Pershad* v *Moti Chand* (1913) 40 Cal 635 647 649 40 I A 140-148 149 19 I C 296

(d) *Khagendra* v *Sahayram* (1921) 25 Cal W N 896 62 I C 776

(dd) *Sajjad* v *Ishaq* (1920) 18 All L J 83, 54 I C 504

S. 109. *procedure* (*e*) Where the lower Court refused to set aside an abatement on the ground that the application was barred by limitation, and the High Court reversed the order and directed the lower Court *to rehear the application* for permission to implead the heirs, it was held that there was no adjudication on the merits, and that the order of the High Court was interlocutory, and not final (*f*) It has also been held that where the lower Court dismisses a suit on the ground that the suit is barred under O 2, r 2 (*g*) or that the suit as *framed is not maintainable* (*h*), *or that the plaintiff has no locus standi to maintain the* suit (*i*), and the High Court reversing the decision of the lower Court remands the case for trial to that Court, the order of the High Court is not final But there is a conflict of opinion whether where the lower Court dismisses a suit on the ground that it is barred by limitation and the High Court reversing the decision of the lower Court remands the case for trial to that Court, the order of the High Court is final, it being held in some cases that the order is interlocutory (*j*) and in others that it is final (*k*)

In an Allahabad case an application was made by a company under sch II, cl 17, to file an agreement to submit to arbitration The application was opposed (1) on the ground that the agreement not being under the seal of the company was invalid and also (2) on grounds of *misrepresentation and fraud* The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid On appeal the High Court reversed the decree holding that the agreement did not require to be under the seal of the company, and remanded the case for trial of the other issues *viz*, issues as to fraud and misrepresentation From this order of remand the respondent applied for leave to appeal to His Majesty in Council It was held by a Full Bench that the order was not a ' final order within the meaning of cl. (a) of this section, there being other *important* issues to dispose of, namely, the issues of misrepresentation and fraud and leave to appeal was refused (*l*) Sec 105, sub s (2) does not apply to appeals to His Majesty in Council (*m*)

A ... legal practi... the High ... ch an order ... An order ... final order (*o*)

" Order passed on appeal." ... an ... ng of ... fore ... held ... the ... the meaning of this section (*q*)

" Any other Court of final appellate jurisdiction "—An appeal lies to the Privy Council from a final order of a District Judge (*r*) or of the Judicial Commissioner s Court (*s*), made under s 104 See notes to s 104 ' Privy Council appeal

(*e*) (1901) 28 I A 28 34 *supra*

(*f*) *Mumtz ud Daula* v *James Skinner* (1925) 47 All 335 86 I C 161 (25) A A 263

(*g*) *Ahmad Husain* v *Gobind Krishna* (1911) 33 All 391 9 I C 932 *Venkataranga* v *Narasimha* (1915) 38 Mad 509 21 I C 842

(*h*) *Mehr Chand* v *Labhu Ram* (1921) 2 Lah 106 60 I C 522

(*i*) *Sultan Singh* v *Murli Dhar* (1924) 5 Lah 329 80 I C 366 (24) A L 571 [F B]

(*j*) *Mahant* v *Caudasama* (1884) 8 Bom 548 *Habib-un-Nissa* v *Munawar un Nissa* (1903) 25 All 629 *Baij Nath* v *Sohan Bibi* (1909) 31 All 545 3 I C 967

(*k*) *Sathappa* v *Subramanian* (1922) 43 Mad L J 758 71 I C 334 (22) A M 510 *Santi Lal* v *Raj Narain* (1923) 45 All 74 79 I C 87 (24) A A 119 [whether application for decree under O 34 r 6 was barred]

(*q*) *Karsondas* v *Gangabai* (1908) 32 Bom 108

(*r*) *Saadatmand* v *Phul Kuar* (1898) 20 All 412 25 I A 146

(*s*) *Ramlal* v *Kishanchand* (1924) 51 I A 72 51 Cal 361 83 I C 1, (24) A I C 95

Limitation.—The application for leave to appeal to the Privy Council must be made within 90 days from the date of the decree sought to be appealed from [Limitation Act, 1908, Sch I, art 179].

Under the Limitation Act of 1877, it was held that in computing the aforesaid period the time requisite for obtaining a copy of the decree appealed from could not be excluded as s 12 of that Act did not apply to such applications (*t*) It was also held that the application could not be admitted after the expiration of the aforesaid period, though there was sufficient cause for not presenting the application within the prescribed period, as s 5 of the Act did not apply to such applications (*u*) Both these sections have now been amended in the Limitation Act of 1908, and they have been made applicable to applications for leave to appeal The aforesaid decisions are, therefore, no longer law, and it has now been expressly held that under s 12 of the Limitation Act of 1908 the time requisite to obtain a copy of the decree appealed from is to be excluded (*v*)

Interlocutory Orders.—See cl 40 of the Letters Patent

Prerogative of the Crown—The Code does not limit the prerogative of the Crown to admit an appeal Hence special leave may be granted by the King in Council to appeal where leave has been refused by the High Court (*w*) But no special leave will as a rule be granted, unless there is some substantial question of law or general interest involved (*x*) See s 112

Clause (c): Certificate as to fitness.—Leave to appeal to the Privy Council may be granted (1) when a case fulfils the requirements of s 110, or (2) when it is *otherwise* a fit case for appeal to the Privy Council In either case a certificate has to be granted by the High Court, in the first case, a certificate to the effect that the case fulfils the requirements of s 110 and is therefore a fit case for appeal to the Privy Council, and, in the second case, that *for other reasons* it is a fit case for appeal to the Privy Council [see O 45, rr 2 3]. Clause (*c*) of the present section refers to the second class of cases In this class of cases it is not necessary that the order should be a *final* one Nor is it necessary that the value of the subject matter of the suit should be Rs 10,000 or upwards (*y*) The only condition necessary is that the case should be a fit one for appeal to the Privy Council Referring to this clause, Lord Hobhouse said That is clearly intended to meet special cases—such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance" (*z*) This was amplified in a later case before the Judicial Committee where it was said that clause (*c*) contemplated cases in which it is impossible to define in money value the exact character of the dispute, there are questions, as for example, those relating to religious rites and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money ' (*a*). Thus where a petition was made by a company for a certificate to appeal to the Privy Council on the ground that the financial and commercial position of the company might be seriously affected by the questions at issue, and that those questions were of importance to Indian companies generally, the High Court of Bombay granted the requisite certificate The

(*t*) *Moroba* v *Ghanasham* (1895) 19 Bom 301, *Anderson* v *Periasami* (1892) 15 Mad 169, *Shib Singh* v *Gandharp Singh* (1906) 28 All 391

(*u*) *Shib Singh* v *Gandharp Singh* (1906) 28 All 391

(*v*) *Abdullah* v *Admr Genl of Bengal* (1915) 42 Cal 35 24 I C 273, *Ram Sarup* v *Jaswant Rai* (1915) 38 All 82 31 I C 906

(*w*) *Rahimbhoy* v *Turner* (1891) 15 Bom 155 18 I A 6, *Ikramul Huq* v *Wilkie* (1906) 33 Cal 893

(*x*) *Moti Chand* v *Ganga Prasad* (1902) 24 All 174 29 I A 40 See also *Sadagopa* v *Krishnamoorthy Rao* (1907) 30 Mad 185, at p 188, 34 I A 93 99

109. *procedure* (*e*) Where the lower Court refused to set aside an abatement on the ground that the application was barred by limitation, and the High Court reversed the order and directed the lower Court *to rehear the application* for permission to implead the heirs, it was held that there was no adjudication on the merits, and that the order of the High Court was interlocutory, and not final (*f*) It has also been held that where the lower Court dismisses a suit on the ground that the suit is barred under O 2, r 2 (*g*) or that the suit as framed is not maintainable (*h*), or that the plaintiff has no locus standi to maintain the suit (*i*), and the High Court reversing the decision of the lower Court remands the case for trial to that Court, the order of the High Court is not final But there is a conflict of opinion whether where the lower Court dismisses a suit on the ground that it is barred by limitation and the High Court reversing the decision of the lower Court remands the case for trial to that Court, the order of the High Court is final, it being held in some cases that the order is interlocutory (*j*) and in others that it is final (*k*)

In an Allahabad case an application was made by a company under sch II, cl 17, to file an agreement to submit to arbitration The application was opposed (1) on the ground that the agreement not being under the seal of the company was invalid and also (2) on grounds of misrepresentation and fraud The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid On appeal the High Court reversed the decree holding that the agreement did not require to be under the seal of the company, and remanded the case for trial of the other issues *viz*, issues as to fraud and misrepresentation From this order of remand the respondent applied for leave to appeal to His Majesty in Council It was held by a Full Bench that the order was not a final order within the meaning of cl (a) of this section, there being other *important* issues to dispose of, namely, the issues of misrepresentation and fraud and leave to appeal was refused (*l*) Sec 105, sub s (2) does not apply to appeals to His Majesty in Council (*m*)

order (*o*)

meaning of this section (*q*)

"Any other Court of final appellate jurisdiction"—An appeal lies to the Privy Council from a final order of a District Judge (*r*) or of the Judicial Commissioner's Court (*s*), made under s 104 See notes to s 104 Privy Council appeal.'

(*e*) (1901) 28 I A 28 34 *supra*
(*f*) *Mumtz ud Daula* v *James Skinner* (1925) 47 All 335 86 I C 161 (25) A A 263
(*g*) *Ahmad Husain* v *Gobind Krishna* (1911) 33 All 391 9 I C 932 *Venkataranga* v *Narasimha* (1915) 38 Mad 509 21 I C 842
(*h*) *Mehr Chand* v *Labhu Ram* (1921) 2 Lab 106 60 I C 522

(*k*) ...*appa* v *Subramanian* (1922) 43 Mad L J 758 71 I C 334 (22) A M 510, *Santi Lal* v *Raj Narain* (1923) 45 All 74 79 I C 87 (24) A A 119 [whether application for decree under O 34 r 6 was barred]

(*q*) *Karsondas* v *Gangabai* (1908) 32 Bom 108
(*r*) *Saadatmand* v *Phul Kuar* (1898) 20 All 412 25 I A 146
(*s*) *Ramlal* v *Kishanchand* (1924) 51 I A 72 51 Cal 361 83 I C 1, (24) A PC 95

subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards, **S. 110.**

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

O 45, rr. 4-5—Read O 45, rr 4-5, with this section.

This section corresponds with s. 596 of the Code of 1882, except that the words, "or final order," have been added in paragraphs 2 and 3 after the word "decree" *See notes to s 109, "Difference between the old and the new section," on p 287* above

Construction of the section.—In a recent case the Judicial Committee said: "It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub sec (c) of s 109 (*l*)

Date of valuation.—As regards "the amount or value of the subject matter of the suit *in the Court of first instance,*" the material date is the date of the institution of the suit But there is a difference of opinion whether, if interest or mesne profits are claimed in a suit and awarded by the decree, the interest or mesne profits are to be calculated up to the date of the institution of the suit or up to the date of the decree See notes below, "Amount or value of the subject matter of the suit in the Court of first instance"

As regards 'the amount or value of the subject matter in dispute *on appeal to His Majesty in Council,*' the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (*m*)

As regards the value of 'property" referred to in the second paragraph of this section, the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (*n*)

"The amount or value of the subject-matter of the suit in the Court of first instance."—In some cases the value of the subject matter in the suit in the Court of first instance may be over Rs 10,000 and the value of the subject matter in dispute on appeal to His Majesty in Council may be less than Rs. 10,000 In some cases, again, the value of the subject matter in the suit in the Court of first instance may be less than Rs 10,000, and the value of the subject matter in dispute on appeal to His Majesty in Council may be over Rs 10,000 What the section requires is that the value

(*l*) *Udoychand v P F Cuzdar* (1925) 52 I A. 207 211, 52 Cal 650, 655, 88 I C 443, (25) A I C 159

(*m*) *Gooroopersad v Juggutchunder* (1860) 8 M I A 166, *Ram Kumar v Muhammad* (1920) 42 All 445, 55 I C 076

(*n*) *Surendra Nath v Dwarka Nath* (1917) 44 Cal 119 35 I C 605, *Raoji v Laxmibai* (1920) 44 Bom 104 55 I C 972

(*o*) *Moti Chand v Ganga Prasad* (1902) 24 All 174, 29 I A 40

s. 110. *Mesne profits and interest*—The only class of cases under the head, "amount or value of the subject matter of the suit in the Court of first instance," that present any difficulty are those which include a claim for interest or for mesne profits. Prior to the year 1874 appeals to the Privy Council were governed by the Order in Council of April 10 1838 By that Order it was prescribed that the amount or value of the subject matter in dispute in appeal to His Majesty in Council must be Rs. 10,000 or upwards It was accordingly held by the Privy Council in cases which arose prior to 1874 that interest on money claims and mesne profits of immoveable property *subsequent to the date of the institution of the suit* actually awarded by the decree appealed from may be added in calculating the value of the matter in dispute on appeal to His Majesty in Council, but not interest or mesne profits *accruing subsequent to the decree,* and if that amount was Rs 10 000 or upwards a party was entitled to appeal though the value of the subject matter of the suit in the Court of first instance was less than Rs 10 000 (*p*) It was also held that in no case can the costs of the suit be added to the principal in calculating the appealable value (*q*) The condition that the amount or value of the subject matter *of the suit in the Court of first instance* should *also* be Rs 10,000 or upwards was first imposed by the Privy Council Appeals Act 6 of 1874 and it was subsequently inserted in the Code of Civil Procedure The first authoritative decision we have on the meaning of the words, "amount or value of the subject matter of the suit in the Court of first instance," is that of the Judicial Committee in *Moti Chand* v *Ganga Prasad* (*r*) In that case the Court of first instance passed a decree for the plaintiff for principal and interest up to the date of the decree amounting to Rs 9 496, with further interest up to the date of realization From this decree the defendant appealed to the High Court and that Court reversed the decree and dismissed the suit with costs The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council On behalf of the plaintiff it was contended that interest *subsequent to the decree* should be added to the sum of Rs 9 496, and that if that was done, the value of the subject matter of the suit would exceed Rs. 10,000 But this contention was overruled, and the application was refused on the ground that the claim and decree in the original Court were for less than Rs 10,000 The plaintiff then applied to the King in Council for special leave to appeal, but the application was refused. In the course of the judgment their Lordships of the Judicial Committee said "In the present case the amount or value of the subject matter of the suit in the Court of first instance *construing that in the manner most favourable to the proposed appellant*, was at the outside the amount for which he recovered his decree which was below Rs 10 000 amounting in round numbers, I think, to about Rs 9,500" It is conceived that the words, "construing that in the manner most favourable to the proposed appellant," mean "even by including interest subsequent to the suit and up to the decree" This decision is an authority for the proposition that interest *subsequent to the decree* cannot be included in calculating the amount of the subject matter of the suit (*s*) But it is not clear from the judgment whether interest from the date of the suit *up to the date of the decree* can be so included. The High Court of Rangoon has held that it can be so included (*ss*)

As to suits for sale in the case of a mortgage, there is a conflict of opinion whether interest subsequent to the decree of the Court of first instance can be included in calculating the amount of the subject matter of the suit It has been held by the High Court of

(*p*) *Cooroopersad* v *Juggutchunder* (1860) 8 M I A 166 168 *Doorga Doss* v *Rama Nauth* (1860) 8 M I A 262 264 *Goorodoss Roy* v *Gohlam Moulah* (1862) Marshall s Rep 24

(*q*) *Doorga Doss* v *Rama Nauth* (1860) 8 M I A 262

(*r*) (1902) 24 All 174 29 I A 40 [Suit to

S. 110.

Allahabad that in calculating such amount the Court should include interest from the date of the decree [that is, the preliminary decree] up to the expiry of the period of six months provided in O 34 r 4 (t) According to the Calcutta (u), and Patna (v), High Courts, such interests should not be included in determining the appeal able value

It has been held by the High Court of Calcutta in two cases that in a suit fo recovery of possession of immoveable property with mesne profits, the value of the subject matter of the suit consists of the value of the property plus mesne profits up to the date of the suit plus mesne profits from the date of the suit until the delivery of possession or until the expiration of three years from the date of the decree with interest (w) The decision in the first Calcutta case (x) proceeded on the authority of *Mohideen* v *Pitchey* (y), a case under the Ceylon Ordinance No I of 1889 which does not impose any condition as to the amount or value of the subject matter *of the suit in the Court of first instance* The decision in the later Calcutta case, however was based on the terms of s 211 of the Code of 1882 now O 20, r 12 (z) The Calcutta decisions were dissented from by the High Court of Mad ras in *Subramania Ayyar* v *Sellammal* (a), where it was held that in calculating the amount of the subject matter of the suit in the Court of first instance, mesne profits *only up to the date of the institution of the suit* can be added to the value of the property of which possession is claimed The correctness of the Calcutta decisions was also doubted by the Patna High Court in *Maharaja Kesho Prasad* v *Shiva* (b), but in later cases (c) the same Court followed the Calcutta decisions having regard to the practice of that Court in matters of settled practice to follow the Calcutta High Court

The sum of money actually at stake may not represent the true value—In *Radha Krishna* v *Sundaraswamier* (d) their Lordships of the Privy Council said ' The sum of money actually at stake may not represent the true value The proceeding may in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value and its determination may govern rights and liabilities of a value beyond the limit It has thus been held that where the subject matter in dispute relates to a *recurring liability* and is in respect of a property above the appealable value, the case is within the first paragraph of this section Hence if the rent claimed in a suit is less than Rs 10,000, but the liability is of a recurring nature, and the property is above that value, the value of the subject matter must be deemed to be over Rs 10 000 (e) It cannot, however, be said where the suit is to enforce payment of an annuity of Rs 125 per annum, that the value of the subject-matter of the suit is Rs 10 000 or upwards, for such an annuity cannot by any reasonable method of valuation be worth Rs 10,000 (f). Where the sole question was as to the destination of the *income* of the residue until the residuary attained twenty five, and the aggregate amount of the income

(t) *Gajadhar* v *Ambika* (19 3) 45 All 133 69

(c) *Mahabir Prasad* v *Anup Narain* (1918) 3 Pat L J 377 46 I C 137 *Mauder* v *Kishnudeo* (1921) 6 Pat L J 246 63 I C 492

(d) (19 ?) 49 I A 211 216 45 Mad 475 481 74 I C 584 (23) A PC 257

Rs 10 000

110. was less than Rs 10,000 it was held that the value of the subject matter (namely, income) was less than Rs. 10,000, though the value of the residue was over Rs 10,000 (*g*).

Value as laid in plaint.—In suits relating to immoveable property the value of the subject-matter of the suit is the selling or market value and not the value as deduced from the amount of the stamp upon the plaint Hence if in a suit for possession of immoveable property the value of the property as laid in the plaint is under Rs 10,000 for the pur pose of Court fees, it is open to the applicant to show, when applying for a certificate for leave to appeal to the Privy Council, that the market value of the property was Rs 10,000 or upwards (*h*) But a defendant who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him to the High Court should not be allowed to contest that valuation on a petition by the plaintiff for leave to appeal to His Majesty in Council on the principle that a party cannot both approbate and reprobate (*i*)

It has been held by the High Court of Bombay that where in a suit for accounts the plaintiff values his claim for less than Rs 5,000 and institutes his suit in a Court of the Second Class Subordinate Judge whose pecuniary jurisdiction is limited to Rs. 5,000, he cannot be heard to say that the amount of the subject matter is Rs 10,000 or upwards (*j*). In the course of the judgment Beaman, J, said, "The amount or value of the subject matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted It follows that the amount or value of the subject-matter of a suit for the purposes of s 109, clauses (a) and (b), and s 110 of the Civil Procedure Code, if that suit is instituted in a Court the pecuniary limits of whose jurisdiction is Rs 5,000, can never be greater than Rs 5,000" It is different, however, where a suit is for an injunction and a declaration relating to immoveable property, for such a suit according to the Bombay decisions may be brought in the Court of a Second Class Subordinate Judge though the value of the property may exceed Rs 5,000 In such a case, it has been held that the case does not fall under the first paragraph of this section, but that it falls under the second paragraph, and that the plaintiff is not precluded from showing that the decree involved some claim or question to property of the value of Rs 10,000 or upwards within the meaning of the second paragraph (*k*)

"The amount or value of the subject-matter in dispute on appeal to His Majesty in Council."—Not only the amount or value of the subject matter of the suit in the Court of first instance, but the amount or value of the subject matter in dispute on appeal to His Majesty in Council, must be Rs 10,000 or upwards. The word "and" in the first paragraph of the section cannot be read as "or" (*l*) The words "amount or value of the subject matter in dispute on appeal to his Majesty in Council mean the amount or value at the date of the High Court decree under appeal (*m*) *A* sues *B* to recover Rs. 10,800 The trial Judge passes a decree for *A* for Rs 8,280 with interest at the rate of 6 per cent. per annum from the date of suit till the date of realiza tion *B* appeals from the decree to the High Court, and *A*'s suit is dismissed *A* appeals for leave to appeal to His Majesty in Council If interest were to be added to the decretal amount Rs 8,280, the valuation of the proposed appeal to the Privy Council would be

(*g*) *Husenbhoy* v. *Ahmedbhoy* (1902) 26 Bom. 319

(*l*) *Moti Chand* v *Ganga Prasad* (1902) 24 All 174, 29 I A 40

(*m*) *Gooroopersad* v *Juggutchunder* (1860) 8 M. I A, 166

over Rs 10,000 Is *A* entitled to add the interest? The Allahabad Court has held that he is not (*m*1)

A mortgages his property to *B* *C* claims that a portion of the property of the value of about Rs 6,000 belongs to him and that it did not belong to *A* *B* then sues *A* on the mortgage, the morgage debt being Rs 38,000, and joins *C* as a defendant A decree is passed for *A* on the mortgage *C*'s claim is allowed in part by the Court of first instance, but it is disallowed altogether by the High Court Is *C* entitled to appeal to the King in Council? No, because though the amount of the decree passed in favour of *A* exceeds Rs 10 000 the value of *C*'s claim is less than Rs 10,000 (*n*) Note that *C* ought not to have been joined as a party to the suit at all [see notes to O 34, r 1, 'Persons having an interest, etc] '

Single decree in several appeals —*A*, claiming to be the next reversioner on the death of a Hindu widow, sues *B*, *C* and *D*, being alienees of separate items of the estate of the last male holder and obtains a decree against them *B*, *C* and *D* prefer *separate appeals* which are all disposed of by one decree *A* applies for leave to appeal to His Majesty in Council from the decision as to the items in possession of *B* and *D* The claims against the several alienees being based on really different causes of action, the fact that only one appellate decree was drawn up does not affect the requirements of this section, and consequently no leave can be granted in such of the appeals in which the value of the subject matter was below Rs 10,000 (*o*)

Abandonment of appeal in part after grant of certificate —*A* obtains a decree against *B* for Rs 11,000 *B* applies for leave to appeal from the decree to the Privy Council, and a certificate is granted Afterwards in the printed case and at the hearing *B* withdraws part of his appeal, reducing by so doing the amount in dispute to Rs 9 000 Does this render the appeal incompetent? No, if *B* had a *bona fide* intention, when he applied for a certificate, to appeal in respect of the whole amount of the decree (*p*)

"Or the decree or final order must involve, directly or indirectly, some claim or question to property of the value of Rs. 10,000 or upwards."— The decree or final order referred to in the second paragraph of the section is the decree or final order from which the appeal is to be preferred to the Privy Council The material date for determining the value of the property under this paragraph is the date of that decree or order (*q*)

Note that the expression used in the second paragraph of this section is "property" while that used in the first paragraph is subject matter of the suit ' and 'subject matter in dispute on appeal to His Majesty in Council ' It has been held by the High Court of Madras (*r*), that the second paragraph of this section applies only to cases which involve some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal and to be taken into account therewith in making up the appealable value or it may possibly also apply to cases involving claims incapable of a money valuation such as claims to easements and the like, but apart from this if nothing beyond the actual subject matter in dispute is involved, the first paragraph of the section alone applies This decision is at variance with the view expressed by Maclean, C J, at the end of his judgment in *Dalgleish* v *Damodar* (*s*), but that part of the judgment of the learned Chief Justice was not necessary for the determination of the case nor are any [illegible] tna case Miller.

(*m*1) *Ram Kumar* [illegible] *Nath* (1917) 44 All 55 I C 976

(*n*) *Radha Kunwi* [illegible] *Laxmibai* (1920) All 488 43 I A 187 35 I C 939

(*o*) *Vaithilinga* v *Somasundaram* (1919) 42 Mad 228 49 I C 434

(*p*) *Kalka Singh* v *Paras Ram* (1895) 22 Cal 434 22 I A 68

(*r*) *Subramania Ayyar* v *Sellammal* (1916) 39 Mad 843 846 849 31 I C 296

(*s*) (1906) 33 Cal 1286

10. C J, expressed his preference for the view taken by the Madras High Court (t) In *Udoychand* v *P E Guzdar* (u), the plaintiff brought a suit to set aside an award in favour of the defendants for Rs 3,900 The trial judge set aside the award, but the appellate Court reversed the [illegible]

[illegible]

defendant for breach of the contract which had led to the reference to arbitration The High Court refused leave, and the plaintiff applied for special leave to appeal from the decree of the High Court The Judicial Committee held that the plaintiff's claim upon the contract was too remote to be considered as being "property" indirectly involved within the meaning of this section, and the petition was dismissed Their Lordships said 'Their Lordships are not inclined to attempt any precise definition of the word 'property The Civil Procedure Code has not done so, and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce But they think that the present is not a case *where the issue of this suit can be said directly or indirectly to involve other property* Let the situation be considered If this appeal were allowed and were successful, what would be the position? Their Lordships think that this is *not really consequential on the present decree* and too remote to be entitled to the description of being 'property' indirectly involved in the issue of this suit

When the plaintiff, a tenant in common, obtained a decree against the defendant, another tenant in common, for a mandatory injunction directing the defendant to demolish buildings erected by the defendant on a plot of common land, the buildings being worth more than Rs 10 000, the High Court granted leave to the defendant to appeal to the Privy Council, though the subject matter of the suit was valued for purposes of court fees at Rs 1,500 (v) Similarly where the plaintiff obtained a decree for possession of a piece of land worth Rs 2,000, and the result of the decree was to oblige the defendant to remove buildings worth more than Rs 10,000, which the defendant had built on the land, leave was granted to appeal to the Privy Council (w) Where the value of the subject matter of the suit was below Rs 10,000, but the effect of a deed of gift, with regard to the construction of which there was a dispute, would govern the ownership of property worth five lacs, a certificate of appeal was granted (x) Similarly, where the value of the subject matter in dispute on appeal to His Majesty in Council was below Rs 10,000, but the proposed appeal to His Majesty in Council involved a decision as to the validity of an award which dealt with property worth over Rs 10,000, a certificate of appeal was granted (y)

A sues *B* for a declaration that he is entitled to one third share in certain property and for an order that the property should be partitioned and his share given to him The property exceeds Rs 10 000 in value, but the share claimed by *A* is of a value less than Rs 10,000 A decree is passed for *A* as prayed *B* then applies for leave to appeal to His Majesty in Council Can it be said in such a case that the decree involves some claim or question to property of a value exceeding Rs 10 000? Yes, according to the Calcutta High Court (z), no, according to the Bombay High Court, unless there be other property outside the subject matter in dispute which can be affected by the decision (a)

(t) *Maharaja Keshо Prasad* v *Shiva* (1918) 3 Pat L J 317 320 44 I C 475

(u) (1925) 52 I A 207 210 52 Cal 650 654 88 I C 445 ('25) A PC 159

(v) *Amar Chandra* v *Shoshi Bhushan* (1904) 31 Cal 305 [P C]

(w) *Sreemuth* v *Palaniappa* (1911) 34 Mad 535 9 I C 281

(x) *Aliman* v *Hasiba* (1896) 1 Cal W N lxxxxiii See also *Bhupendra* v *Nurpat* (1922) 27 Cal W N 204 ('23) A C 451 *Alagappa* v *Nachiappan* (1922) 43 Mad L J 728 69 I C 395 ('23) A M 125

[illegible]

(a) *De Silva* v *De Silva* (1904) 6 Bom L R 403 *Raoji* v *Laxmibai* (1920) 44 Bom 104 55 I C 972

S. 110.

In *De Silva's* case (*aa*) Sir Lawrence Jenkins, C J, held that in order to determine the value prescribed by this section, the decree has to be looked at as it affects the interests of the parties prejudiced by it, and, where the detriment to the party seeking relief is estimated at less than Rs. 10,000, then the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to, or respecting property of, the prescribed value, and the case does not fulfil the requirements of the section. The Patna High Court has followed the Bombay decisions (*b*) It has similarly been held by the High Court of Bombay that in a suit by a partner for accounts and for recovery of his share, it is the value of the plaintiff s share that must be looked to, and not the value of the whole of the partnership assets (*c*) It appears, however, from a judgment of the same High Court in the undermentioned case (*d*) that if *A* sues *B* claiming the exclusive user of a well and compound valued at Rs 10,000 odd, and the High Court holds that *A* and *B* are equally entitled to the user, the decree must be deemed to involve property of the value of Rs 10 000 odd so as to entitle *A* to a certificate for leave to appeal to His Majesty in Council.

In a suit for an easement of light and air claimed by the owner of property *A* against the owner of property *B*, it is the value of property *A*, and not the value of the easement, that determines the appealable value (*e*) In a recent Bombay case *A* sued *B* for possession under the Bombay Rent Act 2 of 1918 The rent of the portion occupied by *B* was Rs 275 per month. The High Court on appeal decreed *A* s suit It was held that as the rent capitalized at 20 years' purchase amounted to upwards of Rs 10 000, the decree involved indirectly a claim respecting property of the value of over Rs 10,000, and that *B* was entitled to leave to appeal to His Majesty in Council (*f*) In a Lahore case, however, where *A* sued to eject *B* alleging that *B* was a tenant at will, and *B* contended that he was a permanent tenant paying an annual rent of Rs. 1,200 the Court held that the issue in the suit namely, whether *B* was a permanent tenant or a tenant at will did not involve any question respecting property of the value of Rs 10,000 or upwards (*g*)

Where the matter is under the appealable value or is not capable of valuation.—In such a case, a party desirous of appealing to the Privy Council may apply for a certificate that the case is ' a fit one for appeal to His Majesty in Council under s 109, cl (c) (*h*) See notes to s 109, ' Certificate as to fitness."

" Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree."—It is not enough where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, that the appeal involves some substantial question of law, it is further necessary that the amount of the subject matter of the suit and of the subject matter in dispute on appeal must be Rs. 10 000 or upwards, or that the decree must involve some claim to property of like amount The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this

(*aa*) (1904) 6 Bom L R 403 *supra*

(*b*) *Gosain Bhainath* v *Bihari Lal* (1919) 4 Pat L J 415 52 I C 723

(*c*) *Variman* v *Hasham* (19 5) 49 Bom 149 85 I C 191 (2) A B 137

(*d*) *Appaya* v *Lakhamgowda* (1923) 25 Bom L R 77 7- I C 1?7 (23) A B 176

(*e*) *Manilal* v *Banubai* (1921) 23 Bom L. R 374 63 I C 5?8 read with *Appaya* v *Lakhamgowda* (1923) 25 Bom L R 77, at p 79, 7 I C 1-7, (-3) A B 176

(*h*) *Moti Chand* v *Ganga Prasad* (190?) 24 All 174 29 I A 40 *Bombay Burmah Trading Corporation* v *Dorabji* (1903) 27 Bom 415 *Banarsi Prasad* v *Kashi Krishna* (1901) 23 All 2?7 28 I A 11 *Narroji* v *Khursedji* (1904) 6 Bom L R 2?6 *Mowla Newaz* v *Sajidunnissa Bibi* (1?91) 18 Cal 378

10. section (i) This is clear from the word "and" with which the last paragraph of this section begins

It has been held by their Lordships of the Privy Council that the word "decision" in this clause means merely the decision of the suit, and cannot, like the word "judgment," be defined as meaning the statement of the *ground* on which the Court proceeds to pass the decree It follows from this that in order to "affirm" the decision of the Court below it is sufficient if the appellate Court affirms the *decree* of the Court below, it need not also affirm the *grounds of fact* on which the judgment was passed Thus where the decree of the appellate Court was that "the appeal be dismissed,' but the reasons given were not the same as those of the lower Court in respect of some matters of fact, it was held that the decision of the Court below was "affirmed" within the meaning of this section, and that no certificate should be granted unless the appeal involved a substantial question of law (j) Nor is it necessary in order to "affirm' the decision of the Court below that the finding of the appellate Court should coincide in terms with that of the Court below it is sufficient if the findings of fact of the two Courts are in effect the same (k) And it has been held that a decree of the High Court dismissing an appeal for want of prosecution the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called for hearing is a decree 'affirming the decision of the Court below (l) Where the appellate Court agrees with *the findings of the Court below upon the merits, but varies the order as to costs (m) or* awards simple interest from a certain date instead of compound interest (n) it amounts to an affirmation of the decision of the lower Court There is a conflict of opinion whether if the Court of first instance passes a decree for the plaintiff, say for Rs 50 000, and the High Court on appeal reduces the amount to Rs 40,000, the latter decree is a decree of affirmance, it being held by the High Court of Calcutta (o) that it is, and by the High Court of Allahabad that it is not (p) *A* sues *B* on a mortgage *B* denies the mortgage The Court of first instance holds that the mortgage is genuine and decrees *A*'s claim in full. *B* appeals to the High Court The High Court affirms the decree of the Court of first instance upon the question of the genuineness of the mortgage, but reduces the rate of interest by Rs 300 *B* applies for leave to appeal to the King in Council on the question of the genuineness of the mortgage, but not on the question of interest The decree of the High Court is a decree of affirmance so far as the subject matter of the appeal to His Majesty in Council is concerned, and *B* is not entitled to leave to appeal. The reduction of interest which, be it noted, is in *B*s favour, does not amount to such a modification of the decree as to entitle *B* to leave to appeal (q)

In a suit by *A* against *B* a decree is passed in *A's* favour *B* appeals from the decree but the appeal is dismissed by the lower appellate Court *B* then appeals to the *High* Court The appeal is heard by a single Judge of the High Court who reverses the decree of the lower appellate Court From this judgment *A* appeals to the High Court under cl. 15 of the charter with the result that the judgment of the single Judge is reversed by a

(l) *Beni Pai v Ram Lakhan* (1898) 20 All 367

(m) *Chaitanya v Mohamed* (1921) 34 Cal L J 299 66 I C 407

(n) *Bhagat Singh v Jai Ram* (1915) P R no 22 p 125 26 I C 40?

(o) *Raja Sree Nath Roy v Secretary of State* (1904) 8 C W N 294

(p) *Bhagwan Singh v The Allahabad Bank* (1921) 43 All 290 64 I C 3

(q) *Kamalnath v Bithal Das* (1922) 44 All 200, 64 I C 916 (22) A A 89

Bench of two Judges *B* applies for leave to His Majesty in Council Here the decree appealed from is the decree passed by the Bench of two Judges of the High Court The Court 'immediately below the Court constituted by the two Judges is the lower appellate Court and not the Court constituted by the single Judge of the High Court This therefore is a case in which the decree appealed from *affirms* the decision of the Court immediately below, and no leave to appeal can therefore be granted unless the appeal involves some substantial question of law The above result follows from the fact that the *Code* makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court the right of appeal from the judgment of a single Judge of the High Court is conferred by cl 15 of the Letters Patent (*r*)

Rule followed by Judicial Committee in cases of concurrent findings of fact, when the appeal before the committee fails on the question of law on which leave to appeal was granted.—Where a trial judge bases his judgment upon a finding of fact and two of three judges constituting the appellate Court agree with the finding and conclusion, the third judge arriving at the same result upon a different finding of fact, there are concurrent findings to which the rule of practice of the Board referred to below applies (*s*)

The Judicial Committee has undoubtedly power as a Court of review to review the concurrent findings of *facts* of the lower Court, though the appeal before it may fail on the question of law on which leave to appeal was granted But *as a general rule* the Committee will not interfere with these findings on the ground that where the question is one of *fact*, it is a question of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance (*t*) In *Umrao Begum* v *Irshad Husain* (*u*) Lord Hobhouse in delivering the judgment of the Board said "The question is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs Their Lordships would be specially unwilling in such a case to depart from *the general rule* which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Court The mere fact that the lower Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the said rule (*t*)

It cannot detract from the weight of concurrent findings of fact, that different Courts in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations A difference of opinion to that extent is only calculated to suggest that the evidence whatever view be taken of it, must necessarily lead to one and the same inference (*w*) Sometimes the nature of the question may be such (as where the question is whether a deed of gift was executed by a Mahomedan under apprehension of death) that the Judicial Committee will not interfere with concurrent findings of the lower Courts on that question even where the evidence is such as to justify either view (*x*) The rule [above referred to] however, is not an absolute rule, it presses upon the appellant with more or less weight according to the circumstances of the case and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail (*y*) Thus concurrent findings of

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[illegible]

22 Mad 515 26 I A 55

(*t*) *Sanwal Singh* v *Satrupa* (1906) 28 All 215 *Chitpal Singh* v *Bhairon Bakhsh* (1906) 28 All 219

(*w*) *Nilmoni Singh* v *Kirti Chunder Chowdry* (1893) 20 Cal 847 857 20 I A 95

(*x*) *Fatima Bibi* v *Ahmed Bakhsh* (1908) 35 Cal 271 35 I A 67

(*y*) *Chitpal Singh* v *Bhairon Bakhsh* (1905) 28 All 219

110. facts have been allowed to be disputed where the question of fact appeared to be a good deal mixed up with law (z) They have also been allowed to be disputed where the decision, though ultimately one of fact, turned upon the admissibility or value of many subordinate facts, and involved the construction of documents and other questions of law (a) In a recent case their Lordships of the Privy Council said " If it appears that underlying findings of fact there are questions of law on which the finding proceeded or that there is a case that the judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply to the exclusion of such grounds of law as are alluded to (b).

The principle of concurrent findings of fact does not apply where the case is one of no evidence The reason is that a decision that there is no evidence to support a finding is a *decision of law* (c) Nor does it apply to a finding as to the existence of a custom, since that is a matter of mixed law and fact (d) Nor does it apply where the question is one of inference from documents, for that is a question of law (e)

The appeal must involve some substantial question of law—No appeal lies to the Privy Council from an appellate decree when there are concurrent findings of the appellate Court and of the Court below upon questions of fact and when upon such findings no substantial question of law arises (f) To grant leave to appeal on the ground that there *seems* to be a point of law which however has not been argued here, is not a compliance with the provisions of this section (g)

Involve—Suppose that there are concurrent findings of fact of such a character that the Privy Council, having regard to the rule set forth on p. 301 above, would decline to disturb them in appeal suppose further, that no substantial question of law could arise before the Privy Council *unless* such findings were set aside by the Privy Council, can the proposed appeal be said in such a case to *involve* a question of law so as to entitle a party to leave to appeal to the Privy Council? No, according to the Allahabad High Court (h) Yes according to the Calcutta High Court (i) In a Bombay case Ranade, J accepted the view of the Calcutta High Court, Jardine, J, did not express any opinion (j)

Substantial question of law—The rejection of an application under O 41, r 27 [Code of 1882, s 568], for the reception of additional evidence does not involve a substantial question of law (k) Omitting to state reasons in an appellate judgment as required by O 41, r 31 [Code of 1882, s 574] is not a substantial question of law (l) Nor does the dismissal of an appeal for default in furnishing security for costs under O 41, r 10, involve any substantial question of law (m) The question whether a tenancy is to be regarded as one at will or one of a permanent nature is a matter in which a substantial question of law is involved (n) But awarding interest at 9 per cent per annum, being the rate fixed in the mortgage bond from the date of the suit under s 34 above is not such an arbitrary and

(z) Paulem v Paulem (1877) 4 I A 109 1 Mad 252

(a) Venkateswara v Shekari (1881) 8 I A 143 3 Mad 384

(b) Tuladhari v Kesho (1905) 41 Cal L J

94, Vir Singh v Tirath Ram (1916) P R no

unwarrantable exercise of discretion under that section as to constitute it a substantial question of law (o)

Review.—An order granting leave to appeal to the Privy Council is open to review (p)

Appeal —See notes to O 45, r 3, Appeal '

Rules observed by the judicial committee in appeals from decrees of Indian Courts:—

(1) A point not raised in the plaint before the District Judge, or before the High Court, cannot be raised before the Judicial Committee (q)

(2) The Judicial Committee will not disturb the findings of the Court below upon mere issues of fact unless it is clearly satisfied that there has been some miscarriage in the reception or in the appreciation of evidence (r)

(3) In appeal from second appeals the findings of fact by the first Court are binding on the Judicial Committee, unless special leave to appeal from the decision of the first Court has been given (s)

(4) The Judicial Committee will not criticise with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India (t)

(5) As to the circumstances in which the Judicial Committee will allow a re hearing, see the undermentioned cases (u)

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

Bar of certain appeals

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, *or the Government of India Act*, 1915, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies

Amendment —The words and figure " or the Government of India Act, 1915, " were inserted in the section by the Amending Act 13 of 1916

(o) *Bhagat Singh v Jai Ram* (1915) P R no 22 p 125 26 I C 405

(p) *Gopinath v Goluck Chunder* (1889) 16 Cal 29 note

(q) *Sumbhu Nath v Surjmoni* (1898) 25 Cal 187 24 I A 191

(r) *Richardson v Government* (1864) I W R P C 47 *Cheyt Ram v Chowdhree Nowbut Ram* (1859) 7 M I A 207

(s) *Anangamanjari v Tripura* (1887) 14 Cal 740 14 I A 101 *Luchmon Singh v Puna* (1889) 16 Cal 754 16 I A 125

(t) *Shafiq-un nissa v Shaban Ali* (1904) 26 All 581

(u) *Rajundernarain Rai v Bijai Govind Sing* (1836) 1 Moo P C 117 *Venkata Narasimha v Court of Wards* (1886) 11 App Cas 660 *Ram Narayan Singh v Adhindra Nath* (1917) 44 I A 87 44 Cal 388 39 I C 937

Decree or order.—In cl. (a) the words "decree or order" have been substituted for the word "judgment" which occurred in the corresponding s. 597 of the Code of 1882. See notes to s. 109 under the head 'Difference between the old and the new section.'

Bar of certain appeals under clause (a).—The reason why no appeal is allowed from the decrees and orders referred to in cl. (a) of this section is that an appeal from such decrees and orders is provided for in cl. 15 of the Letters Patent. The object clearly seems to be that a party should not be permitted to appeal directly to the King in Council from the said decrees and orders, but that he should in the first instance, appeal under the said cl. 15 to the other judges of the High Court (v).

Order of one Judge.—No appeal lies to His Majesty in Council from an order of a single Judge of a High Court passed in revision under s. 115. The fact that the right of appeal (if any such there was) to appeal to the Judges under cl. 15 of the Letters Patent from the judgment of a single judge sitting in revision has been taken away since the amendment of that clause does not affect the positive enactment contained in this section (w).

112. [S. 616.] (1) Nothing contained in this Code shall be deemed—

Savings.

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Clause (1) (a).—See notes to s. 109, "Prerogative of the Crown," on p. 291 above.

(v) *Sabhapathi* v. *Narayanasami* (1902) 25 Mad. 555, 558.

(w) *Satyanarayana* v. *Venkata* (1923) 46 Mad. 958, 75 I. C. 604, ('24) A. M. 399.

PART VIII.

Reference, Review and Revision.

113. [S. 617.] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit

Reference to High Court

Reference to High Court —See O 46 below

Benares State Court —The High Court of Allahabad has no power to entertain a reference on an application submitted to His Highness the Maharaja of Benares in a civil case from the Benares State Court (x)

114. [S. 623] Subject as aforesaid, any person considering himself aggrieved—

Review

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit

See notes to O 47 r 1 below As to rules of procedure see O 47 below

115. [S. 622] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

Revision

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(x) *Sheobodh* v. *Shira* (1925) 47 All 3[illegible] 86 I C 23 ('25) A A 293

115. (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

Code of 1882, s 622 —This section corresponds with s 622 of the Code of 1882 There is no material alteration in the section

Limits of revisional jurisdiction.—The jurisdiction exercised by the High Court under this section is called Revisional Jurisdiction The powers of the High Court under this section can only be invoked *in cases in which no appeal lies* to the High Court, provided the case has been decided by any Court subordinate to such High Court and such subordinate Court appears—

(1) to have *exercised* a jurisdiction not vested in it by law, *or*

(2) to have *failed* to exercise a jurisdiction vested in it by law, *or*

(3) to have acted in the exercise of its jurisdiction *illegally or with material irregularity*

The High Court has no power to interfere in revision under this section except in the cases mentioned in the section Whether a particular order *is expedient* or not is not a ground on which the High Court can interfere under this section (y) Further, in the exercise of revisional powers, it is not the duty of the High Court to enter into the merits of the evidence , it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order (z) If the High Court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of the inferior Court (a)

High Courts' powers of superintendence.—A case may not fall under this section, and yet it may fall under s 15 of the Charter Act, 1861, now s 107 of the Government of India Act, 1915

Certiorari.—The provisions of this section are not exhaustive Cases may be imagined, though rare ones, which may not fall under this section For such cases it cannot be said that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of certiorari have been taken away by the provisions of this section (b)

"In which no appeal lies thereto"—The High Court cannot act under this section in any case in which an appeal lies to that Court The word "appeal" is not confined to first appeal it includes second appeal (c) Where an appeal is preferred in a case in which no appeal lies, the High Court may in a proper case treat the appeal as an application for revision and deal with it on that footing(d) Similarly if an application

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[illegible] on W N 626 631

[illegible] (d) *Merali* v *Sheriff* (1912) 36 Bom 105 107, 12 I C 687 *Baikanta Nath* v *Sita Nath* (1911) 38 Cal 421, 4[illegible] 9 I C 296 *Rajah Venkata Ramayya* v *Veeraswami* (1918) 41 Mad 554, 559 45 I C 471 *Mohini* v *Ramdas* (1923) 28 Cal W N 271, 80 I C 210, ([illegible]) A C 487.

for revision is made in a case in which an appeal lies, the application may be converted into an appeal (e)

Interlocutory orders.—To give the High Court jurisdiction to revise an interlocutory order it is necessary among other things that it must be a ' case decided ' within the meaning of this section, and further, that no appeal lies to the High Court from that order For the purposes of this section interlocutory orders may be divided into two classes, namely—

A Those from which an appeal lies under s 104 (1) These are orders of the Court of first instance

B Those from which no appeal lies These may be—

(a) orders of the Court of first instance from which no appeal is allowed under s 104 (1), *or*

(b) orders passed in first appeal from which no second appeal lies having regard to the provisions of s 104 (2)

As regards interlocutory orders falling under group A the High Court has no jurisdiction to revise them as they are appealable orders (*f*)

As regards interlocutory orders falling under group B, there is a conflict of opinion whether they are subject to revision under this section This conflict turns mainly on the word ' case and the word " may ' in the section Does the word " case " include an issue or part of a case ? If it does not an interlocutory order is not a " case,' and it is not capable of revision in any case It has been held by some Courts that the word ' case " includes part of a case, and by others that it does not

Assuming that the word " case ' includes part of a case, in other words, includes interlocutory orders and assuming further that the other conditions of the section are satisfied there can be no doubt that the High Court *can* interfere in revision with such orders There is also no doubt that though the High Court *can* revise such orders, it is not bound to do so, for the section says that the High Court *may* call for the record of any case, it being discretionary with the Court to call for the record The matter being one of discretion the question has arisen (and herein comes another divergence of opinion)—in what cases is it proper for the Court in the exercise of its discretion to revise interlocutory orders ? To appreciate the different views on the subject, it is necessary to bear in mind that though an interlocutory order may not be appealable under s 104, it may be challenged in the appeal from the final decree under s 105, provided the order is one ' affecting the decision of the case ' Again there are some interlocutory orders from which an injured party is given a right of suit to set aside the order as stated in the notes ' Alternative remedy by way of suit, on p 310 It has been held in some cases that if a party aggrieved by an interlocutory order has the alternative remedy of challenging the order in an appeal from the final decree under s 105 or if he has the alternative remedy by way of suit, the High Court should not in the exercise of its discretion interfere in revision with such order, the power to interfere being exercisable only where there is no such remedy For instance, no appeal lies from an order of a District Court made on appeal granting a temporary injunction [s 104 (2)], further, any error in such order cannot be objected to in an appeal from the final decree as it cannot possibly affect the decision of the case within the meaning of s 105, nor does a suit lie to set aside such an order, the High Court may therefore interfere in revision with the order (*g*) For the same reason where a Court asks a plaintiff to pay additional Court-fee before his suit can be entertained, the High Court may interfere in revision with the order as the order is one which involves the *jurisdiction* of the Court to try the suit (*h*).

(e) *Ram Bahadur* v *Bajrungi* (1924) 3 Pat 314 78 I C 495 (25) A P 16

(*f*) See, for instance *Narendra* v *Kalkoldas* (1925) 41 Cal L J 286, 79 I C 331, (25) A C 510

(*g*) *Bai Atrani* v *Deepsing* (1916) 40 Bom 86, 33 I C 358

(*h*) *Mani Lal* v *Durga Prasad* (1924) 3 Pat 930, 80 I C 667, (23) A P 673

s. 115. But why, it has been asked, and asked pertinently in a large majority of cases, should the discretion of the High Court be fettered with such a hard and fast rule? Why should the High Court refuse to interfere *in every case* in which the injured party has another remedy open to him? Why should not the High Court revise an order even if there be another remedy open to the injured party, if its non interference might lead to failure of justice or irreparable injury? This last consideration has weighed with many judges and it has accordingly been held in some cases that the High Court may in a proper case interfere in revision even if there is another remedy open to the aggrieved party. With these prefatory remarks we proceed to state the views of the different High Courts on the subject.

Prior to a Full Bench decision of the Allahabad High Court to be presently noted it was held by that Court that interlocutory orders were not subject to revision, first, because an interlocutory order cannot be said to be a "case" within the meaning of this section, and, secondly, because a party aggrieved by such order, though he cannot appeal from the order, has another remedy open to him under s 105, namely, to make the alleged wrongfulness of the order a ground of appeal from the final decree in the suit (i). In *Buddhu Lal* v *Mewa Ram* (j), decided in 1921, a Full Bench of the Allahabad High Court held that the word "case" in this section does not include an issue or part of a case, that it does not therefore include an interlocutory order, and that the High Court therefore has no power to interfere in revision with interlocutory orders *in any case.* According to this decision, in the case of a *suit*, the word "case" means a "suit," and since the High Court under this section can only call for the record of any "case" which has been decided, it has no power under this section to call for the record of a "suit" *until the suit has been decided* The same view of the section has been taken by a Full Bench of the Lahore High Court in *Lalchand* v *Behari Lal* (k), decided in 1924

On the other hand it has been held by the Calcutta (l), Madras (m), Patna (n), and Rangoon (o) High Courts, that the word "case" is wide enough to include an interlocutory order that the words "record of any case" include so much of the proceedings in any case as relate to an interlocutory order, and that the High Court therefore has the power to interfere in revision with orders passed *at any stage of a suit*, though there may be another remedy open to the injured party, *e.g.*, by appeal from the final decree under s 105 At the same time it has been laid down that the High Court will not, in the exercise of its discretion, interfere in revision with interlocutory orders, unless its non interference might lead to failure of justice or irreparable injury Following this principle the High Court of Calcutta in one case set aside an order of the Subordinate Court framing additional issues which were unnecessary for the disposal of the suit, when it appeared that the trial of those issues would entail an expenditure of time and money wholly out of proportion to the matter in dispute and cause irreparable injury to the plaintiff (p) Similarly where the lower Court refused the plaintiff's application for an amendment of the plaint, the High Court of Madras set aside the order in revision, and directed the

(i) *Harsaran* v *Muhammad* (1882) 4 All 91, *Chattar Singh* v *Lekhraj* (1883) 5 All 293, *Farid* v *Dulari* (1884) 6 All 233 *Dhandei* v *Chotu Lal* (1917) 39 All 254 38 I C 828

(j) (1921) 43 All 564 63 I C 15 [F B] overruling *Bhargava & Co* v *Jagannath* (1919) 41 All 602 55 I C 331 *Chhakkan Lal* v *Kanhaiya Lal* (1923) 45 All 218 69 I C 921 (23) A A 118

(k) (1924) 5 Lah 288 84 I C 259 (24) A L 425 [F B]

4 Pat L J 195 ... *Durga Prasad* (1924) 3 Pat 930, 80 I. C 667, (24) A P 673

(o) *Jupiter General Insurance Co Ltd* v *Abdul Aziz* (1923) 1 Rang 231, 76 I C 482, (24) A R 2.

(p) *Sm Sarjubala* v *Mohini* (1924) 28 Cal. W N 991, 82 I C 1008 (25) A C 204

plaint to be amended (*q*) In another case where the question was whether an election petition was maintainable at all, and the lower Court held that it was, the Madras High Court set aside the order in revision, and dismissed the petition The Court observed that if the petition did not disclose any ground for an enquiry, the lower Court would by holding the inquiry exercise a jurisdiction not vested in it by law and to hold it would simply lead to waste of time of the Court and of the parties (*r*) The High Court of Bombay has also held that the word "case" includes part of a case, and that the High Court has the power to interfere in revision with interlocutory orders But there is a difference of opinion within that Court whether the High Court should in the exercise of its discretion interfere only in cases where there would otherwise be no remedy or whether it may interfere even if the injured party has another remedy open to him by an appeal from the final decree under s 105 or by way of suit On the one hand, it has been laid down by a Full Bench in *Shiva Nathaji* v *Joma* (*s*) decided in 1883, that though the High Court will not ordinarily interfere in revision with interlocutory orders where the aggrieved party has another remedy open to him either by an appeal from the final decree under s 105 or by suit, it will interfere if the appeal would manifestly be ineffectual and non interference would result in a defeat of law and a grave wrong to the aggrieved party On the other hand, a Divisional Bench consisting of Sargent, C J, and Candy, J, held in *Motilal* v *Nana* (*t*), decided in 1894, that the High Court should not in the exercise of its discretion interfere in revision with interlocutory orders except in cases where the injured party had no other remedy open to him No reference was made in the judgment to the Full Bench decision in *Shiva Nathaji's* case The decision in *Motilal* v *Nana* was disapproved by a Divisional Bench of the same High Court in *Secretary of State* v *Narsibhai* (*u*), decided in 1924, and the Court followed the principle laid down in the Full Bench ruling In the course of his judgment Koyajee, J, observed that the section did not make the absence of another remedy a necessary condition of its applicability

The sharp distinction as to the meaning of the word "case" between the view taken by the High Courts of Allahabad and Lahore on the one hand and the other High Courts on the other hand is brought out by the following case *A* institutes a suit against *B* in Court *X* One of the issues in the suit is whether Court *X* has jurisdiction to try the suit The Court holds that it has and that the suit must proceed *B* applies to the High Court for a revision of the order of Court X Has the High Court power to interfere in revision with this order, which is an interlocutory order? According to the Allahabad (*v*) and Lahore (*w*) decisions, the High Court has no such power as the decision of an issue in a suit is not a decision of a "case" within the meaning of this section According to the High Courts of Bombay (*x*) and Madras (*y*), the High Court has the power to interfere with the order in revision, as the word "case" includes part of a case, and, further, the High Court would in the exercise of its discretion interfere with the order if it came to the conclusion that the order was wrong, though the order may be challenged in an appeal from the final decree, for if Court X had no

(*q*) *Kariya* v *Tirukkavelu* (1925) 48 Mad L J 349 87 I C 90, ('25) A M 585

(*r*) *Janardhanan* v *Verghese* (1925) 48 Mad L J 451 87 I C 113, ('25) A M 707

(*s*) (1883) 7 Bom 341 357 372 [F B] *Vithal* v *Balkrishna* (1886) 10 Bom 610 616 [F B] *Sonchand* v *Chhaganlal* (1911) 35 Bom 243 245 10 I C 603

(*t*) (1894) 18 Bom 35 *Ichharappa* v *Basangowda* (1920) 44 Bom 595 57 I C 432 *Ramrami* v *Jaja* (1920) 44 Bom 619 57 I C 536

(*u*) (1924) 48 Bom 43 77 I C 241 ('24) A B 65

(*v*) *Buddhu Lal* v *Mewa Ram* (1921) 43 All 564 63 I C 15 [F B]

(*w*) *Lalchand* v *Behari Lal* (1924) 5 Lah 258, 84 I C 259 ('24) A L 425 [F B]

(*x*) *Secretary of State* v *Narsibhai* (1924) 48 Bom 43 77 I C 241 ('24) A B 65

(*y*) *Janardhan* v *Verghese* (1925) 49 Mad L J 451 87 I C 113 ('25) A M 707 See also *Rajani* v *Rajabala* (1924) 52 Cal 128 130, 85 I C 870 ('25) A C 320

15. jurisdiction to try the suit, it would result in unnecessary waste of time and money

As regards orders made on an application for leave to sue in forma pauperis, a distinction has been made by the Allahabad High Court between an order *granting* the application and an order *rejecting* the application An order rejecting the application, it has been held, amounts to a *decision of the case* and is therefore open to revision, but an order granting the application is *not a decision* of the *case*, but a mere interlocutory order, and it is not therefore open to revision (z) In a recent Allahabad case (a), however, Walsh, J, expressed the opinion that no revision lies even from an order rejecting the application, the ground of the decision being that it is not a ' case decided '' within the meaning of this section, no opinion was expressed by Piggott J But where the Court of first instance, instead of trying the question of the petitioner s pauperism, tries the question of his title to the property claimed by him, and finding that the title was not established, dismisses the application to sue in *forma pauperis*, the High Court can interfere in revision for in not trying the question of pauperism, the Court failed to exercise the jurisdiction vested in it by law, and in trying the question of title it exercised a jurisdiction nor vested in it by law (b) The High Court will also interfere in revision if the lower Court dismisses the application on the ground that the petitioner s claim is barred as res judicata as such an inquiry is not warranted by the provisions of O 33, r 5 (c)

Alternative remedy by way of suit —The powers conferred upon the High Court by this section are discretionary Hence though a party may not have a remedy by way of appeal, the High Court may in the exercise of its discretion refuse to interfere under this section if there is *any other remedy* open to the party The especial and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant (d) The recognised rule is that if a party to civil proceedings applies to us to exercise our powers under s [115] he must satisfy us that he has *no other remedy* open to him under the law to set right that which he says has been illegally, irregularly or without jurisdiction done by a subordinate Court' (e) But when it is said by the opponent that there is some other remedy open to the applicant, and the application for revision is opposed on that ground, it must be shown that it is a *certain and conclusive* remedy allowed by law Thus no application will be entertained to revise an order made under O 21, rr 60, 61 or 62 [Code of 1882, ss 280, 281, 282], for though no appeal lies from such order, the party against whom the order is made has a special remedy by way of suit under O 21, r 63 [Code of 1882, s 283] (f) Similarly no application will be entertained to revise a decree passed in a suit for possession instituted under s 9 of the Specific Relief Act 1877 for though no appeal lies from a decree passed in such suit, the party against whom the decree is passed is not precluded from instituting a regular suit to establish his title to possession (g) But if the remedy is a *doubtful* one the High Court may interfere by way of revision under this section (h) And even if the remedy is certain and conclusive the High Court may in an exceptional case interfere

(z) *Muhammad Ajab* v *Muhammad Mahmud* (1910) 3 All 623 6 I C 831 See also *Harsaran* v *Muhammad* (1881) 4 All 91

(a) *Mahadeo* v *The Secretary of State* (192-) 44 All 248 65 I C 255 (22) A A 1

(e) *Gopal Das* v *Alaf Khan* (1889) 11 All 383 *Guise* v *Jaisraj* (1893) 15 All 405

(f) *Sheo Prasad* v *Kastura Kuar* (1888) 10 All 119 *Ittiachan* v *Velappan* (1885) 8 Mad 484

(g) *Bhundal* v *Pandol* (1888) 1[?] Bom 221

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by way of revision under this section (i) No doubt the ordinary rule is that where an aggrieved party has other remedy available, this Court is unwilling to interfere, but it is unquestionable that even if there be such remedy, this Court may interfere in exceptional cases' (j) Thus where the lower Court refused the application of a decree holder for rateable distribution under s 73 on the ground that there was another property of the judgment debtor available for the satisfaction of his claim, the High Court of Madras interfered on revision under this section, though the applicant had clearly a remedy by suit Miller, J, said ' I do not depart from the view that where a party has a remedy elsewhere than in the High Court the High Court should not except in special cases interfere under [this section] But here we have a case in which there is no doubt as to the rights of the parties, and no remedy, if I do not interfere, except by a *suit to which there can be no defence*, and which therefore would surely multiply proceedings In such a case, the lesser evil, at any rate, is interference under [this section] (k) In a recent Patna case, Manuk J, said "When the High Court can by interfering under section 115 in appropriate cases terminate the litigation, the mere fact that another remedy *by suit only* lies should not *per se* be a reason for non interference (l)

Whether High Court 'may' of its own motion call for record.—The powers of revision given by this section are very wide, and the High Court can *of its own motion* call for any record under this section, if it appears desirable so to do to that Court (m) It is not necessary to the exercise of its powers under this section that it should be put into motion by the party aggrieved by the proceeding complained of It has been so held by the High Courts of Calcutta, Allahabad and Madras (n) In a Bombay case, however, where a Collector applied to the High Court to revise a decision of a Mamlatdar, the High Court declined to interfere, stating that in so doing it was following the established practice of the Court, and adding that the defendant, if he felt aggrieved, could himself apply to that Court (o)

"Case."—The word "case is more comprehensive than the word "suit In a recent case before the Judicial Committee (p), the question arose whether proceedings by petition to a Civil Court in a matter under s 10 of the Religious Endowments Act 20 of 1863 constituted a case within the meaning of this section Dealing with that question their Lordships said No definition is to be found in the Code of the word case It cannot, in their Lordships view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court It must, they think, include an ex parte application such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties" The word ' case also includes proceedings under the Guardians and Wards Act, 1890, Probate and Administration Act, 1881, Succession Certificate Act, 1889, Provincial Insolvency Act, 1920, etc (q) There is a conflict of opinion whether the word "case' includes an interlocutory order See notes, Interlocutory Orders" on p 307 above

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(m) *Ishwhar* v *Hari Singh* (1883) 5 All 42

(n) *Puran Mal* v *Janki Pershad* (1901) 23 Cal 690 *Golam Mahammad* v *Saroda* (1900) 4 Cal W N 695, *Debi Das* v *Ejaz Husain* (1906) 28 All 72, *Anthony* v *Dupont* (1882) 4 Mad 217

(o) *Pandu* v *Bhardu* (1897) 21 Bom 806

(p) *Balakrishna* v *Vasudeva* (1917) 44 I A 261, 40 Mad 793, 40 I C 650

(q) *Buddhu Lal* v *Mewa Ram* (1921) 43 All 564 572 63 I C 15 *Lal Chand* v *Behari Lal* (1924) 5 Lah 288 292 84 I C 259 (24) A L 425 See *Ballu* v *Hardawari* (1924) 6 Lah L J 219, 79 I C 431 (24) A L 570 [Guardians and Wards Act 1890—revision]

115. **Subordinate Court.**—A Court subordinate to a High Court is one over which the High Court has appellate jurisdiction (*r*) A District Registrar is not a "Court" within the meaning of this section (*s*) Nor is the Rent Controller of Rangoon (*t*). Nor is a District Judge acting under s 4 of Bombay Act 12 of 1850 (*u*) The Chief Judge of the Small Cause Court at Bombay acting under the powers granted to him by s 33 of the Bombay Municipal Act, 1888, is not a Court subordinate to the High Court of Bombay (*v*) Nor is a District Judge acting under s 23 of the Bombay District Municipal Act, 1873, a Court subordinate to the High Court of Bombay (*w*) The High Court of Kumaun is not a Court subordinate to the High Court of Allahabad (*x*) The High Court therefore has no jurisdiction to revise orders made by them. But a District Judge acting under s 57 of the Madras Local Boards Act 14 of 1920, is a "Court" within the meaning of this section (*y*)

The Court of the Resident at Aden is subordinate to the High Court of Bombay as regards questions which should be stated by the Resident for the decision of the High Court under the provisions of s 8 of the Aden Act 2 of 1864 (*z*) His Britannic Majesty's Courts in Zanzibar are also subordinate to the High Court of Bombay (*a*) A Collector exercising *judicial* functions under the Bombay Mamlatdar's Courts Act II of 1906 is a Court within the meaning of this section (*b*) And so is a Civil Court acting or purporting to act under the provisions of s 10 of the Religious Endowments Act 20 of 1863 (*c*) It has been held by the High Courts of Madras (*d*), and Bombay (*e*), that where an application is made to a Collector for a reference to the Civil Court under s 18 of the Land Acquisition Act I of 1894, and the application is rejected, the Collector in so doing does not act as a "Court," and his order is not subject to revision by the High Court The High Court of Patna has held that a Collector acting under the second proviso to s 49 of that Act is a 'Court," and an order made by him refusing to refer to the Civil Court a question under that proviso is subject to revision by the High Court (*f*) The High Court of Calcutta has held that a Collector acting under s 11 of that Act is not a 'Court" within the meaning of this section (*ff*)

A Judge of a High Court sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court [clause 36, Letters Patent]; therefore, no decision of a single Judge can be revised under this section (*g*)

(*r*) *Balkrishna* v *Collector, Bombay* (1923) 47 Bom 699 701 73 I C 354 (23) A B 290

(*s*) *Manavala* v *Kumarappa* (1907) 30 Mad 326

(*t*) *Mohideen* v *Bukshi Ram* (1925) 3 Rang 410, 91 I C 617, (26) A R 33 [F B]

(*u*) *Cooper, In re* (1918) 42 Bom 119, 43 I C 465

(*v*) *Navalkar* v *Sarojini* (1923) 25 Bom L R 463 73 I C 133 (23) A B 421

(*w*) *Balaji* v *Merwanji* (1895) 21 Bom 279

(*x*) *Sadar Singh* v *Amar Singh* (1923) 45 All 383, 71 I C 991, (23) A A 291

(*y*) *Ramaswami* v *Muthu* (1923) 46 Mad 536, 71 I C 1039 (23) A M 192 *Ahamad* v *Basava* (1923) 46 Mad 123, 72 I C 902, (23) A M 254

(*z*) *Bhimbai* v *Mariam* (1910) 34 Bom 267, 5 I C 867

(*a*) *Merali* v *Sheriff* (1912) 36 Bom 105, 12 I C 687

(*b*) *Purshottam* v *Mahadu* (1913) 37 Bom 114, 17 I C 676

(*c*) *Balakrishna* v *Vasudeva* (1917) 44 I A 261, 268-269, 40 Mad 793, 801, 40 I C 650

(*d*) *Abdul Sattar* v *Special Deputy Collector* (1924) 47 Mad 357, (24) A M 442 [F B] overruling *Parameswara* v *Land Acquisition Collector, Palghat* (1919) 42 Mad 231, 49 I C 659 See *Administrator General of Bengal* v *The Land Acquisition Collector* (1907) 12 Cal W N 241, *Krishna Das* v *Collector of Pabna* (1912) 16 Cal L J 165, 13 I C 470

(*e*) *Balkrishna* v *The Collector, Bombay* (1923) 47 Bom 699, 73 I C 354, (23) A B 290

(*f*) *Saraswati* v *The Land Acquisition Deputy Collector* (1917) 2 Pat L J 204 39 I C 650

(*ff*) *British India Steam Navigation Company* v *Secretary of State* (1911) 38 Cal 250 8 I C. 107

(*g*) *Debendra Nath* v *Bibudhendra* (1916) 43 Cal 90, 94, 33 I C 745

"Jurisdiction"—We have already dealt in the notes to s 21 with the meaning of "jurisdiction" The expression "jurisdiction" is not confined to the jurisdiction to entertain a suit or appeal A Court may have jurisdiction to entertain a suit or appeal, and yet it may have no jurisdiction to pass a particular *order* in the suit or appeal. If it does so, the case is one under clause (a) of the section and the High Court is entitled to interfere in revision This follows from the recent pronouncement of the Judicial Committee in *Lachmi Narain* v *Balmakund* (h), set out on p 317 below in the notes, "The same topic continued," and in *Birj Mohun* v *Rai Uma Nath* (i)

Exercise by Court of jurisdiction not vested in it by law—If a Court assumes a jurisdiction which by reason of the pecuniary or territorial limits of the *jurisdiction of such Court or by reason of the subject matter of the suit or other* proceedings instituted in it, is not vested in it by law, the High Court to which such Court is subordinate may exercise its revisional powers under this section But the High Court will not interfere in revision, unless the facts from which absence of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record (j) Similarly the High Court has power to interfere in revision under clause (a), if the lower appellate Court entertains an appeal from an order from which no appeal is allowed (k), or if a Court administering the Succession Certificate Act, 1889, appoints a receiver (l) or where the lower Court has no jurisdiction to inquire into a question, and it inquires into it (m)

For other cases under this head *see notes*, "The same topic continued," on p 316 below, and notes, 'Wrong decision of lower appellate Court, etc,' on p 319 below

Failure to exercise jurisdiction—Where a Court having jurisdiction to act in a matter declines jurisdiction in the matter, this section will apply Thus where a Court has jurisdiction to accept a plaint (n) or to execute a decree (o), or to review its judgment (p), but refuses to accept the plaint or to execute the decree or to review its judgment on the ground that it has no jurisdiction the High Court will interfere under this section. Similarly where a Court refused to confirm a sale under s 312 of the Code of 1882 [now O 21, r 92], believing that it had no power to do so if the purchaser objected to the sale on the ground of misrepresentation, it was held by their Lordships of the Privy Council that the case was one in which the Court had failed to exercise a jurisdiction vested in it by law, and that the decision was therefore subject to revision under the present section (q) The rejection of an application for fixing a standard rent on the ground that the provisions of the Calcutta Rent Act, 1920, were not applicable to the case, is a refusal by the Rent Controller to exercise jurisdiction conferred upon him by the Act, and is accordingly a proper case for interference under this section (r) An order returning a memorandum of appeal for presentation to another Court is also open to revision (s) Interference under this section is also appropriate where a Court has no discretionary power to refuse a relief, but refuses the relief,

(h) (1924) 51 I A 321 4 Pat 61 81 I C 747 ('24) A I C 198

(i) (1893) 20 Cal 8 19 I A 154

(j) *Mihr Ali* v *Muhammad Husen* (1892) 14 All 413

(k) *Bai Mani* v *Ranchodlal* (1923) 25 Bom L R 147 72 I C 56 ('23) A B 214 (order under O 21, r 101)

(l) *Kanhaiya* v *Kanhaiya* (1924) 46 All 372 79 I C 363 ('24) A A 376

(m) *Maung Tun* v *Maung Po* (1923) 1 Rang 265 76 I C 504 ('23) A R 199

(n) *Zamiran* v *Fateh Ali* (1905) 32 Cal 146

Badami Kuar v *Dinu Rai* (1868) 8 All 111

[illegible]

(q) *Birj Mohun* v *Rai Uma Nath* (1893) 20 Cal 8 19 I A 154

[illegible]

15. believing that it has a discretionary power to do so Thus where a Court refused the application of a decree holder for a rateable distribution under s 73, though according to its own finding he was clearly entitled to such distribution, on the ground that there was other property of the judgment debtor available for the satisfaction of his claim, the High Court of Madras interfered under this section (*t*) But where a Court has a discretion in a matter, a wrong exercise of such discretion is not a proper ground for interference under this section (*u*)

For other cases under this head, see notes "The same topic continued" on p 316 below and notes, "Wrong decision of lower appellate Court, etc," on p 319 below

Where a Court in the exercise of its jurisdiction has acted illegally or with material irregularity.—Cl (c) of the section contemplates cases, other than those referred to in cls (a) and (b), namely, cases where the Court has either exercised a jurisdiction not vested in it, or failed to exercise a jurisdiction vested in it It is intended to refer to the class of cases where the Court *having jurisdiction and exercising it* appears to have acted illegally or with material irregularity in the exercise of such jurisdiction (*v*) The words, "acted in the exercise of its jurisdiction illegally or with material irregularity," have given rise to a conflict of opinion. It is therefore best first to state how much is settled law and then to deal with the various interpretations put on the words "illegally" and "material irregularity" by the various High Courts

It is settled law that where a Court has jurisdiction to determine a question and it has determined that question, it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision —The leading case on the subject is *Amir Hassan Khan* v *Sheo Baksh Singh* (*w*), decided by their Lordships of the Privy Council in 1884 In that case it was laid down by their Lordships that where a Court *has* jurisdiction to decide the question before it and in fact decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, *merely because its decision is erroneous* The mere fact that the decision of the Court is wrong affords no ground for the interference of the High Court under this section In the course of the judgment, their Lordships said "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they *had* perfect jurisdiction to decide the question which was before them [namely, whether the suit was barred as *res judicata*] and they did decide it *Whether they decided it rightly or wrongly,* they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity" Following this decision, it has been held that the High Court will not interfere under this section, merely because the lower Court wrongly decided that the suit was barred by limitation (*x*), or that it was barred as *res judicata* (*y*), or because the lower Court proceeded upon an erroneous construction of the sections of an Act (*z*) or misunderstood the effect of a document in evidence (*a*), or

face of it is barred by limitation and *fails to adjudicate upon the question of limitation* [Limitation Act s 3] *Tara* v *Basiruddi* (1915) 19 Cal W N 970 29 I C 476

excluded evidence which it ought to have admitted (b) except probably in cases where it is in direct contravention of some statutory provision (c), or held, though incorrectly, that there was no relation of landlord and tenant between the parties to a suit or proceeding (d), or that no notice was necessary to be given to a railway company under s 77 of the Railways Act (e) or that an application to set aside a sale was not timed barred (f) *Similarly it has been held that no revision lies from an order passed in* appeal remanding a case under O 41, r 23 below (g) though such order may be erroneous in law The cases cited above were all cases in which the Court *had* jurisdiction to decide the question before it, and in fact decided the question, but the decision was impeached as being erroneous in law and was sought to be revised under the present section In all those cases the High Court held that though there was an error in law, the decision was not open to revision, on the ground that a mere error in law is not an "illegality" within the meaning of this section In all these cases the High Court might well have said in the words of their Lordships of the Privy Council in another case (h), "It [the lower Court] made a sad mistake, it is true, but a Court *has jurisdiction* to decide wrong as well as right" The point was further emphasized by their Lordships of the Privy Council in *Balakrishna* v *Vasudeva* (i) Referring to this section, their Lordships said:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise of it, or the illegal assumption of it The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved (j)

The rule laid down in *Balakrishna's case* has been interpreted or rather applied differently by different High Courts This may be explained by an illustration *A* applies under O 21, r 89, to set aside a sale in execution of a decree The lower Court places a wrong interpretation on r 89 and holds that *A* is not a person entitled to apply under that rule, and dismisses *A*'s application *A* then applies to the High Court for a revision of the order of the lower Court Can the High Court interfere in revision? It has been held by the Patna High Court (k) that it can, the reason given being that the case is one of a *refusal to exercise a jurisdiction* vested by law in the lower Court, and therefore within this section In the course of his judgment Mullick, J, said "The Court's decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction An erroneous decision on a question of law or fact *after* jurisdiction has once been legally assumed would not be a ground for interference under section 115 of the Code of Civil Procedure but if the decision is *the very basis and foundation of jurisdiction* in its limited sense as distinguished from powers, it at once comes within the purview of the section The judgment of their Lordships of the Privy Council in *Balakrishna* v *Vasudeva* is in my opinion authority for this view The same view has been taken by a Full Bench of the Madras High Court (l) These decisions have been dissented from by a Full Bench of the Allahabad High Court (m) In the course of his judgment Banerji J, after referring to Balakrishna's case, said "In the present case the Court was competent to determine whether [*A*] was entitled to make an application under O 21, r 89, and it had jurisdiction to decide that question, and it decided it adversely to [*A*] The Court may have been

(b) *Madharrao* v *Gulabbhai* (1899) 23 Bom

(1915) 4 I A 171 176 37 All 485 494 495 30 I C 849

(i) (1917) 44 I A 261 40 Mad 793 40 I C 650

(j) (1917) 44 I A 261 267 40 Mad 793 799 40 I C 650 *Ashiq Ali* v *Imtiaz Begam* (1917) 39 All 723 42 I C 891 [suit valuation] *Jhinku Lal* v *Bisheshar Das* (1919) 40 All 612 46 I C 71 [O 23 r 1]

(k) *Musammat Dhanwanti* v *Sheo Shankar* (1919) 4 Pat L J 340 51 I C 873

(l) *Sundaram* v *Mausa* (1921) 44 Mad 554 63 I C 937 (F B)

(m) *Lad Ram* v *Sundar Singh* (1923) 45 All 425 74 I C 773 (23) A A 392 (F B)

15. wrong in its decision, but it cannot be said that in the exercise of its jurisdiction it acted illegally or with material irregularity in the sense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships." The substantial point of difference between these two divergent views is that the Patna and Madras High Courts treat the refusal by the lower Court to entertain the application as a *refusal to exercise* a jurisdiction vested it by law, while the High Court of Allahabad regards the refusal as no more than a decision, though erroneous, on a point of law *in the exercise* of the lower Court's jurisdiction There is no difference of opinion between these Courts on the point that where the lower Court assumes jurisdiction or refuses jurisdiction on an erroneous construction of a statute, the High Court can interfere in revision The difference arises on the question—is it a case of a refusal to exercise jurisdiction, or a case merely of a wrong decision on a point of law in the exercise of the Court's jurisdiction? According to the Patna and Madras High Courts, it is the former, according to the Allahabad High Court, it is the latter Following its Full Bench ruling, the Madras High Court has held that though an erroneous decision on a point of limitation is not a ground for interference under this section, the High Court can and will interfere if the Small Cause Court refuses to entertain an application for retrial of a suit tried by a single judge of that Court, where such refusal proceeds on a wrong view of a question of limitation(n) It has similarly been held by that Court that where a District Judge on an erroneous construction of a statutory rule, assumes jurisdiction to declare whether a person elected as a President of Local Board is duly elected or not, and assuming such jurisdiction declares his election to be void, the High Court has the power to interfere under this section (o)

The same topic continued—The decision in *Amir Hassan Khan's* case presupposes jurisdiction in the Court whose decision is sought to be revised on the ground that it is erroneous Hence the principle of that decision does not apply where a Court erroneously assumes a jurisdiction which is not vested in it by law (p) Thus if a Court proceeding upon an erroneous construction of a section of an Act assumes a jurisdiction which is not vested in it by law, the High Court will interfere in revision and set aside the decree of the lower Court as one passed without jurisdiction (q) Similarly if a Court wrongly decides that a suit is of a civil nature, and entertains the suit on that basis, the decision is open to revision under clause (a) of this section, for no civil Court is competent to entertain a suit which is not of a civil nature (r), see s 9 above Likewise if a Court proceeding upon an erroneous construction of a statute or upon a misapprehension of the law declines to exercise a jurisdiction vested in it by law, the High Court has the power to interfere under clause (b) of this section (s) These, however, are cases under clauses (a) and (b) of the present section. They are not cases under clause (c) being the clause now under consideration The reason why these cases are mentioned here is that it was contended in those cases that as the assumption of jurisdiction or the refusal to exercise it had proceeded upon an *error of law* the High Court had no power to interfere under this section and the decision in *Amir Hassan Khan's* case was relied upon in support of that contention But the High Courts held that if the case came under either clause (a) or clause (b) it was immaterial that the assumption of jurisdiction or the refusal to exercise it proceeded upon an *error of law* The High Courts also pointed out that the basis of the decision in *Amir Hassan*

(n) *British India Steam Navigation Co* v *Sharafally* (1923) 46 Mad 938 70 I C 888 ('23) A M 435

See also *Brij Mohun* v *Rai Uma Nath* (1893) [illegible]

Khan's case was that the lower Court *had* jurisdiction to determine the question before it and that it *had* determined it, and all that that case decided was that an *erroneous* decision of a case *in the exercise of the Court's jurisdiction* was no ground for interference under this section

A Court has no power to dismiss a suit after the decree is passed in the suit If it does so the question arises whether the case is one of exercise of jurisdiction not vested in the Court or one of illegality or material irregularity In *Lachmi Narain v Balmakund* (t), the Judicial Committee held that the case was one of exercise of jurisdiction not vested in the Court In that case the High Court on appeal passed a decree by consent for a partition upon certain terms and remitted the suit to the Subordinate Judge for disposal under the decree The plaintiff failed to appear on the day appointed by the Subordinate Judge for the matter to be proceeded with, and the Judge made an order dismissing the suit, he based his action upon O 17, r 2 and O 9, r 8 The plaintiff applied to the High Court The High Court decided that the case came both under clause (a) and under clause (c) of this section, and they set aside the order of the Subordinate Judge and ordered the case to be restored to his file The defendants appealed from this order to the Privy Council on the ground that the High Court had no power to interfere in revision Their Lordships affirmed the decision of the High Court and said "Their Lordships do not think it necessary to determine that the case came under para (c) of s 115 But they think that the order which the Subordinate Judge made was one which he *had not jurisdiction* to make" The order of the Subordinate Judge was not merely wrong in law, it was an order which he had no jurisdiction to make

Other cases—No irregularity or illegality—Beside cases of the type of *Amir Hassan's* case, there are cases in which the action of the lower Court has been held *not* to amount to illegality or material irregularity, *e g*, failure to give notice where none is required to be given under the Code (u), deciding a case without taking into consideration a point of law, where such point was never raised before the Court (v)

What is illegality or material irregularity?—*Amir Hassan Khan's* case decides what an illegality or material irregularity *is not* What then *is* an illegality or material irregularity within the meaning of this section? To find an answer to this question, the Courts have adopted *Amir Hassan Khan's* case as the basis Different interpretations have been put by different Judges upon the decision in that case, and hence we have a number of conflicting views on the meaning of the words in question of which the principle ones are set forth below —

1 That the words "acted in the exercise of its jurisdiction illegally or with material irregularity," refer only to an *error of jurisdiction*, and apply only to cases of the kind comtemplated by cls (a) and (b) of this section (w) As against this view it has been said that the words in question did not occur in the Code of 1877, that they were first introduced by the amending Act of 1879, that errors of jurisdiction had already been provided for by the first two clauses of the section, and that the words in question must refer therefore to something else than errors of jurisdiction (x)

2 That the said words refer to *errors of procedure* only as distinguished from errors of *law* (y) This view proceeds mainly on the word "acted" In a Calcutta case, Jenkins, C J, said "It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the *faults of procedure* indicated in that section If there was an error committed [by the Small Cause Court

(t) (1924) 51 I A 321 4 Pat 61 81 I C 747 (24) A I C 108

(u) *Vishnu v Rampratab* (1921) 45 Bom 300 59 I C 713

(v) *Haridas v Ratansey* (1922) 46 Bom 56 62 I C 952 (22) A B 143

(w) *Magni Ram v Jiwa Lal* (1885) 7 All 336, *Badami Kuar v Dinu Rai* (1886) 8 All 111

(x) *Kristamma v Chapa* (1894) 17 Mad 410 414 415

(y) *Kristamma v Chapa* (1894) 17 Mad 410 414 415

15. Judge] it was an error of *law* and not of *procedure*, and in my opinion Mr Justice Fletcher had no power to interfere (z)

3 That the said words apply to cases where there is a *wilful disregard or conscious violation* by a judge of a rule of *law* or *procedure* (a) As against this view it has been said that it engrafts upon the Privy Council ruling a qualification to the effect that the High Court can interfere under the present section if the erroneous decision is the result of *conscious violation* by the lower Court of a rule of law or procedure and that the distinction is in no way warranted by the language of the section (b) The answer given to that is that if the section did not apply to cases where a Judge consciously violated a rule of law or procedure a lower Court might wilfully disregard the decisions of the High Court or even of the Privy Council and there would be no check upon it (c)

4 *That the said words apply to cases where the decision complained of is vitiated by a gross and palpable error* (d) According to this view, a mistake, though of law, if gross and palpable would give jurisdiction to the Court under this section But this view runs counter to the Privy Council decision (e)

5 That the words acted illegally do not merely imply the committing of an error of procedure such as the expression ' acted with material irregularity does " Those words have relation to gross and palpable errors of Subordinate Courts resulting n grave injustice (f)

It will not serve any useful purpose to discuss these conflicting views Suffice it to say as observed by the Judicial Committee in *Balakrishna* v *Vasudeva* (g) that the section applies to jurisdiction alone *the irregular exercise of it* or the illegal assumption of it The section is not directed against conclusions of law or fact *in which the question of jurisdiction is not involved* See notes Jurisdiction on p 313 above

Having noted the different interpretations put upon the words is question we proceed to note some of the decisions reported on the subject

It is an illegality to frame an issue on a point of fact expressly *admitted* by the defendant and to dismiss the suit on the ground that the fact is not proved (h) Similarly it is an illegality if a Court passes a decree on an unstamped hundi The Stamp Act expressly provides that an unstamped hundi *shall* not be acted upon (i) [see Stamp Act II of 1899 s 35] It is an illegality, if the appellate Court calls in question the admissibility of a document not duly stamped after the same has been admitted in evidence in the Court of first instance Such a course is manifestly against the provisions of the Stamp Act by which it is enacted that when an instrument has been admitted in evidence such admission *shall* not be called in question at any stage of the same suit (j) [see Stamp Act II of 1899 s 35] It is also an "illegality" to pass a decree where there is no evidence at all to support it (k) It is an illegality to attach in execution of a decree the tools of an artisan contrary to s 60 of the Code (l) or to attach money in a provident fund regulated by the Provident Funds Act 9 of 1897 (m)

It is a material irregularity within the meaning of this section if a Court taking a mistaken view of the question at issue proceeds to determine an issue which does not

(z) *Shew Prosad* v *Ramchunder* (1914) 41 Cal 323 338 23 I C 977

(a) *Shiva* v *Joma* (1883) 7 Bom 341 358 359 *Kristamma* v *Chapa* (1894) 17 Mad 410

(b) *Kristamma* v *Chapa* (1894) 17 Mad 410 420

(c) *Ross* v *Pitambar* (1903) 25 All 509 5?4 *per* Stanley C J

(f) *Jogunnessa* v *Satish Chandra* (1924) 51 Cal 690 83 I C 433 ('24) A C 633

(g) (1917) 44 I A 261 267 40 Mad 793 799, 40 I C 6?0

(m) *Hindley* v *Joynarain* (1919) 46 Cal 962, 970 9 3 54 I C 439

really arise in the case, and bases its decision of the case on a determination of that issue (n) It is also a material irregularity to treat the delivery of a summons by post to a person who was not shown to be the defendant as good service, and to pass a decree ex parte against the defendant on that footing (o) or to attach in execution of a *personal* decree against a defendant property which he holds as *trustee* for another (p), or to make an order against a person without hearing him (q) It is also a material irregularity for a Court to decline to go into evidence when required to do so and to proceed to dispose of the suit upon the pleadings or upon allegations made in a petition (r) or to refuse to draw up its own decree, whether it be preliminary or final (s) or to refuse to grant a certificate for a refund of court fees paid on a memorandum of appeal when a case is remanded under O 41, r 23 (t) [Court Fees Act 7 of 1870 s 13] It is also a material irregularity to apply to a case a section of an Act which is not applicable to it (u), or to disregard the provisions of the Evidence Act and to place the burden of proof on a wrong party (v)

Wrong decision of lower appellate Court as to jurisdiction of trial Court —The question that arises under this head is whether the High Court has jurisdiction to interfere under this section where the lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit Cases of this kind arise when a Court of first instance returns a plaint on the ground that it has no jurisdiction to entertain the suit, and the lower appellate Court *affirms* the order of the Court of first instance or *sets aside* the order Has the High Court jurisdiction in such a case to revise the order of the *lower appellate Court?* It has been held by the High Court of Allahabad (w) that it has not, the reason given being that if the lower appellate Court committed an error, it did so *in the exercise of its jurisdiction* in entertaining an appeal which it was bound to entertain. On the other hand, it has been held by a full Bench of the Madras High Court (x), that the High Court has jurisdiction to interfere in revision with the order of the lower appellate Court, the reason given being that the case came either under cl (b) or cl (c) of this section. In an earlier Calcutta case (y), the Court took the same view as that taken by the Allahabad Court, but in a later case (z), where the lower appellate Court had confirmed the order of the first Court, the High Court entertained an application to revise the order of the lower appellate Court In a Bombay case (a) where the lower appellate Court had confirmed the order of the first Court, and the application was for the revision of the orders of both the lower Courts, the application was entertained.

Order refusing review —This section does not apply to an order of a lower Court refusing to grant a review of its decision (b)

Award —See notes to Schedule II, paras 15 and 16, under the heading ' Revision "

(n) *Venkubai* v *Lakshman* (1888) 12 Bom 617 *Sivaprasad* v *Tricomdas* (1915) 42 Cal 926 931 27 I C 917

(o) *Jagannath* v *Sassoon* (1894) 18 Bom 606 *Abraham* v *Donald* (1906) 29 Mad 324

(p) *Shard* In the matter of (1901) 28 Cal 574

(q) *Sato Koer* v *Gopal Sahu* (190) 34 Cal 9 9

(t) *Bhausing* v *Chaganiram* (1918) 42 Bom 363 45 I C 55_

(u) *Sew Bux* v *Shib Chunder* (1886) 13 Cal 2_,

Jugobundho v *Jadu* (1887) 15 Cal 47

(x) *Atchayya* v *Sri Seetharamachandra* (1916) 39 Mad 195 18 I C 555 [F B] *Meenatchi* v *Ananthanarayana* (1903) 26 Mad 224

(y) *Mathura Nath* v *Umesh Chandra* (1896) 1 Cal W N 6 6

(z) *Zamiran* v *Fateh Ali* (1905) 32 Cal 146

(a) *Vishvanath* v *Rambhat* (1891) 15 Bom 148

(b) *Lakshman* v *Maruti* (1924) 26 Bom L R 284 80 I C 267 (24) A B 344

S. 115. **Gross miscarriage of justice.**—The interference of the High Court under this section in cases where the lower Court has acted illegally or with material irregularity should be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice (*c*). Hence the judgment of a lower Court should not be set aside upon a mere technicality (*d*).

Sanction to prosecute.—Where a Civil or a Revenue Court, acting under s. 476 of the Criminal Procedure Code, grants or refuses an application to prosecute a party to the suit or witness before it, it is a *decision* of a *case* within the meaning of the *present section*. The High Court, therefore, has no jurisdiction to interfere under s. 439 of the *Criminal* Procedure Code and to call for the proceedings of the lower Court under that section. But it has power under s. 115 of *this* Code as also under section 15 of the High Courts Act [now s. 107 of the Government of India Act, 1915] to call for the proceedings and to pass such order as it may deem expedient. In other words, the application in such cases lies on the *civil* revisional side of the High Court, and not on the *criminal* revisional side. But the Bench exercising criminal jurisdiction may deal with the matter, if authorized to do so by the Chief Justice under section 14 of the High Courts Act [now s. 108 of the Government of India Act, 1915] (*e*). The rule is the same where action has been taken by a Subordinate Civil Court under s. 195 of the Criminal Procedure Code (*f*). See also the undermentioned cases (*g*).

Appeal.—By cl. 15 of the Letters Patent, as amended in March 1919, it is provided that no appeal lies from an order made in the exercise of revisional jurisdiction. Prior to the amendment there was a conflict of decisions as to whether an appeal lay to the High Court under cl. 15 of the Letters Patent from the judgment of a single Judge delivered in the exercise of revisional jurisdiction under this section. The matter stood thus: it was enacted by cl. 15 of the Letters Patent, as it stood before the amendment, that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court *pursuant* to *s.* 13 *of the Charter Act*. Now s. 13 of the Charter Act provides for the exercise by the Judges of the High Court of the *original* and *appellate* jurisdiction vested in the High Court. This gave rise to the question whether the division of jurisdiction into (1) original and (2) appellate was exhaustive or not. If the division was exhaustive, revisional jurisdiction must be treated as comprised in appellate jurisdiction, so that an appeal would lie under cl. 15 from the judgment of a single Judge exercising revisional jurisdiction. If the division was not exhaustive, so that revisional jurisdiction was something outside the original and appellate jurisdiction, the case would not fall within s. 13 of the Charter Act, and no appeal can therefore lie under cl. 15 of the Letters Patent. It was held by

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(*c*) *Per* Davies J. in *Kristamma* v. *Chapa* (1894) 17 Mad. 410 at p. 421; *Ismailji* v. *Macleod* (1907) 31 Bom. 138.

(*d*) *Asharfi Lal* v. *Deputy Commissioner of Bara Banki* (1895) 22 Cal. 729, 22 I. A. 90.

(*e*) *Bhup Kunwar in the matter of the petition of* (1904) 26 All. 249, 257 [F. B.]; *Emperor* v. *Har Prasad* (1913) 40 Cal. 477, 10 I. C. 197 [F. B.]; *Emperor* v. *Kashi* (1916) 38 All. 695, 36 I. C. 836. But see *Uttupura* v. *Emperor* (1910) 33 Mad. 43 [F. B.].

(*f*) *Saligram* v. *Ramji Lal* (1906) 28 All. 554.

the High Courts of Madras (*h*), and Calcutta (*i*), that the division of the jurisdiction of High Courts into original and appellate was exhaustive and that revisional jurisdiction was included in appellate jurisdiction, and that an appeal therefore lay under cl 15 of the Letters Patent from an order of a single Judge made under the present section, provided such order amounted to a "judgment" within the meaning of that clause The contrary was held by the High Court of Bombay (*j*), it does not, however, appear that there was any "judgment" in the Bombay case (*k*)

Laches —An application for revision will not be entertained unless it is made without unreasonable delay (*l*)

(*h*) *Chappan* v *Moidin* (1899) 22 Mad 68, *Tuljaram* v *Alagappa* (1912) 35 Mad 1 8 I C 340, *Srinivasa* v *Ramaswami* (1916) 39 Mad 235, 29 I C 846

(*i*) *Shew Prosad* v *Ram Chunder* (1914) 41 Cal 323, 23 I C 977, *Debendranath* v *Bibudhendra* (1916) 43 Cal 90 33 I C 745

(*j*) *Hiralal* v *Bai Ani* (1898) 22 Bom 891 See also *Nisar Ali* v *Ali Ali* (1906) 28 All 183

(*k*) See (1914) 41 Cal 323, 335, 23 I C 977, *supra*

(*l*) *Durga Prasad* v *Sheo Charan* (1882) 4 All 154, *Balmakund* v *Sheo Jatan* (1884) 6 All 125

PART IX.

Special Provisions relating to the Chartered High Courts.

116. [S 631] This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1861, *or the Government of India Act*, 1915

Part to apply only to certain High Courts

The italicized words were inserted in the section by the Amending Act 13 of 1916

117. [S 632] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts

Application of Code to High Courts

Save as provided in this Part —See s 120

Save as provided in Part X —See s 129

Rules — Rules means rules contained in the First Schedule or made under s 122 or s 125 see s 2 (18) see also O 49 r 3

118. [S 634] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs,

Execution of decree before ascertainment of costs

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation

119. [S 635] Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the

Unauthorised persons not to address Court

High Court to make rules concerning advocates, vakils and attorneys.

See Letters Patent, cls 9 and 10

Provisions not applicable to High Courts in original civil or insolvent jurisdiction

120. [Ss. 638, 639.] The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20

As to *Rules* not applicable to Chartered High Courts, see O 49, r 3

Sub section (2) of this section by which it was provided that nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court has been repealed by the Presidency Towns Insolvency Act III of 1909, s 127

PART X.

Rules.

121. [*New.*] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule

The whole of this Part is new, except ss 129, 130 and 131, which correspond to s 652, paras 2, 3 and 4, of the Code of 1882

As to annulment and alterations of rules, see s 124

122. [*New* *Cf* S. 652, first para.] High Courts established under the Indian High Courts Act, 1861, *or the Government of India Act*, 1915, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule

Power of certain High Courts to make rules

The italicized words were inserted in the section by the Amending Act 13 of 1916

Rules made under this section by the High Courts are set out in Appendices at the end of this work

Sections 122 to 128 excepting s 125 provide for rules to be made by Chartered High Courts for regulating their own procedure and the procedure of the Civil Courts subject to *their superintendence, in other words, Courts subject to their appellate jurisdiction*, see High Courts Act, 1861, s 15, and the Government of India Act, 1915 s 107 These rules must not be inconsistent with the provisions in the body of the Code (see s 128) Further, they are subject to the previous approval of the authorities mentioned in s 126 Sec 129 provides for rules to be made by Chartered High Courts as to their *original* civil jurisdiction These rules may be inconsistent with the provisions in the body of the Code, but they must not be inconsistent with the Letters Patent establishing those Courts.

None of the Courts empowered under this section to frame rules has power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act (*m*)

123. [*New*] (1) A Committee, to be called the Rule Committee, shall be constituted at *the town which is the usual place of sitting of each of the High Courts referred to in section* 122.

Constitution of Rule Committees in certain Provinces

(*m*) *Narsingh* v *Sheo Prasad* (1918) 40 All. 1 7, 42 I C 8.. (F B)

(2) Each such Committee shall consist of the following persons, namely — S. 123.

(a) three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president:

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

The words 'the town which is the usual place of sitting of each of the High Courts referred to in section 122' in sub sec (1) were substituted for the words, 'each of the towns of Calcutta Madras Bombay, Allahabad, Lahore and Rangoon' by the Amending Act 13 of 1916.

124 [*New*] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration

Committee to report to High Court

The provisions as to Rule Committees apply to rules to be made under s 122. Rules under that section can only be made after the Chartered High Courts have taken the opinion of the Rule Committee attached to them

125 [*New*] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such condition as, in the case of the Court of the Judicial Commissioner of Coorg, the Governor General in Council, and, in other cases, the Local Government, may determine

Power of other High Courts to make rules

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court

Rules under this section should not be inconsistent with the provisions in the body of this Code See s 128 and contrast s 129 As to sanction see s 126

126 [*New*] Rules made under the foregoing provisions shall be subject to the previous *approval* of the following authorities, namely —

Rules subject to sanction

(*a*) if the rule is made by a High Court established under the Indian High Courts Act, 1861, *or the Government of India Act*, 1915, to the *approval* of the authority prescribed by *the proviso to section* 107 *of the latter Act* for rules made under that section,

(*b*) if the rule is made by any other High Court, to the *approval* of the Local Government

The word approval in the section was substituted for the word sanction wherever it occurred in the section by the Amending Act 13 of 1916

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916 The words and figures the proviso to section 107 of the latter Act were substituted for the words and figures section 15 of that Act also by the Amending Act 13 of 1916

Ss 126-128

Sanction —This sect on requires in the ca e of rules to be made by Chartered H gl Courts the same sanct on as is required by s 107 of the Government of Ind a Act 1915 the object being that the rule mak ng power should correspond with the power conferred under sect on 107 of that Act That section empowers the Chartered High Courts to make and issue general rules for regulat ng the pract ce and proceed ings of Courts subject to the r appellate jurisd ct on subject to the previous approval in the case of the H gh Court of Calcutta of the Governor General in Council and in other cases of the local Government

127. [*New*] Rules so made and *approved* shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect within the local limits of the jurisdiction of the High Court which made them as if they had been contained in the First Schedule

P lication of rules

The word approved was subst tuted for the word sanct oned by the Pe pealing and Amending Act 24 of 1917 sch I

128. [*New*] (1) Such rules shall be not inconsistent with the provisions in the body of this Code but, subject thereto, may provide for any matter relating to the procedure of Civil Courts

Matters for which rules may provid

(2) In particular and without prejudice to the generality of the powers conferred by sub section (1) such rules may provide for all or any of the following matters namely —

(*a*) the service of summonses notices and other process by post or in any other manner either generally or in any specified areas and the proof of such service

(*b*) the maintenance and custody while under attachment of live stock and other moveable property the fees payable for such maintenance and custody, the sale of such live stock and property and the proceeds of such sale

(*c*) procedure in suits by way of counter claim, and the valuation of such suits for the purposes of jurisdiction ,

(*d*) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not (n),

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract, express or implied, or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or

on a *guarantee, where the claim against the* principal is in respect of a debt or a liquidated demand only, or

on a trust, *or*

(ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non payment of rent, or against persons claiming under such tenant;

(g) procedure by way of originating summons,

(h) consolidation of suits, appeals and other proceedings,

(i) delegation to any Registrar, Prothonotary or Master or other *official of* the Court of any judicial, quasi-judicial and non judicial duties, and

(j) all forms, registers, books, entries and accounts *which may* be *necessary or desirable for the* transaction of the business of Civil Courts

Power of Chartered High Courts to make rules as to their original civil procedure.

129. [S 52, **third para**] Notwithstanding anything in this Code, any High *Court established under* the Indian High Courts Act, 1861, *or the Government of India Act*, 1915, may make such rules not inconsistent with the Letters

(n) See *Balmukund* v *Bissendoyal* (1910) 46 Cal 48 50 I C 51

Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code

Ss. 129-131.

The italicized words were inserted in the section by the Amending Act 13 of 1916

Rules as to original civil procedure of Chartered High Courts —Rules made under s 122 must not be inconsistent with the provisions in the body of this Code Under this section any Chartered High Court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction Such rules may not be consistent with the provisions in the body of the Code but they must not be inconsistent with the Letters Patent establishing it The Letters Patent here referred to are the Letters Patent of 1865 those being the Letters Patent in force when the present Code was enacted and not the Letters Patent of 1862 (o)

130 [S 652, **second para**] A High Court not established under the Indian High Courts Act, 1861, *or the Government of India Act*, 1915, may, with the previous *approval* of the Local Government, make, with respect *to any matter other than procedure*, any rule which any High Court so established might, under section 15 *or section* 107 *respectively of those Acts*, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency town

Power of other High Courts to make rule as to matters other than procedure

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916 The words or section 107 respectively of those Acts were substituted for the word of that Act also by the Amending Act 13 of 1916

The word approval was substituted for the word sanction by the Repealing and Amending Act 24 of 1917 sch I

131. [S 652, **fourth para**] Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law

Publication of rules

(o) *Udoy Chand* v *Khetsidas* (1924) 51 Cal 995 908 911 81 I C 1048 (24) A C 105

PART XI.

Miscellaneous.

132. [S 640] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court

Exemption of certain women from personal appearance

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code

See notes to O 26 r 1 Persons exempted from attending Court

133. [S 641] (1) The Local Government may, by notification in the local official Gazette exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption

Exemption of other persons

(2) The names and residences of the persons so exempted shall from time to time, be forwarded to the High Court by the Local Government and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission unless the party requiring his evidence pays such costs

See O 26 r 1

134. [*New*] The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code

Arrest other than in execution of decree

This section is new It supplies an omission

135. [S 642] (1) *No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court*

S. 135

Exemption from arrest under civil process

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses, acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal

(3) Nothing in sub section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree

Alterations in the section —

1 The words other than process issued by such tribunal for contempt of Court in sub s. (2) have been added to give effect to a Calcutta decision (*p*)

2 Sub section (3) is new It has been substituted for the words except as provided in section 337A sub section (5) and sections 256 and 643 which occurred at the commencement of sub section (2) in the Code of 1882

Grounds of exemption from arrest — The exemption here conferred is not for the personal benefit of the individual but for the furthering of public interests and the better administration of justice In other words the exemption is not the privilege of the person attending the Court but that of the Court which he attends If therefore a witness does not believe *bona fide* that his attendance was required there is no privilege (*q*) For the same reason where a writ of attachment for *contempt* of Court has been issued against a party to a suit he cannot claim privilege from arrest while proceeding to Court for the purpose of attending the hearing of the suit (*r*)

While going to or attending and while returning from Court.— A party to a suit is exempt from arrest under this section while going to or attending the Court before which the suit is pending and while returning from such Court The following are the leading cases bearing on this part of the section —

(1) Where a plaintiff who was a native of Patna and who had instituted a suit in the High Court of Madras left Patna on receiving a letter from his solicitors that his presence was required and arrived at Madras on 24th October and the suit having come on for hearing on the 27th of October was adjourned till the 25th of December and he was arrested in execution of a decree against him on the 10th of November

(*p*) *John v Carter* (1880) 4 B L R O C 90
(*q*) *Hooma Churn v Tel* (1885) 14 B L R App 13 *Samarapuri v Parry & Co* (1890) 13 Mad 150, 158 *Omrudoll in the matter of* (1876) 1 Cal 91
(*r*) *John v Carter* (1880) 4 B L R O C 90

135. it was held by the High Court of Madras that he was *privileged from arrest* (*s*) This decision was disapproved by the Allahabad High Court (*t*) in the case cited in ill (2) below, but it is in accordance with the decision of the House of Lords in the under-mentioned case (*u*)

(2) *A*, residing in Bombay, goes to Benares to prosecute an application to set aside an ex parte decree passed against him by the Benares Court, and puts up at a Dak bungalow in Benares On the date fixed for the hearing of the application *A* attends the Court when his application is heard and dismissed He then leaves the Court, returns to the Dak bungalow, and thence proceeds to the railway station where he is arrested in execution of the decree while actually seated in the train It is found on evidence that *A* had taken a ticket for Allahabad when arrested On the above facts the High Court of Allahabad held that *A*'s arrest was legal The Court said "In the present case [*A*] had left the Court and had returned to the place where [he] was staying in Benares, he had then left that place and [was] actually on his way to Allahabad which is not his home In these circumstances we cannot hold that he, at the time of arrest, was *returning* from a tribunal within the meaning of section 135" (*v*)

(3) The exemption from arrest continues during such period as is reasonably occupied in going to, attending at, and returning from the place of trial (*w*) But if there is a deviation, the privilege is forfeited It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from, and a less crowded and more convenient road adopted (*x*)

(4) A debtor who is released from jail under an order of the Court on the ground that the order under which he was committed was illegal, *may* be arrested under civil process immediately after he is released He is not privileged from arrest as *returning from Court* It does not follow, because imprisonment followed on an order which was illegal, that he should be treated when released from jail as returning from Court (*y*)

(5) *A* is arrested in execution of a decree obtained against him by *B*, and is brought before the Court While he is in the custody of the Court's officers, he is arrested in execution of a decree obtained against him by *C* *A* is not exempt from arrest in execution of *C*'s decree It cannot be said that *A*, while he was under arrest in execution of *B*'s decree, was voluntarily in Court in connection with the execution of *B*'s decree (*z*)

"Parties."—A defendant in a summary suit under O 37 [Code of 1882, chapter 39] is privileged from arrest, though he has not obtained leave to defend the suit (*a*).

Civil process—This section applies only to witnesses and parties arrested under writs issued by Courts to which the Code applies It does not apply where a party is arrested under a writ issued from a Small Cause Court There being no provision *in the Small Cause Court Act corresponding to this section, questions as to exemption* from arrest in the case of persons arrested under writs issued from Small Cause Courts must be governed by the principles of the English law on the subject These are very much the same as those set forth in the present section (*b*)

Appeal—Where a judgment debtor arrested in execution of a decree claims exemption from arrest under this section, but the exemption is not allowed, the order is one under s 47, and is appealable (*c*)

(*s*) *Sita Bux in the matter of* (1882) 4 Mad 317

(*t*) *Ardeshirji v Kalyandas* (1910) 32 All 3 6, 3 I C 46

(*u*) *Persse v Persse* (1846) 5 H L C 671, Halsbury, Vol 25 p 818

(*v*) *Ardeshirji v Kalyandas* (1910) 32 All 3 3 I. C 46

(*w*) *Appasamy v Govinen* (1868) 4 Mad H C 145

(*x*) *Soorendro Nath in the matter of* (1880) 5 Cal 106 *Emperor v Bihari* (1924) 46 All 663

(*y*) *Samarapuri v Parry & Co* (1890) 13 Mad 150

[illegible]

(*b*) *Soorendra Nath, in the matter of* (1880) 5 Cal 106

(*c*) (1924) 47 Mad L J 678, 84 I C 513 (24) A M 900, *supra*.

Exemption of members of legislative bodies from arrest and detention under civil process

135A. (*1*) No person shall be liable to arrest or detention in prison under civil process—

(*a*) If he is a member of either Chamber of the Indian Legislature or of a Legislative Council constituted under the Government of India Act, during the continuance of any meeting of such Chamber or Council,

(*b*) if he is a member of any committee of such Chamber or Council, during the continuance of any meeting of such committee

(*c*) if he is a member of either Chamber of the Indian Legislature, during the continuance of a joint sitting of the Chambers, or of a meeting of a conference or joint committee of the Chambers of which he is a member,

and during the fourteen days before and after such meeting or sitting

(*2*) A person released from detention under sub-section (*1*) shall, subject to the provisions of the said sub section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the pro visions of sub section (*1*)

This section was added by s 3 I A t 23 of 1925

of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court

Language of subordinate Courts

137 [S 645] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such

subordinate Court until the Local Government otherwise directs

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English, but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him, and the Court shall make such order as it thinks fit in respect of the payments of the costs of such translation

Sub section (3) is new

Power for Local Government to require evidence to be recorded in English

138 [S 185A] (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification or falling under a description set forth therein that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed

(2) Where a judge is prevented by any sufficient reason from complying with a direction under sub section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court

Oath on affidavit by whom to be administered

139 [S 197] In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this *behalf*, or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent

The words or other person in cl (b) are new

Assessors in causes of salvage etc

140 [S 645A] (1) In any Admiralty or Vice Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may,

if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly

Ss 140, 1

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed

141. [S 647] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction

Miscellaneous proceedings

This section does not apply to proceedings in execution —S 647 of the Code of 1882, as it stood when that Code was first enacted, ran as follows —

The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction *other than suits and appeals*

The question arose under that section whether the words proceedings other than suits and appeals included proceedings in execution in other words whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree On the one hand it was held by the High Courts of Allahabad (*d*) and Bombay (*e*) that that section applied to applications for execution of decrees so that the procedure relating to suits was to be applied to applications for execution On the other hand it was held by the High Court of Calcutta that that section did not apply to proceedings in execution (*f*) In this state of authorities the Legislature intervened, and an Explanation was added into the section by the Civil Procedure Code Amendment Act 6 of 1892 which ran as follows —

Explanation —This section does not apply to applications for the execution of decrees which are proceedings in suits

The effect of the above Explanation was to supersede the Allahabad and Bombay rulings above referred to and to give legislative sanction to the Calcutta decision

In the meantime one of the Allahabad cases referred to above namely the case of *Fakir ullah* v *Thakur Prasad* (*g*) was taken up to the Privy Council and that tribunal held in the year 1894 that independently of the Explanation s 647 did not apply to applications for execution but only to original matters in the nature of suits such as proceedings in probates guardianships and so forth thus overruling the Allahabad and Bombay cases (*h*) This decision if it had come three years earlier would have rendered the Explanation unnecessary Now that we have got the Privy Council decision and the rule firmly established that s 647 does not apply to proceedings in execution the Explanation is unnecessary, and it has accordingly been omitted in the present section (*i*) At the same time two alterations have been made in the section, namely (1) the words in regard to suits have been added and (2) the words other

[illegible]

(*e*) *Parjade* v *P rj de* (1889) 6 Bom 681
(*f*) *Bunko Behary* v *N l Madhub* (1891) 18 Cal 635
(*g*) (1890) 12 All. 1 9
(*h*) *Thakur Prasad* v *Fakir ullah* (1895) 1 All 106 22 I A 44
(*i*) *Hari Charan* v *Manmatha* (1914) 41 Cal I 4 5 19 I C 683 *Balasubramania* v *Sen m mal* (1915) 38 Mad 199 21 I C 3

than suits and appeals" have been omitted In so doing the Legislature has now done what it could have done as well in 1892

The reason why the words "other than suits and appeals" which occurred at the end of s 647 have been omitted in the present section is this S 647 applied to proceedings "other than suits and appeals" The High Court of Allahabad held that applications for the execution of decrees were proceedings "other than suits and appeals" *and that s 647 applied therefore to such applications (j) On the other hand, the High* Court of Calcutta held that applications for the execution of decrees were not proceedings "other than suits and appeals, *they being proceedings in suits,* and that s 647 did not therefore apply to such applications (k) The Legislature adopted the view of the Cal*cutta High Court, and enacted by* way of Explanation to the section that the "section does not apply to applications for the execution of decrees *which are proceedings in suits*" It would have been a shorter cut if the Legislature had amended s 647 by deleting the words 'other than suits and appeals,' as those were the words that gave rise to the conflict instead of adding into the section an Explanation which certainly was not happily worded What the Legislature omitted to do in 1892 it did in 1908

This section, we have said, does not apply to *proceedings in execution (l)* Hence the procedure provided in the Code in regard to *suits* does not apply to *applications for execution of decrees* We proceed to note the decisions on the subject —

1 The provisions of s 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees But though these provisions do not in terms apply to applications for execution, they are governed by principles analogous to those of *res judicata* See notes to s 11, p 68 above

2 The provisions of O 2, r 2 [Code of 1882, s 43] do not apply to applications for execution Hence where a decree awards two distinct reliefs, an application to enforce one relief is no bar to a *subsequent application* to enforce the other relief, though both reliefs are awarded by the same decree (*m*)

3 The provisions of O 9 [Code of 1882, ss 96 to 109] do not apply to applications for execution Hence if the applicant fails to *appear* at the hearing of the application, the Court cannot dismiss the application under O 9, r 8 [Code of 1882, s 102], though it may do so under its inherent power (*n*) And where in the exercise of this power an application for execution is dismissed, the Court has no power to *restore* it to the file under O 9, r 9 [Code of 1882, s 103] (*o*) as that rule does not apply to execution proceedings But though the Court has no power to *restore* to the file an application which has once been dismissed for default, such dismissal is no bar to a *fresh* application for execution (*p*) See notes to O 9, r. 9, and O 9, r 13, "Execution proceedings"

4 The provisions of O 17, rr 2 3 [Code of 1882, ss 157 158] do not apply to *applications for execution Hence an order dismissing an application for default* is no bar to a fresh application for execution (*q*).

5 The provisions of O 23, r 1 [Code of 1882, s 373] do not apply to applications for execution Hence the *withdrawal* of an application, though it be without the leave of the Court, is no bar to a fresh application for execution (*r*) See now O 23, r 4

(*j*) *Radha Charan* v *Man Singh* (1890) 12 All 392, at p 395

(*k*) *Bunko Behary* v *Nil Madhub* (1891) 18 Cal 635, at p 638

(*r*) *Thakur Prasad* v *Fakirullah* (1895) 17 All 106 22 I A 44, *Bunko Behary* v *Nil Madhub* (1891) 18 Cal 635

S. 141

6 See notes to s 144, "Is a proceeding under this section a proceeding in execution"

7 See O 22, r 12

Other cases under this section are considered in their proper place.

"Proceedings in any Court of civil jurisdiction."—The proceedings spoken of in this section refer to *original* matters in the nature of suits, such as proceedings in probate, guardianship and so forth, and do not include execution (s) An application under s. 18 of the Religious Endowments Act, 1863, is a proceeding of this nature Hence it must be verified as required by O 6, r 15 of the Code (t) But an application for settlement of rents made to a *Revenue Officer* under s 105 of the Bengal Tenancy Act 8 of 1885 is not a proceeding in a Court of civil jurisdiction Hence the petition need not be signed as required by O 6, r 14 (u) A petition by a company to the High Court under the Indian Companies Memorandum of Association Act, 1895, for the confirmation of a special resolution altering the Memorandum of Association of the Company, is a proceeding within the meaning of this section Therefore where the petition was dismissed, and the Company applied for leave to appeal to the Privy Council, the case was dealt with by the Court under s 595 of the Code of 1882, [now s 109] (v) Similarly an application to set aside an ex parte payment order made under the Indian Companies Act 6 of 1882, is a proceeding in a Court of civil jurisdiction Hence the provisions of O 9, r 13 apply to the case (w) An application under s 12 of the Guardians and Wards Act, 1890, is a proceeding in a Court of civil jurisdiction Hence a receiver may be appointed in such a proceeding under O 40, r 1 (x) But an application for a succession certificate under the Succession Certificate Act, 1889, is not such a proceeding Hence a receiver cannot be appointed under O 40 in such a proceeding (y) An application for the appointment of a Common Manager under s. 93 of the Bengal Tenancy Act 8 of 1885 is a proceeding of the kind contemplated by this section, a receiver therefore may be appointed under O 40, r 1, pending the application (z) Disciplinary proceedings taken under s 14 of the Legal Practitioners Act 18 of 1879 are ' not proceedings in any Court of civil jurisdiction " within the

is made under that para, the applicant may join several causes of action in the application as provided by O 2, r 3 below (b) An inquiry before a Commissioner appointed by a Court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section. Hence the provisions of O 18, r. 1, apply to the proceeding (d)

"The procedure provided in this Code."—This section extends the procedure provided in this Code in regard to suits to proceedings in Civil Courts It does not confer any substantive right not expressly given elsewhere by the Code, *e g*, a right of appeal (e) Hence no appeal lies from an order passed on a "proceeding" of the kind contemplated by this section unless the order comes within the purview

(s) *Thakur Prasad* v *Fakirullah* (1895) 17 All 106 111, 22 I A 44

(t) *Amdoo Miyan* v *Muhammad* (1901) 24 Mad 685, 689

I C 363, (21) A A 376

(z) *Asadali* v *Mahomed* (1916) 43 Cal 946, 36 I C 177 But O 40, r. 1, is not confined to "suits"

(a) *In the matter of Janak Kishore* (1916) 1 Pat L J 576 37 I C 481

(b) *Dreyfus & Co* v *Gurditta Mal* (1911) Punj Rec No 35 p 123 9 I C 655

(d) *Ramalka* v *Negusam* (1924) 47 Mad 800, 92 I C 133 (25) A M 145

(e) *Parasurama* v *Seshier* (1904) 27 Mad 504, *Damodara* v *Kutappa* (1913) 36 Mad 16, 10 I C 879

of O 43 (*f*) Further the section does not confer upon any Court entertaining such proceedings a *power* not expressly given elsewhere by the Code, *e g*, the power to refer questions to the High Court [s 113] (*g*)

44

142 [S 94] All orders and notices served on or given to any person under the provisions of this Code shall be in writing

Orders and notices to be in writing

143 [S 95] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made

Postage

Provided that the Local Government may remit such postage or fee or both, or may prescribe a scale of court fees to be levied in lieu thereof

144 [S 583.] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal

Application for restitution

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1)

The old section —S 583 of the Code of 1882 ran as follows —

When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits

The new section —Sub sec (1) of the present section is s 583 so recast as to give legislative recognition to the practice founded on that section.

Sub sec (2) is new See notes below Sub section (2) bar of suit' and 'Where a decree is varied or reversed

(*f*) Chand r v Durga (19 4) 46 All 538 51 C 323 (-4) A A 689 *Hara* v *Murari* (19) 36 Cal L J 184 65 I C 1003 (2) A C 5 2 *Habibar* v *Saukunnessa* (19 3) 38 Cal L J 358 7 I C 90 (4) A C 3 *Chandra Bati* v *Jagan Nath* (1 5) 7 Lah L J 31 90 I C 611 (2) A L 449

(*g*) *Damodara* v *Kuttappa* (1913) 36 Mad 16 10 I C 819

Restitution —The word ' restitution " in this section means restoring to a party what he has lost in execution of a decree passed against him on the decree being varied or reversed in appeal The granting of restitution is *not discretionary* The principle of the doctrine of restitution is that on the reversal of a decree in appeal the law raises an obligation in the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost (*h*) The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, and the Court in making restitution *is bound* to restore the parties, so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from it (*i*)

The doctrine of restitution contemplates the case where property has been received by a decree holder in execution of a decree and the decree or part thereof is subsequently varied or reversed on appeal by the judgment debtor In such a case, the procedure to be adopted by the judgment debtor is to apply under this section to the Court of first instance for restitution of the property and for consequential relief On such application being made the Court *shall* cause restitution to be made to the judgment debtor (the successful appellant) The restitution to be made must be such as will, so far as may be, place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed (*j*) This principle applies with equal force whether restitution has or has not been directed in the appellate decree (*k*) For the purpose of making such restitution as aforesaid, the Court may make any orders, including orders for the refund of costs (*l*), and for the payment of interest (*m*), damages (*n*), compensation and mesne profits (*o*) which are properly consequential on such variation or reversal. In directing restitution it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation (*p*) Where an order is made against a party for restitution but restitution is not made, the order may be enforced by sale of his property [s 36] (*q*)

It is to be observed that the restitution to be awarded under this section must be ' properly consequential on the reversal of the decree The Court may therefore in a proper case refuse to make an order for the refund of costs (*r*)

Illustrations

(1) *A* obtains a decree against *B* for possession of immoveable property [or a decree for the recovery of moveable property, say timber or a decree for a sum of money] and in execution of the decree obtains possession of the property [or obtains the timber or recovers the money] The decree is subsequently reversed in appeal *B* is entitled

(*h*) *Doraisami* v *Annasami* (1900) 23 Mad 306 311

(*i*) *Hurro Chunder* v *Shoorodhonee* (1868) 9 W R 402

(*j*) (1868) 9 W R 402 *supra*

[illegible]

(*m*) *Podger* v *Comptoir d Escompte de Paris* (18[illegible]1) L R 3 I C 46 *Forester* v *Secretary of* [illegible]

[illegible] *Narain* v *Kamakhia Singh* (1909) 36 I A 197 31 All 551 3 I C 798 *Parbhu Dayal* v *Ali Ahmad* (1910) 32 All 79 4 I C 376 *Parbhu Dyal* v *Kalyan Das* (1916) 43 I A 43 38 All 163 33 I C 505

(*p*) *Ganga Prasad* v *Brojo Nath Das* (1908) 12 Cal W N 642

(*q*) *Parbhu Dyal* v *Kalyan Das* (1916) 43 I A 43 38 All 163 33 I C 505 *Mahadeo* v *Rama* (1916) 40 Bom 194 31 I C 305

(*r*) *Tara Chand* v *Champi* (1924) 46 All [illegible] 84 I C [illegible] A I R [illegible] A 713

144. on an application under this section to restitution of the property [or of the timber or of the money], though there may be no direction for restitution in the decree of the appellate Court *Munshi Dinesh Proshad* v *Shanker* (1904) 9 Cal. W N 381, *Bal vantrav* v *Sadrudin* (1889) 13 Bom 45, *Bhagwan* v *Ummat ul Hasnain* (1896) 18 All. 262

(2) *A* obtains a decree against *B* for Rs 5,000, and recovers the amount in execution The decree is subsequently reversed in appeal *B* is entitled on an application under this section to a refund of the money together with *interest* up to the date of repayment though the appellate decree may be silent as to interest see the cases cited in foot note (*m*) above In *Rodger* v *Comptoir d Escompte de Paris* (*s*), which is the leading case on the subject, Lord Cairns in delivering the judgment of the Privy Council, observed as follows 'It is contended on the part of the respondents here [that is, *A* in the present illustration], that the principle sum being restored to the present petitioners [that is *B* in the present illustration] they have no right to recover from them any interest It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners They will, by reason of an act of the Court, have paid a sum which it is now ascertained, was ordered to be paid by mistake and wrongfully They will recover that sum after a lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money On the other hand these fruits will have been enjoyed or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them *with interest* during the time that the money has been withheld These observations apply equally to mesne profits which form the subject of the next illustration.

(3) *A* obtains a decree against *B* for possession of certain immoveable property and in execution of the decree obtains possession of the property The decree is subsequently reversed in appeal *B* is entitled to possession of the property together with *mesne profits* during the period of dispossession see the cases cited in foot note (*o*) on p 339 If the property has in the meantime been let out by *A* to tenants, *B* is entitled to remove any tenant who refuses to vacate *Rohni Singh* v *Holding* (1894) 21 Cal 340

Splitting of claim for restitution—It has been held by the High Courts of Patna and Madras that the provisions of O 2, r 2, do not apply to a proceeding under this section *A* obtains a decree against *B* for possession of certain immoveable property, and recovers possession of the property pursuant to the decree *B* appeals from the decree and the decree is reversed in appeal. *B* then applies for restitution of the *property* and the property is restored to him Subsequently *B* applies for *mesne profits* for the period during which *A* was in possession of the property Is *B* debarred from claiming mesne profits on the ground that he ought to have included the claim for mesne profits in the application for restitution of the property? No (*t*) Similarly a judgment debtor who applies for and obtains restitution of a *sum of money* on reversal by the appellate Court of the decree pursuant to which he had paid the sum to the decree holder is not precluded from making a fresh application for recovery of *interest* for the period during which the decree holder had the use of the money (*u*)

(*s*) L. R 3 P C. 465

(*t*) *Krupasindhu* v *Mahanta* (1918) 3 Pat L J 367 47 I C 47

(*u*) *Somasundaram* v *Chokkalingam* (1917) 40 Mad 780 38 I C 806

Inherent power to grant restitution —The power of a Court to grant restitution is not confined to the cases covered by the provisions of this section It extends also to cases which do not come strictly within this section The reason is that a Court has an inherent right under s 151 irrespective of this section to order restitution (t).

In *Jai Berham* v *Kelar Nath Marwari* (u) their Lordships of the Privy Council said It is the duty of the Court under s 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved As was said by Cairns L C, in *Rodger* v *Comptoir d Escompte de Paris* (x) One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression *the act of the Court* is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case " In *Jai Berham s* case, a sale in execution of a decree was set aside on the ground that the sale certificate comprised property different from that which was attached. The property was purchased by a stranger to the decree, and the price paid by him into Court was applied towards satisfaction of the decree The judgment debtor applied for possession Their Lordships held that both under s 144 and s 151 the purchaser was entitled to be paid the excess of the purchase price over the mesne profits This decision, it is submitted is an authority for the proposition that where an application for restitution does not come strictly within the purview of this section, *e g*, where the sale alone is set aside in execution proceedings, but the decree is not varied or reversed or where the decree and the sale are set aside in a separate suit, the Court may entertain the application under the inherent power conferred upon it by s 151 If this view be correct it will be needless for the Courts in future to resort to s 47 which can only apply if the decree holder himself is the purchaser, or where the purchaser is a stranger to the decree, he is regarded as a representative either of the decree holder or of the purchaser within the meaning of that section. It is also submitted that a proceeding under this section is not a proceeding in execution

In the exercise of their inherent power the Courts have applied the principle of this section to cases which were not strictly within the terms of the section Thus where *A* sued *B* to establish his right to a fund in Court, and *B* was allowed to draw the money on giving an undertaking to the Court to repay it if *A* succeeded in the suit, and *A* succeeded in establishing his title, it was held that though the undertaking given by *B* did not provide for the payment of interest, the Court had inherent power to order *B* to repay the money with interest (y) See notes below, " Where a decree is varied or reversed "

" Place the parties in the position which they would have occupied but for such decree as has been reversed —A party is not entitled under this section to restitution of property which was not in his possession before suit, but was in possession of the opposite party, and which therefore could not have been taken out of his possession under any decree of Court. *A* applies for letters of administration

4. to the estate of *X* *B* sets up a will of the deceased. The moveable properties in dispute are in the possession of *B* *B* delivers the properties to a Commissioner appointed by the Court who locks them up in a room under seal. The High Court directs probate of the will to be granted to *B* Thereafter on *B*s application the moveables are handed over to her Subsequently the order of the High Court is reversed by His Majesty in Council and letters of administration are directed to be granted to *A* *A* then applies under this section for restitution of the properties to him *A* is not entitled to restitution. The case is not one of *restitution* at all, for *A* was never in possession of the properties (z)

Who may apply for restitution — Any party entitled to any benefit by way of restitution or otherwise may apply under this section.

(1) *Where decree proceeds on a common ground* —The expression any party' is not confined to parties to the *appeal* in which the decree has been reversed or modified It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal provided the appeal is in effect and substance in favour *of such person (a)* *This would especially be the case where the decree appealed* from proceeds on a ground common to all the plaintiffs or to all the defendants (*b*) see O 41, r 4 *A* obtains a decree against *B* and *C* The decree proceeds on a ground common to both *B* and *C* *B* alone appeals from the decree The decree is reversed in appeal *C* is entitled to claim restitution under this section though he was not a party to the appeal

(2) *Transferee of a decree* —Further the expression ' any party' includes the transferee of a decree passed in appeal *A* obtains a decree against *B* for Rs 5 000 *B* appeals from the decree Pending the appeal *A* realizes from *B* Rs 5 000 in execution The decree is subsequently reversed in appeal. *B* assigns the decree passed in appeal (in his favour) to *C* *C* is entitled, as transferee of *B*s decree, to the benefit of that decree and he may apply under this section for an order directing *A* to pay to him what *B* would be entitled to, namely, Rs 5 000 and interest (*c*)

(3) *Auction Purchaser* —A sale in execution of a decree may be set aside in a proper case even against a purchaser who is a stranger to the decree either in execution proceedings or in a separate suit, *e g* where the sale certificate comprises property different from that which is attached (*d*), or when a decree is obtained on a mortgage executed by a Hindu father on behalf of himself and his minor son, and the decree and the sale of the mortgaged property in execution of the decree are set aside in a suit by the minor against the decree holder and the auction purchaser on the ground that the mortgage did not bind the minor (*e*) But the auction purchaser is entitled in such cases, before restoring possession to the judgment debtor, to be paid the purchase price by the successful judgment debtor less the mesne profits if the sale is set aside in execution proceedings under this section (*f*), and, if the sale is set aside by a decree in a separate suit, under O 47 or s 151 (*g*) It has been held by the High Court of Rangoon that an auction purchaser who is not a party to the original suit or to the appeal or to the execution proceedings is not entitled to apply under this section (*h*)

C
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(*b*) *Irat Malhavan v Vengnat Sivarapa* (1909) 18 Mad L J 39

(*c*) See *Jamini Nath v Dharma Das* (1906) 33 Cal 857 [a case under s 583 of the Code of 1882]

(*d*) *Jai Berham v Kedar Nath Marwari* (19[illegible]) 49 I A 351 2 Pat 10 69 I C 278 ([illegible]) A PC 269

(*e*) *Bindeshri Prasad v Badal Singh* (1923) 45 All 369 74 I C 873 (23) A A 394 [F B]

(*f*) (19[illegible]) 49 I A 351 2 Pat 10 69 I C 278 (22) A I C 269 *supra*

(*g*) (1923) 45 All 369 74 I C 873 (23) AA 394 *supra*

(*h*) *Ma Tok v Maung Mo* (1925) 3 Rang 251, 89 I C 603 (25) A R 215

Against whom restitution may be claimed :—

(1) *Transferee of decree reversed in appeal*.—In two Allahabad cases decided under the old section it was held that restitution could not be claimed by *application* under that section against the transferee of a decree reversed in appeal, though the transferee had obtained the full benefit of the decree by execution, unless he was joined as a party to the appeal (i) The point of the decision may be explained by an illustration *A* obtains a decree against *B*, and assigns the decree to *C* *C* applies for execution of the decree against *B*, and obtains payment of the decretal amount *B* appeals from the decree, and the decree is reversed in appeal It was held under the old section that *B* could not claim restitution against *C* by *summary process* under that section *unless* *C* was joined as a party to the appeal (j) Those decisions might perhaps be supported on the ground that where a party sought restitution under the old section, he had to proceed by an application to *execute* the decree passed on appeal, and that a decree cannot be executed against persons who are not parties to it The language of the present section is much wider, and it is submitted that the Court has power under this section to order *C* to make restitution to *B* on an application by the latter in that behalf, even if *C* was not joined as a party to the appeal. See also s 146 It is worth noting that according to the same High Court, *B* could not claim restitution against *C* even by way of *suit*, the reason given being that *B* could have no cause of action in such a case against *C* But this decision has been dissented from by the High Court of Madras (k)

(2) *Auction purchaser*.—Except in cases of the kind mentioned in case (3) under the heading "Who may apply for restitution," restitution cannot be obtained under this section against a *bona fide* purchaser for value at an auction sale held by a Court which had jurisdiction to sell the same (l) It is otherwise, however, where the decree holder himself is the purchaser (m) See notes to s 65, "Effect of reversal of decree upon sale," p 192 above

(3) *Surety*.—This section applies only to the parties or their representatives and does not apply to sureties Hence restitution cannot be claimed under this section against a surety (n)

Sub-section (2) : bar of suit.—This sub section is new It provides in express terms that where restitution could be obtained by *application* under this section, no separate suit shall be brought in respect of it. The decisions under the Code of 1882 were not uniform, it having been held in some cases that a separate suit for restitution was barred, and in others that it was not (o)

Under s 583 of the Code of 1882, proceedings for restitution had to be commenced [illegible] of the appell to decree Th s was required by the langu[illegible] decree should be [illegible] ee in suits" That gave rise to the question whether the rule contained in s 244 [now s. 47] which provided that all questions relating to execution should be determined by the Court executing the decree *and not by a separate suit* was one of the rules referred to in s 583 It was held in some cases that it was, and that a separate suit for restitution was therefore barred In other cases it was held that it was not, and that a separate suit could be maintained for restitution. The present section simplifies matters by omitting all refer

[illegible] Lalta Pras[illegible] (1898) 20 All [illegible]

(l) *Puran Lal* v *Hanif un Nissa* (1916) 38 All 240 34 I C 303

(m) *Shirbai* v *Jesoo* (1919) 43 Bom 235 48 I C 130 *Sagore* v *Mafizaddin* (1919) 24 Cal W N 50 51 I C 955

(n) *Raghubar Singh* v *Jai Indra Bahadur Singh* (1919) 46 I A 228 236, 42 All. 158 164 55 I C 540

(o) See *Sheodulal* v *Ehawani* (1907) 29 All 348 *Matram* v *Ramkumar* (1905) 35 Cal 275

14. ence to *execution* The position of the section has also been changed, it being transferred from the chapter headed "Of appeals from original decrees" to Part IX headed "Miscellaneous" A separate suit is *now barred* by the express terms of the section, and the application for restitution is no longer one for *execution* of the appellate decree The Court is empowered to make such order as it deems proper for restitution, and the order, if not obeyed, may be enforced as a decree (*p*) [see s 36]

It must be observed that the suit that is barred under this section is a suit to obtain restitution, compensation or other relief *which could be obtained by application under this section*, further the compensation to be awarded under this section must be "consequential" on the variation or reversal of a decree It follows that if the compensation claimed is *not consequential* on such variation or reversal, a separate suit for such compensation will not be barred under this section (*q*)

"Decree."—An order for rateable distribution made under s 73 is not a decree within the meaning of this section (*r*)

"Where a decree is varied or reversed."—The old section applied only where the decree of reversal was a decree *passed in first appeal*, or where, by virtue of s 587 [now s 108], it was one *passed in second appeal* It was held not to apply where restitution was claimed on the reversal of a decree in appeal to the Privy Council (*s*) or in review (*t*) This was because the words of that section were, "when a party entitled to any benefit by way of restitution or otherwise *under a decree passed in an appeal under this chapter*," that is, chapter 41 relating to appeals from original decrees

As regards the present section there is a difference of opinion According to one view, the section applies in all cases where a decree is varied or reversed, however the variation or reversal is effected, even though it be in a separate suit, and by whatever Court (*u*) According to another view, the section does not apply unless the decree is varied or reversed by a Court *superior* to the one that passed it This view is based on the ground that the words "Court of first instance" in this section are used to distinguish the Court which is to grant the restitution from some other Court which has varied or reversed the decree (*v*) The point of difference between these two views is brought out by the following—

Illustration

A obtains an ex parte decree against *B* in Court X In execution of the decree a house belonging to *B* is sold by Court X, and it is purchased by *A* Subsequently on *B*'s application the ex parte decree is set aside by Court X. *B* then applies to Court X for an order against *A* for restoring possession of the house to him According to the former view, Court X may direct restitution *under this section*, though the decree was both passed and set aside by that Court (*w*) According to the latter view, restitution cannot be ordered *under this section* (*x*), but the Court may grant restitution under s 151 (*y*) or under s 47 (*z*)

Does this section apply where the decree is neither varied nor reversed, but the sale alone is set aside as under O 21 r 92? It has been held that it does not, but that the

All 15? 14[illegible]
(*t*) *Collector of Meerut* v *Kalka Prasad* (1906) 28 All 665

43 I C 130
(*x*) (1916) 1 Pat L J 43, 45 34 I C 747, *supra*
(*y*) (1919) 43 Bom 235 239 49 I C 130, *supra*
(*z*) *Sivamirao* v *Valentine* (1920) 44 Bom 702, 57 I C 125

Court may in such a case grant restitution in the exercise of its inherent power under s 151 Thus where *A* obtained a decree against *B*, and in execution of the decree purchased certain property belonging to *B* and took possession of it, and the *sale* was subsequently set aside under O 21, r 92, and possession restored to *B*, it was held on an application by *B* for mesne profits that there being no "decree" that was set aside, this section did not apply, but that the Court may in the exercise of its inherent power direct *A* to pay mesne profits to *B* during the period *A* was in possession of the property (*a*)

See notes above, "Inherent power to grant restitution"

The Court of first instance.—In a suit for ejectment under the Agra Tenancy Act 2 of 1910 [local], the Court of first instance is the Revenue Court which heard the suit, and not the Court of Appeal (*b*)

Jurisdiction of Court under this section—Suppose the damages claimed in lieu of restitution exceed the pecuniary limits of the jurisdiction of the Court to which an application is made under this section Has the Court power to award those damages? It has been held by the High Court of Bombay that it has (*c*)

Is a proceeding under this section a proceeding in execution?—An application for execution under s 583 of the Code of 1882 was held to be one by way of execution (*cc*) There is a conflict of opinion whether a proceeding under this section is a proceeding in execution It has been held by the High Court of Madras (*d*) and Bombay (*e*), that it is, while it has been held by the High Courts of Allahabad (*f*) and Patna (*g*), that it is not This distinction is important in the following respects —

(1) If an application under this section is one by way of execution, it would be governed by art 182 of Sch I of the Legislation Act, and further, s 6 of that Act relating to the exclusion of the period of minority would apply to the application (*h*) If it is not, it would be governed by art 181 (*i*) [applications for which no period of limitation is prescribed]

(2) If an application under this section is one by way of execution, the provisions of s 141 would not apply to it [see notes to s 141] But they would, if it is not one by way of execution In the latter case, if the application is dismissed for default, it may be restored under O 9, r 9 (*j*)

(3) The difference between the two views also affects the Court fee on a memorandum of appeal from an order passed under this section (*k*) See notes below, "Court fee See also notes above, 'splitting of claim for restitution"

Limitation.—See notes above, 'Is a proceeding under this section a proceeding in execution"

Applicability of s. 141—See notes above, 'Is a proceeding under this section a proceeding in execution."

(*a*) *Jaglip* v *Holloway* (1917) 2 Pat L J [illegible]

[illegible]

(*g*) *Balmakund* v *Basanta Kumari* (1924) 3 Pat 371 78 I C 200 (25) A P 1 (F B) approving *Krupasindhu* v *Mahanta* (1918) 3 Pat L J 367, 57 I C 47

(*h*) *Kurgodigouda* v *Ningangouda* (1917) 41 Bom 625 41 I C 238 *Hamidalli* v *Ahmedalli* (1921) 45 Bom 1137 62 I C 233 *In Shirbai* v [illegible]

Appeal.—The determination of a question under this section is a decree and appealable as such (n): see s. 2, cl. (2), definition of "decree". But the question must be one directly covered by the section, and not one incidentally connected with or collateral to the decision of any such question. Thus a decision that an application under this section is time barred is a decision on a question collateral to the question of restitution and hence it is not a decree and not appealable as such (o).

Court-fee.—It has been held by the Allahabad High Court that an appeal from an order made on an application under this section requires to be stamped *ad valorem* under the Court Fees Act, 1870, sch. I, art. 1, as an appeal from a decree. This proceeds on the view taken by that Court that an application under this rule is not an application for execution (p).

Enforcement of liability of sureties.

145. [S. 253.] Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

The old section.—The corresponding s. 253 of the Code of 1882 ran as follows :—

"Whenever a person has before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant:

"Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

The new section —The present section differs from the old section in the following respects —

1 The old section applied only to surety bonds for the performance of a *decree* It did not apply to surety bonds for the fulfilment of a condition imposed upon a person under an order of the Court [see cl. (c) of the present section] It was also doubtful whether the old section applied to suretyships for the restitution of property taken in execution of a decree [see cl (b) of the present section] The present section applies not only to surety bonds for the performances of a decree, but also to surety bonds referred to above as also to bonds for the payment of money under an order of the Court See notes below

2 The present section applies to suretyships for the performance of *any decree* whether original or appellate [see cl (a)] As to the old section it was doubtful whether it applied to original decrees only or applied also to appellate decrees.

3 The word personally has been newly added in the present section

Object of the section —This section provides that where a person has become liable as surety for the performance of a decree or for any of the purposes specified in cls (b) and (c), the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety, to the extent to which he has rendered himself *personally* liable, in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him It is no longer necessary to institute a *regular suit* to enforce the security as it was in some cases under the old section The present section provides a summary remedy in *execution*, and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable

Security for the performance of "any" decree :—

1 *Ex parte decree* —*A* obtains an ex parte decree against *B* The decree is set aside under O 9, r 13 [Code of 1882 s. 108] on *C* standing surety for the performance of any decree that may be passed against *B* on a re hearing The suit is re heard and a decree is passed against *B* *A* may enforce the security by *executing* the decree against *C* (*q*) A separate *suit* is not necessary

2 *Appellate decree* —The summary procedure contemplated by this section applies to suretyships for the performance of *any* decree, whether it be an original or an appellate decree Under the old section there was a conflict of decisions as to whether the summary remedy provided by that section applied at all to suretyships for the performance of *appellate* decrees it being held by the High Court of Calcutta that it did not (*r*) and by the other High Courts that it did (*s*) The present section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of *appellate* decrees also The rules that provide for security for the performance of appellate decrees are rules 5 and 6 of Order 41, corresponding to ss. 545 and 546 of the Code of 1882 An illustration will make the point clear *A* obtains a decree against *B* and applies for execution. *B* appeals from the decree and applies for stay of execution under O 41 r 5 Execution is stayed on *C* standing surety for the due performance of any decree that may be passed against *B in appeal.* A decree is eventually passed by the

(*q*) *Sonatun* v *Dino Nath* (1899) 26 Cal 222.
(*r*) *Tokhan* v *Udwant* (1895) 22 Cal 25 *Subjoo Das* v *Balmakund* (1896) 23 Cal 212 (s 546)
(*s*) *Venkapa* v *Basil ngapa* (1888) 12 Bom 411, *Jamsetji* v *Bawabhai* (1901) 25 Bom. 409 *Janki* v *Sarup* (1895) 17 All. 99 *Thirumalai* v *Ramayyar* (1890) 13 Mad 1 But see *Lakshman* v *Gopal* (1906) 30 Bom. 506

145. appellate Court against *B* *A* may enforce the security against *C* by executing the appellate decree against him as if *C* was a party to the decree According to the Calcutta decisions under the old section, *A*'s only remedy was by way of *suit* against *C*

Security for restitution of property taken in execution of a decree — *A* obtains a decree against *B* for possession of certain lands *B* appeals from the decree Pending the appeal *A* applies for execution of the decree The Court allows execution on *C* standing surety for the restitution of the lands to *B* in the event of the decree being reversed in *appeal*, or for payment to *B* of the value of the property [O 41, r 6 Code of 1882 s 546] The decree is eventually reversed in appeal *B* may enforce the security by *executing* the *appellate* decree against *C* According to the Calcutta decisions under the old section *B* could only enforce the security by a separate suit (*t*)

Security for the payment of money —The following are some of the sections and rules providing for security for the payment of money —

S 55, sub s (4) [security on behalf of a judgment debtor who is arrested in execution of a decree and who expresses his intention to apply to be declared an insolvent]

O 25 r 1 [security for costs]
O 38, r 2 [security in cases of arrest before judgment]
O 38, r 5 [security in cases of attachment before judgment]
O 41 r 10 [security for costs of respondent in first appeal]
O 45 r 7 [security for costs of respondent in appeal to the King in Council]

Security for fulfilment of any condition imposed on any person — The summary remedy provided by the old section applied only where the security given was for the performance of a *decree* and for no other purpose Thus where a defendant produced certain promissory notes in Court, and the plaintiff objected to their return to the defendant, but they were returned to him on *C* standing surety *for their production* when required, it was held that the plaintiff could not on non production of the notes, proceed against *C* by *execution*, the reason given being that the security was not given for the performance of a *decree*, and that his remedy was by way of *suit* only against *C* (*u*) Under the present section the security may be enforced by execution against *C*

Though the langauge of this section is considerably wider than that of the old section, the section applies only when the Court passes an order or decree which is intended to be an order or decree enforceable through execution by a party to a suit or other proceeding against another party thereto A bond, therefore, passed by a surety under O 32 r 6 (2) cannot be enforced by summary process under this section, it can only be enforced by a suit (*v*) See notes to O 21 r 43, Security bond for producing attached property

A is committed to jail in execution of a decree obtained against him by *B* *A* applies to be released from jail to enable him to make an application in insolvency with a view to his protection from arrest *A* is released from jail under s 55 (4) on *C* standing surety for the production of *A* on a particular day The insolvency application fails and it thereupon becomes incumbent upon *C* to produce *A* before the Court If *C* fails to do so, *B* and not the Government is entitled to the security money (*w*) The money is to be appropriated towards satisfaction of the decree it is not to be given to the decree holder as a solatium or further benefit over and above the decretal amount (*x*)

(*t*) *Subjoo* v *Balmakund* (1896) 24 Cal 12
(*u*) *Narayanamma* v *Ramayya* (1899) 22 Mad 263

... 614 ... abale ... Da ... I L ... 5 Cal

"To the extent to which he has rendered himself personally liable."—A surety (1) may render himself personally liable, or he (2) may only give a charge upon his property, or he (3) may undertake a personal liability and charge his property as further security

The provisions of this section apply to the first case, the *personal* security given by the surety security may be enforced by attachment and sale of his property

This section does not apply to the second case In *Raghubar Singh* v *Jai Indra Bahadur Singh* (y), their Lordships of the Privy Council said In the course of the judgments in India s 145 was referred to but whatever might have been its effect if the sureties had been *personally* liable, it has no application now that their Lordships have construed the instrument as giving *only a charge upon property* In that case the plaintiff obtained a decree for possession against the defendant The defendant appealed from the decree The plaintiff was on his application let into possession in execution of the decree upon furnishing security The security was furnished by *S* who entered into a bond whereby he hypothecated his property The bond was passed to the Court *no obligee was named in the bond* It was contended on behalf of the surety that the bond could only be enforced by a suit under O 34, r 14 (Transfer of Property Act s 90), but this contention was overruled, and it was held that the proper order to make was that the property charged be sold unless before a day named the surety found the money This was the procedure adopted by the Allahabad High Court in an earlier case, being the case of *Janki Kuar* v *Sarup Rani* (z) and it was approved by their Lordships The same principle has been applied to security bonds passed in similar terms by the judgment debtor himself (a)

feree and the surety to enforce the security (c)

Notice to surety—The notice required to be given to a surety under this section is a condition precedent to the validity of an order for execution against him An attachment issued without such notice is illegal (d) When a decree is sent by the Court which passed the decree to another Court for execution the notice required by this section may be given by the latter Court (e) For form of notice see App H, form No 13

This section does not bar a regular suit against a surety—As to the old section it was held that it gave an additional not an exclusive remedy against a surety, and that it *did not prevent* the decree holder from bringing a *regular suit* on the surety bond to enforce the security (f) Nor does the present section bar a regular suit (g) It simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the extent to which the surety has rendered himself *personally* liable, and no more If the party for whose benefit security has been given proceeds against the surety in execution the surety is to be *deemed for the purposes of appeal* a party within the meaning of s 47 That is to say, if an order is made in execution enforcing a claim against the surety, the surety may

[illegible] 42 All 1[illegible]8 166 5 [illegible]

(b) *Mukta Prasad* v *Mahadeo* (1916) 38 All 3[illegible] 33 I C 9[illegible] *Ganga Deo* v *Jote Lal* (1917) 2 [illegible] 39 I C 648

(c) *Amir* v *Mahadeo* (1917) 39 All [illegible] 38 I C 3[illegible]

(d) *Tanlin* v *[illegible]* (1924) 2 Rang [illegible] 81 I C 993 ([illegible]) A R 13.

(e) *Lakhmishankar* v *Raghumal* (190[illegible]) 29 Bom 29

(f) *Abdul Kadir* v *Huree* (18[illegible]4) 6 All. H C. 261

(g) *Maul* [illegible] v *Thakore* (1911) 36 Bom 4[illegible], 1[illegible] I C [illegible] Contrast s 144 sub-s (2)

appeal from the order as if he was a party to the suit in which the decree or order sought to be executed was passed (*h*) In this respect the section gives effect to certain rulings under the old section (*i*) But the reference to s 47 does not import into this section the provision therein contained which bars a separate suit

A surety under this section is a party to the suit within the limited purpose mentioned in this section Hence if he seeks to set aside the bond on the ground of fraud or or undue influence, he cannot proceed by an application under this section, but must bring a regular suit (*j*)

Appeal.—An order under this section is appealable as a decree (*k*) See the penultimate paragraph of the section

Limitation—Where an appeal has been preferred from a decree for the performance whereof a person has become liable as a surety, the period of limitation for an application under this section is 3 years from the date of the appellate decree as provided by art 182, cl (2), Schedule I of the Limitation Act, and not 3 years from the date of the original decree (*l*)

Proceedings by or against representatives

146 [*New*] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceeding by or against representatives—The proceeding contemplated by the section includes an appeal The expression "claiming under" is wide enough to cover cases of devolution etc, mentioned in O 22, r 10 *A* sues *B* to establish his right to certain property Pending the suit *B* mortgages the property to *C* The suit is decided in *A*s favour *B* does not appeal from the decree *C*, as a person claiming under *B*, may appeal from the decree (*m*)

See notes to O 9, r 13, under the head "Application by legal representative of deceased defendant" Other cases to which the section applies have been considered in their proper place

Consent or agreement by persons under disability

147. [*New*. R. S. C., O. 16, r. 21.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

Rules of the Supreme Court, O. 16, r. 21.—This section is new. It is taken from O 16, r 21, of the rules of the Supreme Court with some alterations.

(*k*) See *Adhar* v *Pulin* (1914) 19 C W N 1085, 30 I C 694

(*l*) *Cholappa* v *Ramchandra* (1920) 44 Bom 34, 53 I C 187

(*m*) *Sitaramaswami* v *Lakshmi* (1918) 41 Mad 510, 48 I C 840

"Any person under disability."—The section applies to consent given on behalf of persons under disability, such as minors and lunatics See O 32 below

"As to any proceeding"—These words do not refer to the *conduct* of a suit or appeal. A next friend or guardian *ad litem* has undoubtedly the conduct of a suit or appeal in his hands But if he does anything in the action beyond the mere conduct of it, *e g*, consents not to appeal, the person under disability is not bound by it unless it is done with the express leave of the Court (*n*)

"Express leave.—The leave must be *express* In this respect the present section differs from the English rule

148 [*New* R. S C, O. 64, r 7] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

Enlargement of time

'Act prescribed or allowed by this Code'—The present section empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. It is legislative recognition of the rule laid down in the Bombay case of *Bhagvan Das* v *Haji Abu Ahmed* (*o*), and the cases on which the same was based (*p*) In the Bombay case it was held that it was competent to the Court to extend the time fixed under s 54 of the Code of 1882 (now O 7, r 11) even after the expiry of the time originally granted It must, however be noted that the section applies only where time is fixed for the doing of an act *prescribed or allowed by this Code* "Code" includes rules, and prescribed means prescribed by the rules [see s 2, cls (1) and (16)] See, for instance, the following rules —

1 O 6, r 18 (amendment of pleadings)
2 O 7 r 11 (b) (requiring plaintiff to correct valuation of suit)
3 O 7 r 11 (requiring plaintiff to supply requisite stamp paper where the plaint is written upon paper insufficiently stamped)
4 O 8 r 9 (requiring written statement or additional written statement from a party)
5 O 21 r 17 (amendment of application for execution)
6 O 25, r 2 (security for costs of suit)
7 O 41 r 10 (security for costs of appeal)

Act directed or allowed by a decree of Court—This section does not apply where time is allowed for doing an act by a decree of Court (*q*) It was accordingly held by the Allahabad High Court in *Saranjan* v *Ram Bahal* (*r*), that a Court has no power under this section to extend the time fixed by its decree under O 20 r 14 for payment of purchase money in a suit for pre emption The Allahabad decision has been approved by the Madras High Court (*s*) The High Court of Patna has, however, held that the Court has power under this section to extend the time fixed by a decree passed under O 20 r 14 (*t*) The attention of the Patna Court was not drawn to the

(*n*) *Rhodes* v *Swithenbank* (1889) 22 Q B D 5[illegible]

[illegible] v *Hayat* (1912) Punj Rec no [illegible] p 343 15 I C 941

(*r*) (1913) 35 All 58[illegible] 21 I C 5[illegible]

(*s*) (1916) 39 Mad 8[illegible]6 31 I C 240 *supra*

(*t*) *Abu Muhammad* v *Mulut Pertap* (1916) 1 Pat L J 92, 34 I C 65.

Allahabad decision. In a later case, however, the Allahabad High Court held that where an ex parte decree is set aside on condition that the defendant should pay a certain sum of money to the plaintiff within a certain time, and such payment is not made, the Court has power under this section to enlarge the time for payment As to *Saranjan's* case the Court observed that it related to a decree in a suit for pre emption (*u*). In a recent case, however, where a decree was passed in favour of the plaintiff conditional upon her paying an extra court fee of Rs 20 within a week, but the amount was not paid within that period, the High Court of Allahabad held that the Court had no power under this section to extend the time, but that the plaintiff might proceed by an application for a review under s 114 read with O 47, r 1 The Court said : " There is no distinction between a pre emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with ' (*v*) However that may be, it is beyond all doubt that the section does not give any Court power to interfere with or modify its decree after there has been an appeal filed from the decree (*w*) See notes below, " Court to which, etc "

An application for extension of time fixed by the decree in a *redemption suit* for payment of the mortgage debts does not fall under this section, but under O 34, r 8 (*x*).

Period of limitation —This section does not empower a Court to extend the period prescribed by the law of limitation (*y*)

Consent order —Where the time for doing an act has been fixed by a consent order, is cannot be enlarged except by consent (*z*)

Court to which application should be made for extension of time —Where a decree is passed against a defendant requiring him to execute a *Kabuliat* in favour of the plaintiff within two months, and an appeal is preferred from the decree, the only Court that has power to extend the time, assuming the case is one under this section, is the Appellate Court, and not the Court which passed the decree (*a*)

Appeal —No appeal lies from an order under this section. The order is not a decree, nor is it one of the appealable orders mentioned in s 104 (*b*)

Power to make up deficiency of court fees

149. [*New.*] Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee ; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Scope of the section —This section is new It is an enabling section It empowers the Court to allow a party to make up the deficiency of court fees payable on

(*u*) *Jagarnath* v *Kamla Prasad* (1914) 36 All 77, 23 I C 138

(*v*) *Sajjadi* v *Dilawar* (1918) 40 All 579 47 I C 4

(*w*) *Parmanand* v *Kripasindhu* (1910) 37 Cal 548 6 I C 275

(*x*) *Het Singh* v *Tika Ram* (1912) 34 All 388, 14 I C 240

(*y*) *Dukhno* v *Munshi Sahu* (1919) 4 Pat L J

plaints, memoranda of appeal, applications for review of judgment, etc, even after the expiration of the period of limitation prescribed for the filing of these documents The section enables a defective document to be *retrospectively* validated if the insufficiency of the stamp is subsequently made up with the leave of the Court It must, however, be noted that the power to make up the deficiency of court fees is *subject to the discretion of the Court and is not claimable as of right by a party* (c) See notes below "Appeals and applications for review of judgment"

Plaints—As to the case where a plaint is written upon paper insufficiently stamped see notes to O 7, r 11, under the head Clause (c)

Appeals and applications for review of judgment—As to these it was provided by s 582A of the Code of 1882 as follows —

"If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped, and the insufficiency of the stamp was caused *by mistake on the part of the appellant or applicant as to the amount of the requisite stamp*, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the Court"

The above section was introduced into the Code of 1882 by Act 4 of 1892 to supersede a Full Bench ruling of the Allahabad High Court That ruling was to the effect that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the Court, and such order can only be made where the defective memorandum has been received through a *mistake on the part of the Court or its officers*, and not where the insufficiency of the stamp was caused by a *mistake on the part of the appellant* (d).

S 582A applied only to appeals and applications for a review S 582A has been omitted in this Code, and the present section has been enacted which is quite general in its terms It applies to *all* documents chargeable with court fees under the Court fees Act, such as plaints memoranda of appeal or of cross objections, applications for review of judgment, and written statements pleading a set off, or counter claim At the same time the words, and the insufficiency of the stamp was caused by mistake on the part of the appellant or applicant as to the amount of the requisite stamp," which occurred in s 582A, have been omitted in the present section There is therefore no reason to restrict the concession provided for by this section to cases where there is a *bona fide* misunderstanding of the law as to valuation as it was under s 582A It has accordingly been held by the High Court of Bombay that the fact that an appellant has no funds with which to pay the requisite stamp is a good ground for admitting the memorandum of appeal, though presented on the last day of limitation, and for extending the time under this section to pay the requisite stamp (e) According to the Patna High Court, the Court should not give time to make good the deficiency if a litigant has deliberately and to suit his own convenience paid an insufficient court fee Time, according to that Court, may be given when the amount of the court fee payable is open to

(c) See *Valli v Mahmud* (1914) 16 Bom L R 763 766 26 I C 746
(d) *Balkaran Rai v Gobind Nath* (1890) 12 All 129
(e) *Achut v Nagappa* (1914) 38 Bom 41, 21 I C 337

Ss 150.

doubt, or the amount of the court fee cannot be ascertained by the Court till the record is received, or it appears that he has made an honest attempt to comply with the law (*f*) The Lahore High Court has taken a similar view (*g*)

The present section, as stated above, applies to all documents chargeable with court fees, such as plaints, memoranda of appeal, applications for review, etc As regards plaints, it is well settled that in the case of a plaint insufficiently stamped the Court is *bound* under O 7, r 11 (*c*) [s 54 of the Code of 1882] to give time to the plaintiff to make good the deficiency, even if the plaintiff has deliberately and without any excuse paid an insufficient court fee, provided the plaint is presented within the period of limitation As regards appeals, however there is a difference of opinion The High Court of Bombay (*h*) has held that a memorandum of appeal stands on the same footing as a plaint and that just as in the case of a plaint insufficiently stamped the Court is bound to give time to the plaintiff to make good the deficiency, so in the case of a memorandum of appeal insufficiently stamped the Court is *bound* to give time to the appellant to make good the deficiency, the reason given being that O 7, r 11, cl (c), is made applicable to appeals by s 107 (2) [s 582 of the Code of 1882] As to the present section, the Court said in effect that it should be read subject to the provisions, in the case of plaints, of O 7, r 11 (c), and in the case of appeals, of O 7, r 11 (c) coupled with s 107 (2) On the other hand, it has been held by the High Court of Patna (*i*), that the Court is *not bound* in the case of a memorandum of appeal insufficiently stamped to give the appellant time to make good the deficiency, that it *may* allow time if the amount of the court fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, but that it should not allow time if the appellant has deliberately and to suit his own convenience paid on his appeal insufficient court fee According to that Court, the present section should not be construed in such a way as to nullify the express provisions of s 4 or s 6 of the Court Fees Act 7 of 1870 (*j*) A similar view has been taken by the Lahore High Court (*k*) The view taken by the High Court of Bombay has also been dissented from by the Madras High Court (*l*)

Revision —It has been held by the High Court of Allahabad that an order refusing to give time to a party to make up the deficiency in court fee is not capable of revision as such an order does not amount to a decision of a "*case*" within the meaning of s 115 of the Code (*m*)

150 [*New.*] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Transfer of business

(*f*) *Ramsahay* v *Kumar Lachmi* (1918) 3 Pat L J 74 42 I C 675 *Amir* v *Mohan* (1924) 3 Pat 337 80 I C 1080

[illegible] 49 I C 188 [mistake of pleader]

(*h*) *Achut* v *Nagappa* (1914) 38 Bom 41 21 I C 337

(*i*) *Ramsahay* v *Kumar Lachmi* (1918) 3 Pat L J 74 42 I C 675

(*j*) S 4 of the Court Fees Act forbids a High Court to receive a memorandum of appeal unless the proper court fee is paid S 6 contains a similar provision with regard to other Courts

(*k*) See cases cited in f n (*g*)

(*l*) *Narayana* v *Venkatakrishna* (1914) 27 Mad L J 677 26 I C 33

(*m*) *Chhakkan Lal* v *Kanhaiya Lal* (1923) 45 All 319 69 I C 921 ('23) A.A 119

Ss 150, 151

Save as otherwise provided —O (r 13 provides that where an ex parte decree is passed against a defendant he may apply *to the Court by which the decree was passed* for an order to set it aside. Suppose now that an ex parte decree is passed by Court I for possession of certain immoveable properties and subsequently part of its territorial jurisdiction including the locality in which the properties are situated is transferred to Court X. Has Court X power under this section to entertain an application to set aside the decree under O 9 r 13? It has been held by the High Court of Madras that it has. O 9 r 13 does not say that the Court that passed the decree is the only Court that can set it aside (n)

Transferred ?—It has been held by the High Court of Madras that the word transferred in this section is not confined to cases of transfer of business of one Court to another but includes cases where a new Court is given part of the territorial jurisdiction of an old Court and is authorized to try all the business arising within it (o) The High Court of Calcutta has held differently (p)

See notes to s 37 above. See also the under mentioned cases (q)

151 [*New*] Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

Saving of inherent powers of Court

Inherent powers of Court —The Code of Civil Procedure is not exhaustive (r) The Courts have therefore in many cases where the circumstances require it acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration of which alone it exists (s) The law cannot make express provision against all inconvenience so it is that there is no possibility of express all the cases that may possibly happen and it is therefore the duty of a Judge to apply the ... only to ... that appears to be regulated by the express provisions ... all the ... may be made and ... appear ... the express ... of the law ... the consequence ... that ... be gathered from it (t) At the same time it is to be remembered that a Court has no inherent power ... under this section to ... that which is prohibited by the Code ... The ... Court has ... the judgment ... to alter or alter it as it ... would be in direct contravention of the provisions of O 20 r 3 ( ) Further this section does not ... the Court with jurisdiction over matters which are excluded from its cognizance Thus a Court cannot under this section entertain a suit relating purely to caste question ... such a suit not being one of a civil nature ( ) see s 9 above Nor can the Court ignore the provisions of the ... of limitation by appealing to this section (c) Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in

w To a R m v Panna Lal (19 4) 46 A

Ss 149, 150. doubt, or the amount of the court fee cannot be ascertained by the Court till the record is received, or it appears that he has made an honest attempt to comply with the law (*f*) The Lahore High Court has taken a similar view (*g*)

The present section, as stated above, applies to all documents chargeable with court fees, such as plaints, memoranda of appeal, applications for review, etc As regards plaints it is well settled that in the case of a plaint insufficiently stamped the Court is *bound* under O 7, r 11 (*c*) [s 54 of the Code of 1882] to give time to the plaintiff to make good the deficiency, even if the plaintiff has deliberately and without any excuse paid an insufficient court fee, provided the plaint is presented within the period of limitation As regards appeals, however there is a difference of opinion The High Court of Bombay (*h*) has held that a memorandum of appeal stands on the same footing as a plaint and that just as in the case of a plaint insufficiently stamped the Court is bound to give time to the plaintiff to make good the deficiency, so in the case of a memorandum of appeal insufficiently stamped the Court is *bound* to give time to the appellant to make good the deficiency, the reason given being that O 7, r 11, cl (c) is made applicable to appeals by s 107 (2) [s 582 of the Code of 1882] As to the present section, the Court said in effect that it should be read subject to the provisions, in the case of plaints, of O 7 r 11 (c) and in the case of appeals, of O 7, r 11 (c) coupled with s 107 (2) On the other hand it has been held by the High Court of Patna (*i*), that the Court is *not bound* in the case of a memorandum of appeal insufficiently stamped to give the appellant time to make good the deficiency, that it *may* allow time if the amount of the court fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received or it appears that the appellant has made an honest attempt to comply with the law, but that it should not allow time if the appellant has deliberately and to suit his own convenience paid on his appeal insufficient court fee According to that Court the present section should not be construed in such a way as to nullify the express provisions of s 4 or s 6 of the Court Fees Act 7 of 1870 (*j*) A similar view has been taken by the Lahore High Court (*k*) The view taken by the High Court of Bombay has also been dissented from by the Madras High Court (*l*)

Revision —It has been held by the High Court of Allahabad that an order refusing to give time to a party to make up the deficiency in court fee is not capable of revision as such an order does not amount to a decision of a ' *case* ' within the meaning of s 115 of the Code (*m*)

Transfer of business

150 [*New*] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

(*i*) *Ramsahay* v *Kumar Lachmi* (1918) 3 Pat L J 74 42 I C 6 [illegible]

[illegible] Courts

(*k*) See cases cited in f n (*g*)

(*l*) *Narayana* v *Venkatakrishna* (1914) 27 Mad L J 6[illegible] 26 I C 33

(*m*) *Chhallan Lal* v *Kanhaya Lal* (1923) 45 All [illegible]19 63 I C 9[illegible] (23) A.A 11[illegible]

(k) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay (f).

(l) to apply the principles of *res judicata* to cases not falling within section 11 of the Code (f) see notes to s 11 "Section not exhaustive" on p 30 above and "Orders in execution proceedings" on p 68 above

(m) to add a party (g)

(n) to punish summarily by imprisonment contempts of Court by the publication of a libel out of Court when the Court is not sitting (h)

(o) to decide questions of jurisdiction though as a result of its inquiry it may turn out that the Court has no jurisdiction over the suit (i)

(p) to stay proceedings pursuant to its own order in view of an intended appeal (j)

(q) to direct a party that has applied for leave to appeal to the King in Council to pay costs on the dismissal of his application (k)

(r) to take cognizance of questions which cut at the root of the subject matter of controversy between the parties e g whether a deed of mortgage is attested as required by s 59 of the Transfer of Property Act (l),

(s) to amend decrees and orders in cases not covered by s 152 (m), see notes to s 152 "Inherent power to amend decrees and orders"

(t) to set aside an order obtained by fraud practised upon the Court e g, when a pleader not engaged by the defendant at all consents to a decree on behalf of the defendant (n),

(u) to restore a suit dismissed for default in cases not provided for by O 9 r 9, see notes to O 9 r 9 "Inherent power of Court to restore suits on other grounds"

(v) to cause restitution to be made on reversal of decree see notes to s 144 "Inherent power to grant restitution",

(w) to restrain by injunction a person from proceeding with a suit in another Court see notes to O 39 r 1 "Powers of Chartered High Courts to restrain a party from proceedings with a suit pending in another Court"

(x) to rehear a matter before the order passed by the Court at a previous hearing is drawn up and sealed (o)

(y) to order a stay of execution in view of an application by a judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (p)

(z) to set aside an order of dismissal made under O 9 r 8 for non appearance of the plaintiff when the non appearance was owing to the plaintiff's death and the fact of the plaintiff's death was not brought to the notice of the Court dismissing the suit (q)

(aa) to vacate an order obtained by fraud as where an order is made recording the adjustment of a decree [O 21 r 2] and the adjustment has been brought about by fraud practised by one party upon another (r)

(f) 33 C L J 97 93 40 Cal 951 959 960 18 I C 97 supra

( ) Hu ree Persad v Koonjo Behary (186) Mar sh all 99

(j) Luchmi Nara n in the goods of (1901) 5 C W N 781

(k) Jog nd a Chand a v Wazul nnis a Khat n (1907) 34 Cal 860

(p) Nanda Kishore v Ram Golam (1912) 40 Cal 9 18 I C 207

(q) Debi Bakhsh v Habib Shah (1913) 35 All 331 40 I A 151 19 I C 526

(r) Par njpe v Kanade (188) 6 Bom 148 Tul ka hala v Fajal I (1914) 27 Mad L J 172 25 I C 213

S. 151.

(*bb*) to direct an auction purchaser in a case where he has paid the purchase money and subsequently withdrawn it from the Court on the sale to him being set aside under O 21, r 91, to pay back the money into Court on the sale being confirmed in appeal (*s*),

(*cc*) [illegible]

(*dd*) to interfere where its decree is being executed in a manner manifestly at variance with the purport and intent of that decree (*t*),

(*ee*) to stay execution of a decree obtained by *A* against *B* pending not only the decision of a *suit* by *B* against *A*, but the decision of an *appeal* by *B* against *A* from a decree passed against *B* in *B*'s suit (*u*). See O 21, r 29

(*ff*) to stay a suit brought by *A* against *B* in Court *X*, in a case where substantially the whole cause of action arose at another place, and the material witnesses and their books of account are at that place, if no injustice will be done thereby to the plaintiff and the defendant would be subjected to such injustice in defending the suit as would amount to vexation and opression to which he would not be subjected if the suit were brought in another and accessible Court where substantially the whole cause of action arose (*x*)

(*gg*) When a Court loses its records *e g* by accident, it has inherent power to reconstruct them (*y*)

(*hh*) To stay criminal proceedings started under s 476 of the Criminal Procedure Code against a defendant in a suit pending an appeal filed by the defendant from the decree (*z*)

(*ii*) To [illegible]

Prevent abuse of process of Court —A Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (*a*) See notes to O 16, r 1, "Whether witness summons may be refused" See also the undermentioned case (*b*)

Where the Court is bound to grant an application and has no discretion to refuse it, it has no power to dismiss it on "so treacherous a ground of decision as an 'abuse of the process of the Court'" (*c*)

Appeal —No appeal lies from an order made under this section (*d*) But though no appeal lies, the High Court has power under s 107 of the Government of India Act, 1915 to correct subordinate Courts if they have wrongly exercised their inherent powers (*e*)

Limitation —It has been held by the High Court of Patna that an application for restitution either under s 144 or s 151 is governed by the Limitation Act, Sch I, Art 181 (*f*) See notes to s 144, 'Limitation,' on p 345 above

(*s*) *Sukhdeo Dass* v *Rita Singh* (1917) 2 Pat L J 361 39 I C 63

(*t*) *Bhagwan* v *Laram Sukh Das* (1917) 39 All. 8 36 I C 366

(*u*) *Arumuga* v *Perianany appa* (1924) 46 Mad. L J 348 78 I C 76 (1924) A M 489

(*x*) *Kiladi Prasad* v *Sadhu Charan* (1918) 3 P [illegible]

(*zz*) *East Indian Railway Co* v *Jit Mal* (1925) 47 All 538 86 I C 862 (1925) A A 280

(*a*) *Hindustan Assurance Ltd* v *Lal Mulraj* (1914) 2 Mad L J 645, 6 2 27 I C 455

(*b*) *Shah Velchand* v *Lieut Liston* (1914) 38 Bom 638 25 I C 371

(*c*) *Chhatrapat Singh* v *Kharag Singh* (1917) [illegible]

[illegible] 88 I C 526 (1925) A L 393

152. [*New.* R. S. C., O. 28, r. 11. *Cf.* S. 206.] Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Amendments of judgments decrees or orders

S.

Amendment of decrees and orders.—This section has been taken from O 28, r 11, of the Rules of the Supreme Court

There are two and only two cases in which the Court can amend or vary a decree or order after it is drawn up and signed, namely —

(i) under its inherent powers, when the decree or order does not correctly state what the Court actually decided and intended, and

(ii) under this section, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission.

If a decree or order is sought to be amended, or varied in any other case, it can only be done by a review of judgment under O 47, r 1, or by an appeal under s. 96 (*g*) It is doubtful whether a decree or order can be varied even by consent of parties after it is *drawn up and signed* (*h*), see O 20, r 3

Inherent power to amend decrees and orders—Every Court has an inherent power to vary or amend its own decree or order *so as to carry out its own meaning* In so doing it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up (*i*) It only insists that the decree drawn up in the office of the Court should correctly express the judgment given by the Court (*j*) "It would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister (*k*) "I cannot doubt,' said Lord Penzance in *Laurie* v *Lees* (*l*) ' that under the original powers of the Court independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the office of the Court—*to vary them in such a way as to carry out its own meaning* and where, language has been used which is doubtful to make it plain I think *that power is inherent in every Court*" In *Hatton* v *Harris* (*m*), Lord Watson said 'When an error of that kind has been committed, it is always within the competency of the Court if nothing has intervened which would render it inexpedient or inequitable to do so *to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce* '

It will be seen from the above that the Court has no power to vary or amend its decree where it is in conformity with the judgment (*n*), not even if the judgment is erroneous in law (*o*) though the error be apparent on the face of the judgment (*p*)

A decree has been defined in s 2 as the *formal expression of an* adjudication which completely determines the rights of the parties with regard to the matter in contro

(*o*) *Lakho* v *Salamat* (1908) 20 All 337
(*p*) *Charles Bright & Co Ltd* v *Sellar* [1904] 1 K B 6

152. versy in a suit O 20, r 6, provides that a decree *shall be* in conformity with the judgment Where a decree is at variance with the judgment, the Court has power to set right the decree and to bring it into conformity with the judgment (q)

Illustrations

(1) *A* sues *B* for Rs. 5,000 and interest The judgment is for Rs 4 000 with out more The decree is drawn up *in accordance with* the judgment *A* then applies to amend the decree by adding an order for payment of *interest* The application must be refused for the decree is not at variance with the judgment If *A* is aggrieved by the decree, the proper course for him is to apply for a review of judgment or to appeal from the decree *Hasan* v *Sheo Prasad* (1893) 15 All. 121, *Abdul* v *Chunia* (1886) 8 All 377

(2) *A* and *B* enter into an agreement for partition of certain properties. *B* fails to convey to *A* the properties come to *A* s share *A* sues *B* for specific performance of the agreement and a decree is passed declaring only that "*A* is entitled to specific performance of the agreement The usual form is to declare that "the agreement ought to be specifically performed and the Court doth order and decree that the same be specifically performed [*i e*, *both by A and B*] ' The decree may be amended so as to put it in the usual form *Karim Mahomed* v *Rajooma* (1888) 12 Bom 174 [In the above case the amendment was necessary, for the decree as drawn up did not contain any direction to *A* to convey to *B* the properties come to *B* s share, but declared only that *A* was entitled to specific performance]

(3) *A* sues *B* and *C* for Rs. 5 000 The judgment awards Rs 5 000 to *A* as prayed (*i e*, as against *B* and *C*) The decree is drawn up so as to render the amount payable by *B* alone The decree may be amended and brought into conformity with the judgment *Chathappan* v *Pydel* (1892) 15 Mad 403, *Pherozsha* v *Sun Mills, Ltd* (1898) 22 Bombay 370

"Accidental omission"—This section enables the Court to correct errors aris ing from an accidental omission Thus where directions as to costs were *inadvertently* omitted the decree was set right by adding the directions (r) Similarly, where the date from which payments ordered to be made were to run was *inadvertently* omitted, the decree was perfected by adding the date (s)

"Accidental slip."—A *bona fide* error as to the amount of interest due to the defendant may be corrected under this section (t) And so also an error as to the period for which an injunction is to continue (u)

"May"—In a recent case the High Court of Calcutta said "The word 'may' in the section does not make it discretionary with the Court to order the amendment, but merely enlarges the power of the Court by providing that such correction may be made *at any time* or in other words, the section simply emphasizes that no lapse of time would disentitle the Court to make the correction" (v) The correct view, it is sub mitted is the one taken by the High Court of Allahabad namely, that under this section

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[illegible]

(r) *Re Rudd* W N (188) 251 *Re Roper* (1890) 45 C D 126 *Chessum and Sons* v *Gordon* [1901] 1 K B 694

(s) *F* v *F* (1903) P 89

(t) *Barker* v *Purvis* (1886) 56 L. T 131

(u) *Shipwright* v *Clements* (1890) 38 W R (Eng) 746

(v) *Chandra Kumar* v *Sidhantu* (1921) 23 Cal W N 873 875 80 I C 55 (24) A C 895.

"there is *no right* in any party to have a clerical or arithmetical mistake corrected The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case" (*u*)

"At any time"—A decree may be amended under this section *at any time* although the time for appealing from the decree has expired (*x*) There is no limitation for an application to amend the decree (*y*) Under the corresponding English rule, an error in a decree was in one case amended after 30 years (*z*), and in another case after 19 years (*a*) In a Bombay case, an application was made to the High Court to rectify a decree in the exercise of its inherent powers 10 years after the date of the decree, and the application was allowed (*b*) But no amendment should be allowed by the Court either under this section or in the exercise of its inherent powers if it is inexpedient or inequitable to do so, as where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous (*c*) Further, laches may in the particular circumstances of a case disentitle a party to relief under this section (*d*)

Effect of Amendment—An amendment under this section does not revive the decree nor furnish a fresh starting point of limitation for executing the decree (*e*).

What Court may amend—The Court to amend a decree is the Court that passed it Where an appeal is preferred from a decree of a Court of first instance the appellate Court may—

(1) dismiss the appeal under O 41, r 11, sub-r (1) [Code of 1882, s 551] without issuing any notice to the respondent, or it may

(2) confirm, reverse or vary the decree of the Court of first instance [O 41, r 32, Code of 1882, s 577]

In case (1), it has been held by the High Courts of Calcutta, Madras and Allahabad, that it is the appellate Court alone that can amend the decree (*f*) On the other hand, it has been held by the Bombay High Court that it is the Court of the first instance, and not the appellate Court, that can amend the decree, the reason given being that a dismissal under O 41, r 11, leaves the decree of the lower Court untouched (*g*) See notes to s 36 above

In case (2) it is the appellate Court alone that can amend the decree (*h*)

The same principles apply to decrees passed in second appeal

An arithmetical error in the decree of the lower Court repeated in a confirming decree of the appellate Court, may, it is submitted, be corrected by the appellate Court

Where an application for *revision* of a decree of a Provincial Small Cause Court is rejected by the High Court *in limine*, the proper Court to amend the decree is the Small Cause Court, and not the High Court (*i*)

2.

Revision.—A decision under this section granting an application for amendment is an order and not a decree. The decision may therefore be the subject of revision under s. 115, but it cannot be the subject of an appeal (j). It has been so held by the High Courts of Calcutta, Allahabad and Bombay in cases under the corresponding s. 206 of the Code of 1882. A different view has been taken by the High Court of Madras. According to that Court, where a decree is amended, the aggrieved party has the right to appeal from the decree as amended. Hence if no appeal is preferred within the period of limitation, he cannot afterwards apply for a revision of the order allowing the amendment (k).

Where a case is one of 'accidental slip' within the meaning of this section, but the Court which passed the decree refuses to amend it on the ground that the case does not fall under this section, the refusal amounts to a failure to exercise a jurisdiction vested in the Court within the meaning of s. 115, and the High Court has power to interfere in revision (l). Similarly where the lower Court amends a decree in a case in which according to its own view the amendment should be refused, stating as a reason for the amendment that it *was bound* under this section to bring the decree into conformity with the judgment, the High Court is entitled to interfere in revision under s. 115 (c) of the Code (m).

Does not apply.—Where the order has drawn up represents the real decision of the Court, the Court has no jurisdiction to rehear or alter it (n). "Even when the order has been obtained by fraud, the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous" (o).

Consent decree.—Where a decree founded on a compromise does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground *ejusdem generis* with it (p). See notes to s. 96, "Procedure for setting aside consent decrees," on p. 203 above.

Successive applications for amendment—Res judicata.—See notes to s. 11, 'Applications for amendment of decree,' on p. 70 above.

Code of 1882, s. 206.—The third paragraph of s. 206 of the Code of 1882 ran as follows:—

If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

The above paragraph enabled the Court to amend its decree in the following two cases, namely:—

(1) Where the decree was at variance with the judgment, and
(2) Where any clerical or arithmetical error was found in the decree.

The present section corresponds with the second part of the above paragraph. The first part of the paragraph which empowers the Court to amend its decree so as

to bring it into conformity with the judgment has been omitted. An application to amend a decree so as to bring it into conformity with the judgment must now be made to the Court in the exercise of its *inherent power*. This power has been saved by s. 151.

Appeal.—No appeal lies from an order directing an amendment either under the Code (q) or under the Charter (r). In a case, however, where the whole method of calculation adopted by the first Court was challenged in the plaintiff's application, which purported to be an application under s. 152, and the first Court allowed the amendment, it was held that the order allowing the amendment must be regarded as one made under O. 47, and that the order was therefore appealable (s).

It has been held by the High Court of Madras that though no appeal lies from an *order of amendment*, an appeal would lie from the *amended decree* (t).

General power to amend

153 [*New*. R. S. C., O. 28, r. 12.] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding all necessary amendments shall be made for determining the real question or issue raised ... on such proceeding.

r. 12.—This section is new. It is taken from the Rules of the r. 12. The words "in a suit" after the word "proceeding" do not ...le.

...ection.—O. 6, r. 17, is confined to amendments of "pleadings," ...g errors in "judgments, decrees or orders." The present section ...er on the Court to amend defects and errors in "any proceeding ...ke all necessary amendments" for the purpose of determining ...sue between the parties to the suit. This power is vested in the ...e appellate Court (u). In *Australian Steam Navigation Co.* v. ...eir Lordships of the Privy Council said: "Their Lordships are ...nendment whenever it can be done without injustice to the other ...y have been put to certain expense and delay, yet if they can be ...i any way, it seems to their Lordships that an amendment ought ...urpose of raising the real question between the parties."

...**g in a suit.**"—The following are some of the cases in which ...h rule has been applied:—

...atories.—*Where it was admitted by the defendant, a solicitor,* ...ries, that his partner had paid into the banking account of the ... the latter for investment, the defendant was allowed to *amend* ...that the admission had been made by mistake (w). In another ...t charged the plaintiff (his manager) with misconduct, and the ...rogatories of which the substance was to ask the defendant to ...onduct on which he relied, it was said by Thesiger, L.J., that ...red the interrogatories, and it was subsequently discovered by

...*ikshar* (1900) 28 Cal. ... *Vateera* (1892) 16 Mad. ... *an ullah Khan* (1892) 14 ... 1921) 3 Lah. L. J. 341, 66.

(t) *Viswanathan* v. *Ramanathan* (1901) 24 Mad. 646.
(u) *Mukunda Lal* v. *Jogesh Chandra* (1916) 1 Pat. L. J. 393, 35 ... 3... I. C. 3 0.
(v) (1889) 14 App. Cas. 318, 3..0.
(w) *Hollis* v. *Burton* [1892] 3 Ch. 226.

Revision—A decision under this section granting an application for amendment is an order and not a decree The decision may therefore be the subject of revision under s 115, but it cannot be the subject of an appeal (*j*) It has been so held by the High Courts of Calcutta, Allahabad and Bombay in cases under the corresponding s 206 of the Code of 1882 A different view has been taken by the High Court of Madras According to that Court, where a decree is amended, the aggrieved party has the right to appeal from the decree as amended Hence if no appeal is preferred within the period of limitation he cannot afterwards apply for a revision of the order allowing the amendment (*k*)

Where a case is one of accidental slip within the meaning of this section, but the Court which passed the decree refuses to amend it on the ground that the case does not fall under this section, the refusal amounts to a failure to exercise a jurisdiction vested in the Court within the meaning of s 115, and the High Court has power to interfere in revision (*l*) Similarly where the lower Court amends a decree in a case in which according to its own view the amendment should be refused, stating as a reason for the amendment that it *was bound* under this section to bring the decree into conformity with the judgment the High Court is entitled to interfere in revision under s 115 (c) of the Code (*m*)

Does not apply—Where the order has drawn up represents the real decision of the Court the Court has no jurisdiction to rehear or alter it (*n*) Even when the order has been obtained by fraud, the Court has no jurisdiction to rehear it If such a jurisdiction existed it would be most mischievous (*o*)

Consent decree—Where a decree founded on a compromise does not embody the true terms of the compromise the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground *ejusdem generis* with it (*p*) See notes to s 96, ' Procedure for setting aside consent decrees on p 265 above

Successive applications for amendment—Res judicata—See notes to s 11, "Applications for amendment of decree, ' on p 70 above

Code of 1882, s 206—The third paragraph of s 206 of the Code of 1882 ran as follows —

' If the decree is found to be at variance with the judgment or if any clerical or arithmetical error be found in the decree the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment '

The above paragraph enabled the Court to amend its decree in the following two cases namely —

(1) Where the decree was at variance with the judgment, and

(2) Where any clerical or arithmetical error was found in the decree

The present section corresponds with the second part of the above paragraph The first part of the paragraph which empowers the Court to amend its decree so as

(*j*) Nalinakshya v [illegible] 23 All 177 Surti v Ginga [illegible] v Sheo Prasad (1893) [illegible] 1st p and tuba v Agarsingji 180 [illegible]
(*k*) Viranathan v [illegible] 648 [illegible] I Pat L.
(*l*) Sitaleo v Deo D [illegible]

to bring it into conformity with the judgment has been omitted. An application to amend a decree so as to bring it into conformity with the judgment must now be made to the Court in the exercise of its *inherent power*. This power has been saved by s 151.

Appeal.—No appeal lies from an order directing an amendment either under the Code (q) or under the Charter (r). In a case, however, where the whole method of calculation adopted by the first Court was challenged in the plaintiff's application, which purported to be an application under s 152, and the first Court allowed the amendment, it was held that the order allowing the amendment must be regarded as one made under O. 47, and that the order was therefore appealable (s).

It has been held by the High Court of Madras that though no appeal lies from an *order of amendment*, an appeal would lie from the *amended decree* (t).

153. [*New.* **R. S. C., O. 28, r. 12.**] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

General power to amend.

R. S. C., O. 28, r. 12.—This section is new. It is taken from the Rules of the Supreme Court, O. 28, r. 12. The words "in a suit" after the word "proceeding" do not occur in the English rule.

Scope of the section.—O. 6, r. 17, is confined to amendments of "pleadings," and s 152 to correcting errors in "judgments, decrees or orders". The present section confers a *general* power on the Court to amend defects and errors in "any proceeding in a suit" and to make "all necessary amendments" for the purpose of determining the real question at issue between the parties to the suit. This power is vested in the original as well as the appellate Court (u). In *Australian Steam Navigation Co.* v. *Smith and Sons* (v), their Lordships of the Privy Council said: "Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties."

"Any proceeding in a suit."—The following are some of the cases in which the corresponding English rule has been applied:—

Answers to interrogatories.—Where it was admitted by the defendant, a solicitor, in answer to interrogatories, that his partner had paid into the banking account of the [illegible]

specify the acts of misconduct on which he relied, it was said by Thesiger, L. J., [illegible] if the defendant answered the interrogatories, and it was subsequently discovered [illegible]

(q) *Nalinakshya* v. *Mafakshar* (1900) 28 Cal 177; *Narayanasami* v. *Natesa* (1892) 16 Mad 424, 425.
(r) *Muhammad* v. *Ihsan ullah Khan* (1892) 14 All 226.
(s) *Ramji* v. *Giani* (1921) 3 Lah L. J. 341, 66 I. C. 932.
(t) *Viswanathan* v. *Ramanathan* (19[illegible]) [illegible] 646.
(u) *Mukunda Lal* v. *Jogesh* [illegible] Pat L. J. 393, 397, 3[illegible] I. C. 370.
(v) (1889) 14 App Cas 318, [illegible]
(w) *Hollis* v. *Burton* [1892] [illegible]

him that there were other acts of misconduct on which he could rely, there was nothing to prevent his being *allowed to amend* his answers to the interrogatories (*x*) See as to interrogatories O 11, rr 1 11, below

Particulars—An application to amend particulars if made a reasonable time before the trial, will generally be allowed on terms (*y*) But leave to amend particulars, when it is applied for at the trial, will as a rule be refused (*z*)

Notice of motion—A notice of motion in an action for the rescission of an agreement for the sale of land was allowed to be amended at the hearing by asking for the appointment of a receiver (*a*)

Saving of present right of appeal

154. [S. 3, third para.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

"Any present right of appeal"—There is a conflict of decisions as to the meaning of the words "any *pres nt* right of appeal" which occur in this section. According to the Chief Court of the Punjab, the words "any present right of appeal" refer to a right which had actually come into existence at the commencement of this Code by virtue of the decree or order sought to be appealed from having been passed before this Code came into force (*b*) According to the Madras High Court, those words refer to a right which had become vested in a litigant before this Code came into force (*c*) Thus there are cases in which a second appeal lay under the old Code from certain orders made in execution (the orders being treated as decrees), while no such appeal lies under the present Code According to the Chief Court of the Punjab, no second appeal would [illegible]

preferred when the old Code was in force, though the order made in first appeal was not made until after the new Code came into force (*d*) Similarly there are cases in which an appeal was allowed from certain orders under the old Code from which no appeal is allowed under the present Code According to the Chief Court of the Punjab, no appeal would lie from the order in such a case unless the *order* was made when the old Code was in force (*e*) According to the Madras High Court, it would seem that an appeal would lie if the *suit* in which the order was made was instituted when the old Code was in force See s. 96, sub s. (3), and ss 97 and 104 See also notes to s 1

Amendment of certain Acts

155. [*New.*] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Repeals.

156. [*S.* 3, *first sentence.*] *The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.*

(*x*) *Saunders* v *Jones* (1877) 7 C D 435 452

(*y*) *Yorkshire Provident Co* v *Gilbert* [1895] 2 Q B 148

(*z*) *Moss* v *Malings* (1886) 33 Ch D 603

(*a*) *Cook* v *Andrews* [1897] 1 Ch 266

(*b*) *Ganda Mal* v *Firandilla* (1913) Punj Rec no 1, p 1 15 I C 725

(*c*) *Kalinga* v *Narasimha* (1911) 21 Mad L J 631 9 I C 937

(*d*) (1911) 21 Mad L J 631, 9 I C 937, *supra*.

(*e*) (1913) Punj Rec no 1, p 1, 15 I C 725 *supra*

This section and the Fifth Schedule to the Code have been repealed by the Second Repealing and Amending Act 17 of 1914, s 3

Continuance of orders under repealed enactments

157 [*S* 3, *second sentence*] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf

Reference to Code of Civil Procedure and other repealed enactments

158 [S 3, second para] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule

THE FIRST SCHEDULE.

ORDER I.

Parties to Suits.

1\. **1** [S. 26, R. S. C., O. 16, r. 1.] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits any common question of law or fact would arise.

Who may be joined as plaintiffs.

Scope of the Order.—This order deals with joinder of parties and to a certain extent with joinder of causes of action (*f*). O. 2, r. 3 deals exclusively with joinder of causes of action. Rule 4 of this Order is to be read with rule 1.

General rules.—Before considering the present rule it may be as well to note the general rules relating to the joinder of parties and of causes of action. According to the Code the essentials of a suit are—(1) opposing parties, (2) a subject in dispute, (3) a cause of action, and (4) a demand of relief (*g*) [see O. 7, r. 1]. All these essentials must concur in every suit properly framed. Order 1 deals with the joinder of parties. Order 2 deals with the frame of suits. In framing a suit the following three kinds of misjoinder must be guarded against:—

(i) *Misjoinder of plaintiffs.*—Where there are more plaintiffs than one, the provisions of the present rule apply. This rule relates to the joinder of plaintiffs. It provides in effect that two or more persons may be joined as plaintiffs in one suit if the right to relief alleged to exist in each plaintiff arises from the *same act or transaction* and there is a *common question of law or of fact*. If not, they cannot be joined as plaintiffs *in one suit*, and they must bring *separate suits*. If two or more persons are joined as plaintiffs in *one* suit in a case not covered by O. 1, r. 1, the result is a *misjoinder of plaintiffs*. The objection on the ground of misjoinder of plaintiffs should be taken at the earliest possible opportunity, if not it will be deemed to have been waived [O. 1, r. 13]. Where such objection is taken and the Court finds that it is well founded, the Court should not dismiss the suit [O. 1, r. 9], but the plaint may be amended [O. 6, r. 17] by striking out the names of such persons as have been improperly joined as plaintiffs [O. 1, r. 10, sub-r. (2)], and the suit may then be proceeded with [O. 1, r. 9]. In other words an objection on the ground of misjoinder of plaintiffs is not fatal to the suit (*h*).

(ii) *Misjoinder of defendants.*—Where there are more defendants than one, the provisions of rule 3 of this Order apply. That rule relates to the joinder of defendants. It provides in effect that two or more persons may be joined as defendants in one suit if the right to relief alleged to exist against each of them arises from the *same act or transaction*, and there is a *common question of law or of fact*. If not, they cannot be joined as

(*f*) *Bullock* v. *London General Omnibus Co.* (1907) 1 K. B. 264, 272; *Compania Sansinena* v. *Houlder Brothers & Co.* [1910] 2 K. B. 354, 363, 367.

(*g*) *Krishnappa* v. *Shivappa* (190) 31 Bom. 393, 398.

(*h*) *Janokinath* v. *Ramrunjun* (18 9) 4 Cal. 949.

defendants in *one suit*, and *separate suits* must be brought against them If two or more persons are joined as defendants in one suit in a case not covered by O 1, r 3, the result is a *misjoinder of defendants* As in the case of plaintiffs, so in the case of defendants, the objection on the ground of misjoinder should be taken at the earliest possible opportunity, if not, it will be deemed to have been waived (O 1, r 13) Where such objection is taken, and the Court finds that it is well founded, the Court should not dismiss the suit (O 1, r 9), but the plaint may be amended (O 6, r 17) by striking out the names of such persons as have not been properly joined as defendants [O 1, r 10, sub r (2)], and the suit may then be proceeded with (O 1, r 9) In other words, an objection on the ground of misjoinder of defendants is not fatal to the suit

(iii) *Misjoinder of causes of action* —As to the meaning of "cause of action," see notes to s 20 under the head cause of action p 90 above A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or it may be coupled with a misjoinder of defendants There may again be a misjoinder of claims founded on several causes of action Accordingly, this subject may be considered under the following three heads —

(a) *Misjoinder of plaintiffs and causes of action* —Where in a suit there are *two or more plaintiffs and two or more causes of action*, the plaintiffs should be *jointly interested* in all the causes of action If the plaintiffs are not *jointly interested* in all the causes of action, the case is one of *misjoinder of plaintiffs and causes of action* O 2, r 3, read with O 1, r 1, forbids such a misjoinder The objection on the ground of misjoinder of plaintiffs and causes of action should be taken at the earliest possible opportunity (O 2, r 7) As to the procedure to be followed in the case of misjoinder of plaintiffs and causes of action, see notes to O 2, r 3, "Procedure in case of misjoinder of plaintiffs and causes of action" See also s 99 above

(b) *Misjoinder of defendants and causes of action Multifariousness* —Where in a suit there are *two or more defendants* and *two or more causes of action*, the suit will be bad for misjoinder of defendants and causes of action, if different causes of action are joined against different defendants separately (O 2, r 3, and O 1, r 3) Such a misjoinder is technically called *multifariousness* The objection on the ground of multifariousness should be taken at the earliest possible opportunity (O 2, r 7) As to the procedure to be followed in the case of multifariousness, see notes to O 2, r 3, "Procedure in case of multifariousness See also s 99 above

(c) *Misjoinder of claims founded on several causes of action* —See O 2, rr 4 5

Non joinder of parties.—Where a person who is a necessary party to a suit is not joined as a party to the suit, the case is one of *non joinder* A suit should not be dismissed on the ground of non joinder (i) The objection for non joinder should be taken before the first hearing (O 1, r 13), and the plaint may be amended by adding the omitted party either as plaintiff or as defendant, bearing in mind that no person can be added as a *plaintiff*, though he may be added as a defendant, without his consent (i) See notes to O 1, rr 9 and 13

Relation of this rule to O 2, r. 3 —O 2, r 3, is to be read subject to the provisions of this rule (j)

Changes effected in the law.—We now turn to rule 1 of Order 1 Before considering it in detail, we may observe that under the corresponding s 26 of the Code of 1882, all persons could be joined in one suit as plaintiffs, provided that the right to relief alleged to exist in each plaintiff, arose from the *same cause of action* The present

(i) *Maphabala* v *Kunhanna* (1898) 21 Mad 3 3

(j) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111 41 I C 944

O. 1, r. 1. rule is much wider It is a reproduction, almost verbatim, of O 16 r 1 of the English rules It enables several plaintiffs, though they have *separate causes of action*, to join in *one* suit, if—

(1) the right to relief, alleged to exist in each plaintiff, arises out of the *same act or transaction* and

(2) there is a *common question of law or fact*

The expression "act or transaction" used in this rule is more comprehensive than the expression 'cause of action' used in the old section, for the same act or transaction may give rise to different causes of action as when several persons are injured by the same act of negligence on the part of a railway company Under the old section such persons could not join as plaintiffs in one suit, the *causes of action being different* Under the present rule, it seems, they can as the right to relief arises out of the *same act*

The old section —The corresponding s 26 of the Code of 1882 ran as follows —

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist whether jointly severally or in the alternative, *in respect of the same cause of action*

The decisions on the meaning of 'cause of action' in the old section were not uniform In some cases it was held that the expression 'cause of action' meant facts constituting the infringement of a right *plus* facts constituting the right itself (k) while in others it was held that it referred to facts constituting the *infringement of the right*, but not necessarily also those *constituting the right* itself (l)

The following are some of the cases decided under the old section It was held in those cases that the plaintiffs could not all join in one suit and that they should bring separate suits Under the present rule, it is submitted, the plaintiffs may in each one of the following cases all join in one suit —

1 In *Aldridge* v *Barrow* (m) the defendant the editor and proprietor of a newspaper, published articles which referred to the 'Calcutta Police,' without naming individuals The plaintiffs, six of the members of the Calcutta Police Force, jointly sued the editor for damages, alleging that the articles were directed against them, and that they constituted a libel Here the libel was in the same words, and in the same documents, but of different persons It was held that the plaintiffs could not all be joined in one suit The Court said 'It is true that the injury may have been caused by *one act* of the defendant, as, for instance, in the case of a railway accident causing injury to several passengers, or, as is here alleged, of a collective libel on several individuals The cause of action of the persons injured will none the less remain separate and distinct There cannot in such cases be said to be *one or the same cause of action*"

2 In *Rajjo Kuar* v *Debi Dial* (n), several creditors, to each of whom separate debts were owing by the same debtor, jointly sued the debtor to avoid a deed of gift executed by the debtor in favour of his daughter, on the ground that it was made fraudulently with intent to defeat their claims The Court held that they could not join as plaintiffs in one suit on the ground that the causes of action were *separate and distinct* It is conceived that in such a case the suit may be properly brought by one or more creditors on behalf of themselves and others under O 1, r 8

(k) *Nusserwanji* v *Gordon* (1882) 6 Bom 266 273, *Ramanuja* v *Devanayaka* (1885) 8 Mad 361 *Lingammal* v *Venkatammal* (1883) 6 Mad 239 *Salima Bibi* v *Sheik Muhammad* (1896) 18 All 131 *Rahim Baksh* v *Amiran Bibi* (1896) 18 All 219, *Rajjo Kuar* v *Debi Dial* (1896) 18 All 432

(l) *Haramoni* v *Hari Churn* (1895) 22 Cal 833 839 *Aldridge* v *Barrow* (1907) 34 Cal 662 668, *Fakirapa* v *Rudrapa* (1892) 16 Bom 119 *Varajlal* v *Ramdat* (190) 26 Bom 259 265 *Pinapati* v *Pinapati* (1903) 26 Mad 647, 649

(m) (1907) 34 Cal 662

(n) (1896) 18 All 432

3 In *Karajlal* v *Ramdat* (o) *A* and *B* were assaulted by *C* at an interview in *C*'s house *A* and *B* jointly sued *C* for damages for assault It was held that the assault on *A* and that on *B* constituted *two distinct causes of action*, and the suit was therefore bad for misjoinder of plaintiffs The Court said "We may go further and say that as the blows on each plaintiff were inflicted *at the same time and place* and must be proved by *the same evidence*, it would be more convenient if the law permitted the trial of the two suits together than that it should be necessary to try them separately *But this is a matter for the consideration of the Legislature*"

4 In *Ali Serang* v *Beadon* (p) thirteen firemen, who were engaged on board a steamer, were all arrested under one warrant on a charge of desertion, and they were all tried together and sentenced to one month's imprisonment The term of imprisonment expired on 5th May, but they were not released on that date Thereupon all the thirteen brought a suit against the superintendent of the jail for damages for wrongful detention It was held that the causes of action were *distinct and separate* and could not be joined in one suit

5 In *Ramanuja* v *Devanayaka* (q), several trustees of a temple were removed from the office of trustees by the District Temple Committee A suit by the trustees for a declaration that their removal was without just cause was held to be bad for misjoinder, on the ground that the dismissal of each trustee gave rise to a *distinct* cause of action.

New Rule—In all the cases cited above, it was held that the plaintiffs having *distinct* causes of action, they could not join in one suit, and that the proper course for them was to bring separate suits The present rule is intended to meet those cases. In such cases, therefore, as the above, the plaintiffs may now all join in *one* suit The present rule enable several persons to join as plaintiffs in *one* suit though their causes of action may be *separate and distinct, provided that*—

(1) the right to relief alleged to exist in them, arises out of the *same act or transaction or series of acts or transactions* and

(2) the case is of such a character that, if such persons brought separate suits, any *common question of law or fact* would arise

Both these conditions must be satisfied to enable two or more persons to join as plaintiffs in one suit The two conditions are *not alternative* (r)

Illustrations

(1) *A* publishes a series of books under the title of ' The Oxford and Cambridge Publications so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them The two Universities may join as plaintiffs in one suit to restrain *A* from using the title, because the publication and the belief induced are *common questions of fact* arising out of the *same series of transactions* (s)

(2) *A*, a shareholder in a company, sues *B*, *C* and *D*, the directors, to recover damages *on his own behalf* for fraudulently inducing him to purchase shares by declaring an illegal dividend and he joins in the same suit a claim *on behalf of himself and all other shareholders* (see r 8 below) for repayment by the defendants to the company of the amount of the dividend paid out by them. *A* is not entitled to join both causes of action in one suit, because the right to relief claimed in his personal capacity and the right to

(o) (1902) 26 Bom 259
(p) (1885) 11 Cal 244
(q) (1885) 8 Mad 361
(r) *Stroud* v *Lawson* [1898] 2 Q B 44 52 54
(s) *The Universities of Oxford and Cambridge* v *George Gill & Sons* [1899] 1 Ch 55

O. 1, r. 1. relief claimed by him as representing the shareholders *do not arise out of the same transaction or series of transactions* (t)

(3) Four persons, each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company, joined as co plaintiffs in one suit against the directors, claiming damages for misrepresentations contained in the prospectus *Held* that as the several causes of action arose out of the *same transaction*, and the case would involve *common questions of fact*, the suit was properly framed (u)

(4) In a suit instituted by A, B and C jointly for an injunction against D, E and F, it is alleged that all three defendants, as officers of several associations of workmen, conspired to prevent all persons, not belonging to the associations, from obtaining employment in place of the members of the associations To constitute the overt acts alleged to have been committed in furtherance of the conspiracy, it is averred that D E and F caused A, B and C to be molested, that E used threatening language to A, and that F assaulted C It is proved that D was not a party to the conspiracy As the claim arises out of the *same series of transactions*, and involves the *common question of fact and law* whether the overt acts were committed in furtherance of the conspiracy, A, B and C may join in the suit notwithstanding that an injunction is granted against E and F only (v) See r 4 (a) below

The illustrations given above are all English cases decided under the new English rule 1 of Order 16 That rule came into operation on the 26th of October, 1896 The present rule is in the main a reproduction of the English rule The old English rule corresponded with s 26 of the Code of 1882, except that the words ' in respect of the same cause of action ' did not occur in that rule But though those words did not occur in that rule, it was held that two or more persons could not join as plaintiffs in *one* suit unless the *cause of action was the same* Thus in *Smurthwaite* v *Hannay* (w), it was held by the House of Lords that several shippers of different shipments of cotton on the same ship for the same voyage could not jointly sue the shipowner for damages for short delivery, the causes of action being *distinct* and *separate* For the same reason it was held that persons injured by the same act of negligence could not join in one action as plaintiffs for damages against the wrong doer (x) But since the test under the new English rule as well as the present Indian rule is no longer the identity of the *cause of action*, but the identity of the *act or transaction*, such a joinder of plaintiffs as that in the above cases would now be perfectly legitimate both in England and India (y) In *Thomas* v *Moore* (z), Pickford, L J, said "Whatever the law may have been at the time when *Smurthwaite* v *Hannay* was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right

Plaintiffs having different interests —Under the old section there was a conflict of decisions as to whether, where the plaintiffs were entitled to *different interests* in a property, they could join in one suit to recover possession of the property from a third party if the *ground* on which the relief was claimed was *common* to all the plaintiffs

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(t) *Stroud* v *Lawson* [1898] 2 Q B 44
(u) *Drincqbier* v *Wood* [1899] 1 Ch. 393 and see *Frankenburg* v *Great Horseless Carriage Co* [1900] 1 Q B 504
(v) *Walters* v *Green* [1899] 2 Ch 696.
(w) [1894] A C 494
(x) *L & O Steam Navigation Co* v *Tours* [illegible]

According to the Allahabad decisions, they could not (*a*), according to the Madras and Calcutta decisions, they could (*b*) Under the present rule, there is no doubt that such persons may be joined in one suit as plaintiffs

Illustrations

A succeeds to *B*'s estate by inheritance, and assigns a portion thereof to *C* *D* is in possession of the estate, and disputes *A*'s right of succession to it *A* and *C* may under the present rule jointly sue *D* for recovery of possession of the portions of the estate to which they are entitled, as their claims in respect thereof are based on a *common ground* It does not matter that *A* claims by right of *inheritance* and *C* under an *assignment* from *A* Both the conditions required by the rule are present in the case

Further, having regard to the comprehensive language of this rule, there is no objection to plaintiffs suing in a double capacity, if the conditions prescribed by this rule are complied with Thus where plaintiffs were trustees of a house part of which was let out by them and the rest occupied by them as tenants, and they sued both as trustees and tenants for an injunction to restrain the defendant from committing a nuisance, it was held that there was no objection to their suing as trustees to protect the reversion and as tenants to enjoy the property free from the nuisance (*c*) See notes below "Jointly"

"Any right to relief"—The words "any right to relief" are wider than the words '*the* right to any relief' which occurred in the old section (*d*)

"Severally,"—Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons *severally*, they may join as plaintiffs in one suit or they may at their option bring separate suits The rule does not require that they should join as plaintiffs in one suit A Hindu priest raises a masonry structure upon a certain platform round a sacred tree, on which *every* member of the community has an *individual* right to perform religious rites Here every member of the community has *individually* a cause of action, and any one member may therefore sue the priest for the removal of the structure But it is not necessary that all the members should join as plaintiffs in one suit They *may* so join if they choose, but the law does not say that they *should* all so join (*e*) The same rule applies when two or more persons are entitled to the same relief *in the alternative* see notes below, under the head "in the alternative" The rule, however is different when two or more persons are *jointly* entitled to the same relief in respect of a transaction

Jointly—Where two or more persons are *jointly* entitled to the same relief in respect of a transaction, they must all join as plaintiffs in one suit Thus if *A*, *B* and *C* are *joint owners* of a property they must all be joined as plaintiffs in a suit to recover the property (*f*) So in a suit to recover joint family property, all the members of the joint family must as a general rule be joined as plaintiffs (*g*) In a suit to recover trust property all the trustees must join as plaintiffs (*h*) In a suit to recover the estate of a deceased person all the executors who have proved the will of the deceased must be joined as plaintiffs (*i*) If any one of them does not consent to join as plaintiff, he may be joined as a defendant [r 10, sub r (2)] The proper course is first to ask him to join as

(*a*) *Salima Bibi* v *Sheik Muhammad* (1896) 18 All 131 *Rahim Bakhsh* v *Amiran Bibi* (1896) 18 All 219

(*b*) *Muthuraja* v *Chockalingam* (1896) 19 Mad 335 *Sundar Jha* v *Bansman Jha* (1906) 33 Cal 367

(*c*) *Bai Bhicaiji* v *Perojshaw* (1916) 40 Bom 401, 408 33 I C 192

(*d*) See *Hannay & Co* v *Smurthwaite* (1893) 2 Q B 412, *Viscount Gort* v *Rowney* (1886)

plaintiff, and if he refuses, to join him as defendant. But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (j)

A Hindu dies leaving a widow, an adopted son, and a separate brother. A dispute arises between the widow and the adopted son on the one hand and the brother on the other as regards certain lands The widow and the adopted son allege that the lands form part of the estate of the deceased. The brother, on the other hand, alleges that the lands belong to him *If the widow does not dispute the adoption*, a suit may be brought by her and the adoped son as *co plaintiffs* against the brother to recover the property from him, for the plaintiffs are *jointly* interested in disproving the defendant s title (k). But what *if the adoption is not admitted by the widow*, and she asks the Court to decide the question of adoption *as between her and the adopted son*, and prays that if the adoption is proved, the property may be delivered to the adopted son, *or* that it may be delivered to her, if the adoption is not proved? In such a case, it has been held by the High Court of Madras, that a suit by the widow and the adopted son as *co plaintiffs* to recover the property from the brother is defective on the ground of *misjoinder of plaintiffs*, for the plaintiffs having *antagonistic claims*, it cannot be said that the right to relief exists *jointly* in them (l)

"In the alternative"—If in the case put above, the adoption is disputed, not by the widow, but by the brother, a suit may be brought by the widow and the adopted son as *co plaintiffs* against the brother, claiming *in the alternative* to recover the property for the widow if the adoption is not valid, *or* for the adopted son if the adoption is valid (m) Here there is no misjoinder of plaintiffs, for the validity of the adoption is not disputed by the *co plaintiff* as in the preceding case, but by the *defendant*. See O 1, r 4 (a), below

Plaintiff transferred to category of defendants—See notes to O 1, r 10, under the same head

Appeal—See notes to O 1, r 3 "Appeal"

Power of Court to order separate trials

2. [*New*. R. S. C., O. 16, r. 1.] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

This rule contemplates the case where a suit has been brought by several plaintiffs, in respect of the same act or transaction, but where the causes of action are so distinct that it may not be convenient to dispose of them at one trial (n) In such a case the Court may put the plaintiffs to their election as to which of them should proceed with the suit or order separate trials or make such other order as may be expedient. A suit by several creditors joining as co plaintiffs in a creditor's action, or a suit by several market

(j) *Pyari v Kedirnath* (1899) 26 Cal 409, 417 *Hanumant Dasi v Hari Charn* (1895) 22 Mad [illegible] Punj [illegible] I C. [illegible] 1849) [illegible]

gardeners claiming certain preferential rights as to stands in the market, is not a suit where the joinder could embarrass or delay the trial (o)

3. [S. 28, *Cf.* R. S. C., O. 16, r. 4] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

Who may be joined as defendants.

Misjoinder of defendants—This rule is the converse of rule 1 It deals with joinder of defendants. See notes to O 1, r 1, "Misjoinder of defendants," on p 366 above Rule 4 of this Order is to be read with this rule

Relation of this rule to O 2, r 3—O 2, r 3, is to be read subject to the provisions of this rule (p)

Jurisdiction—This rule contains a provision as to joinder of parties It assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit If the Court has such jurisdiction, then this rule may come into play. Hence if in a suit brought against two defendants *A* and *B*, the Court has jurisdiction against *A*, but none against *B*, this rule does not confer jurisdiction upon the Court to try the suit against *B* also, merely because the conditions of this rule are satisfied (q)

The old section—The corresponding s 28 of the Code of 1882 ran as follows —

"All persons may be joined as defendants against whom *the right to any relief* is alleged to exist, whether jointly, severally or in the alternative, in respect of *the same matter*"

In some cases under that section it was said that the expression "same matter" was equivalent to same cause of action,' in others that it was equivalent "to same act or transaction"

New Rule—Under the present rule all persons may be joined as defendants against whom *any* right to relief in respect of the *same act or transaction* is alleged to exist, where if separate suits were brought against such persons, any *common question of law or fact* would arise A plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants on the analogy of O 1, r 2, if it thinks it right to do so (r) "Whatever the law may have been at the time when *Smurthwaite* v *Hannay* (s) was decided, joinder of parties and joinders of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right" (t) As a general rule where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters be disposed of at the same time, the

(o) *Bedford* v *Ellis* [1901] A C 1, 12

(p) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111 41 I C 944

(q) *Bengal and North Western Ry. Co* v *Sadaram* (1922) 49 Cal 895, 70 I C 225, ('22) A C 500

(r) *Payne* v *British Time Recorder Co* [1921] 2 K B 1

(s) [1894] A C 494

(t) *Thomas* v *Moore* [1918] 1 K B 555, 565

, r. 3. Court will allow the joinder of defendants subject to its discretion as to how the action should be tried (u) [see ill (3) below] See notes to O 2, r 3, "Joinder of defendants and causes of action

Illustrations

1 *A* riding in an omnibus belonging to *B*, is injured by a collision between the omnibus and a cart belonging to *C* *A* sues *B* and *C* for damages for personal injury charging the defendants *jointly* with joint negligence, and, alternatively charging *separate negligence against each defendant* *The suit is not bad for mi joinder of defendants* because the injury to the plaintiff arose from the *same transaction or series of transactions* and the case involves *common questions of fact* (t) It is otherwi e, if the injury arises from *distinct* acts as in the next illustration.

2 *A* sued *B* for damage done to his house by *B* s negligence *B* denied negligence, and alleged that the damage was caused by the negligence of *C* Thereupon *A* applied for an order to join *C* as defendant *Held* that the order could not be made Collin , L J said When we analyse this case, we find we are dealing with it upon the as sumption that the *two acts* which were done the one by [*B*] and the other by [*C*], are entirely di connected torts, each of them a separate injuria—if it be injuria at all—*quite distinct one from the other* The one was done recently by [*B*] by excavation and the other at a much earlier date by [C a water company] by allowing water from its main to weaken the soil in front of the plaintiff s property *Thompson* v *London County Council* (w) *Sadler* v *Great Western Railway Company* (x) Referring to these two cases Scrutton, L J said in *Payne* v *British Time Recorder Co* (y) that neither of them would now be decided in the way they were In that case *P* entered into a contract with *B Co to supply them with certain printed cards which should conform to certain speci* mens supplied to him by them. In order to carry out that contract *P* entered into a contract with W Co to supply him with the cards, and paid for them The cards were duly sent to B Co , but B Co refused to accept them on the ground that they did not conform to the specimens *P* sued B Co and W Co claiming as against B Co the price of the goods sold and in the alternative as against W Co damages for breach of contract in not supplying the cards in accordance with the specimens It was held that as there was a common question of fact to be tried, namely, whether the cards were in accordance with the specimens supplied, the Court would in the exercise of its discre tion allow the two defendants to be joined in one action.

3 *M* mortgages certain property to *X* After *X* s death, *A* claiming to be the adopted son of *X* sues *M* on the mortgage, and a consent decree is passed in the suit. Subsequently *B* alleging that she is the sister and heir of *X*, sues *A* and *M* (1) for a de claration that the adoption of *A* was not validly made, and (2) that the consent decree (to which she was not a party) is not binding on her *Held* by the High Court of Bombay that the suit is bad for misjoinder ( ) This decision, it is submitted, is wrong, and it has been dissented from by the Calcutta High Court (a)

4 The mere fact that the relief claimed against the several defendants *differs in detail* is no ground for objection that the suit is bad for misjoinder of defendants,

(u) [19 1] . K B 1 *supra*
(t) *Bullock* v *London General Omnibus Co*
though simultaneously obstructed the access to the plaintiff s house)
(y) [19 1] 2 K B 1 1.
(z) *Umabai* v *Bhau Balvant* (1910) 34 Bom 3.8
(a) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111, 134 13., 41 I C 944

provided that the suit against the defendants is in respect of the *same act or transaction*. *A* applies for shares in a Company on the faith of a prospectus. The shares are allotted to him, and he pays up Rs 5,000 thereon. *A* then sues the Company and the directors alleging that the prospectus was false and calculated to mislead, claiming as against the Company cancellation of the allotment to him of his shares and the return of Rs. 5,000 with interest, and as against the directors Rs 5,000 by way of damages. Here the relief claimed against the Company is *rescission and repayment of the purchase money with interest*, and that claimed against the directors is *damages*. The fact that the *relief* claimed against the two sets of defendants *differs in detail* does not render the suit bad for misjoinder of defendants, for the suit is in respect of *one transaction*, namely, the issue of a false and fraudulent prospectus. "In substance the shareholder has *one grievance*, call it a cause of action or what you like, and in substance he has *one complaint*, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of *that one thing* which they have done, namely, the issuing of a prospectus." "The remedy . . . is different as against the several defendants, *but not so much in substance as in form*." (*b*) See r 5 below.

5 *A* is an exporter of frozen meat. *B* is the owner of a line of steamers. By a contract between *A* and *B*, *B* agrees to carry from Argentine to Europe frozen meat in steamers belonging to him or in other suitable steamers. It is subsequently agreed that frozen meat should be shipped by *A* on a steamer called the *Devon* procured by *B* and belonging to *C*. Meat is accordingly shipped on the *Devon*, and the master of the *Devon* signs a bill of lading in respect of it and hands it to *A*. *A* sues *B* and *C* in respect of damage to the meat alleged to have been caused by the unseaworthiness of the *Devon* claiming against *B* on the terms of the before mentioned *contract* and against *C* upon the *bill of lading*. The suit is not bad for misjoinder of defendants (*c*)

6 *A* sues *B*, *C*, *D*, *E* and *F*, for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages. It is alleged in the plaint that the goods belonged to *A*, that *B* obtained from *A* the documents of title relating thereto by fraud and made them over to *C*, that *C*, knowing that *B* had no title either to the documents or to the goods, wrongfully dealt with them and sold the goods to *D* and *E*, that *D* and *E* wrongfully claimed to retain the goods and the documents of title; and, lastly, that one of the documents of title, namely, a railway receipt was pledged by *B* to *F*, though the goods covered by it were in the possession of *D*. The suit is not bad for misjoinder of defendants and causes of action (*d*). "The foundation of the case, on which the rest of it depends, is the alleged fraud of *B*. If such fraud is proved, the question is, did the defendants who all claim under *B* obtain any title? If the plaintiff fails to prove fraud on the part of *B*, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence, but that does not make the case any the less one of a common question of law and fact. *The same act or transaction* which concerns all the part[illegible]

[illegible]

[illegible]

[illegible]

convenient, the Court may [*Umabai v Vithal* (*e*)] direct the successive trial of the issues separately affecting different defendants. The question of the alleged fraud of *B* touching all the defendants may be tried first. If it fails there is an end of the case" (*f*)

(*b*) *Frickenburg v Great Horseless Carriage Co* [1900] 1 Q B 504

(*c*) *Compania Sansinena v Houlder Brothers & Co* [1910] 2 K B 354

(*d*) *Jamendra Nath v Brajendra Nath* (1918) 45 Cal 111 41 I C 944

(*e*) (1909) 33 Bom 293 306

(*f*) (1918) 45 Cal 111, 124 125, 41 I C 944, *supra*

r. 3. **No misjoinder where some reliefs merely ancillary**—Where the relief claimed against some of the defendants is *merely ancillary* to the relief claimed against others the suit is not bad for misjoinder, provided the suit is not in respect of distinct causes of action *A* and *B* are co sharers of certain lands in the occupation of *C* and *D* *A* is entitled to two thirds of the lands and *B* to one third *A* sues *B*, *C* and *D*, asking as against *C* and *D* that they may be *ejected* from *his share* of the lands and as against *B* that the l [illegible]

[illegible] for possession The inclusion of *B* in this suit is merely as that of a person properly a party to the proceeding in the circumstances of the case, and not as a litigant against whom a separate claim having no necessary connection with the ejectment of *C* and *D* is made *B* in fact, is a necessary party to the suit, for an actual division between *A* and *B* is essential to the ejectment of *C* and *D* (g) See r 5 below

Ship—A ship is a "person" within the meaning of this rule, so that a suit may be instituted against a ship as a defendant (h)

"Any right to relief."—The words "any right to relief" are wider than the words "*the* right to any relief" which occurred in the old section (i)

"Jointly"—(1) *B* and *C* simultaneously assault *A* in pursuance of a *conspiracy* *A* may sue *B* and *C* in one suit for damages see *Varajlal* v *Ramdat* (1902) 26 Bom 259 264 *Cf O Keefe* v *Walsh* [1903] 2 I R 681

(2) *A* obtains a lease of certain lands from *B* (landlord) and enters into possession of the lands *B* then lets the lands in separate portions to *C*, *D* and *E* Subsequently *B*, *C*, *D* and *E* forcibly dispossess *A* of the land *A* may sue *B*, *C*, *D* and *E* in one suit for ejectment The plaintiff being entitled to claim possession of the land *as a whole*, the mere fact that *C* *D* and *E* hold *specific and distinct* portions of the land under *different* demises from *B*, does not make the suit bad for misjoinder of defendants *Nundo* v *Banomali* (1902) 29 Cal 871, *Raghunath* v *Sarosh* (1899) 23 Bom 266

(3) *Walters* v *Green* [1899] 2 Ch 696 given as ill (4) in the notes to O 1 r 1, under the head "New Rule," p 370 above, is also an illustration under this head

Joint wrong doers—Joint tort-feasors may be sued jointly or severally Thus where more persons than one are concerned in the commission of a wrong the person wronged has his remedy against all or any one or more of them at his option But if the person wronged elects to sue only one of several joint tort feasors, he cannot afterwards bring a suit against the rest even though the judgment may remain unsatisfied (j)

"Severally"—(1) Certain property held by *A* is sold under the Madras Rent Recovery Act in separate lots for arrears of rent, and purchased by *B*, *C* and *D* respectively *A* sues *B*, *C* and *D* to set aside the sale on the ground that proper notice of sale was not given The suit is not bad for misjoinder of defendants, merely because the property was sold to *different purchasers* The proceeding under which the various items [of the property] were sold was *one*, and the *ground* upon which the validity

(g) *Sri Raja Simhadri* v *Prattipati* (1906) 29 Mad 29

(h) *The Bombay Persia Steam Company* v *Shephard* (1888) 12 Bom 237

(i) See *Hannay & Co* v *Smurthwaite* [1893] 2 Q B 412 *Viscount Gort* v *Rowney* (1886) 17 Q B D 625 635 *Universities of Oxford and Cambridge* v *George Gill and Sons* [1899] 1 Ch 55

(j) *Brinsmead* v *Harrison* (1872) L R 7 C P 547 *Rahmubhoy* v *Turner* (1890) 14 Bom 408.

of the sale was impugned is the *same* in each case (*k*) To use the words of the present rule, the right to relief claimed is in respect of *the same act or series of acts*, and there is a *common question of fact and law*

(2) A suit is brought by a reversionary heir, on the death of a *Hindu widow*, to recover from *A*, *B* and *C* three separate properties sold by the widow to *A*, *B* and *C* respectively by three separate deeds of sale on the ground that the sales were made without legal necessity According to the Madras decisions the suit is not bad for misjoinder (*l*), according to the Bombay and Allahabad decisions, it is (*m*) These were decisions under the old section The question under the present rule would be whether if separate suits were brought against *A*, *B* and *C*, any *common question* of law or fact would arise In a recent case under the old Code similar to the one above their Lordships of the Privy Council said ' Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case (*n*) In a case under the new Code, where the suit was brought by a reversioner claiming a third share of the estate against another reversioner who was in possession of some of the property, and against three other persons two of whom were purchasers and one a mortgagee from the widow, it was held by the Allahabad High Court that under the new Code in any event it was not a case of misjoinder of defendants (*o*)

(3) In a suit for partition of joint family property by a minor against his father, vendees and mortgagees from the father and others who had obtained decrees against the father, it being alleged that the decrees were all collusive and fraudulent were held by the Madras High Court to be proper parties (*p*)

"In the alternative'—(1) *A* executes a lease of his land to *B* for a period of two years. At the end of the first year *A* sells the land to *C* *C* demands rent for the second year from *B* *B* alleges payment of the whole rent for two years to *A* in advance *C* may sue *A* and *B*, praying for a decree against *A*, if it be found that *B* paid the rent to *A* as alleged, or, in the alternative, against *B*, if it be found that *B* did not pay the rent to *A* *Madan Mohun* v *Holloway* (1886) 12 Cal 555, *Mouji* v *Kuverji* (1907) 31 Bom 516

(2) *A* purchases certain land from *B*, and enters into possession Subsequently he is dispossessed by *C* who claims to be the owner of the land *A* may sue *B* and *C* praying for a decree against *B* for a refund of the purchase money if it is found that *C* is the owner, or a decree, in the alternative, against *C* for possession if it is found that *C* is not the owner *Serajul Huq* v *Abdul Rahaman* (1902) 29 Cal. 257

(3) *A*, alleging that his agent *B* lent Rs 1 000 to *C*, and that *C* had denied receipt of the money from *B*, sues *B* and *C*, praying for a decree against *B*, if it is found that the amount was not paid to *C*, or, in the alternative, against *C* if it is found that the amount was paid to him The suit is properly framed, for the ' transaction" in respect of which the relief is claimed is the same *Meyappa* v *Periannan* (1906) 29 Mad 50, *Arnnabhella* v *Venkataswami* (1884) 7 Mad 123

(4) *A* mortgages his property to *B* *B* assigns the mortgage to *C* who gives notice of the assignment to *A*, and demands payment from *A* of the amount secured by the mortgage *A* says he paid Rs 200, part of the mortgage debt, to *B*, before the

(*k*) *Dorasamy* v *Muthusamy* (1904) 27 Mad 94

(*l*) *Vasudeva* v *Kuleadi* (1874) 7 M.H C 290 *Mahomed* v *Krishnan* (1888) 11 Mad 106

(*m*) *Kachar* v *Bai Rathore* (1883) 7 Bom 283 *Ganeshi* v *Khairati* (1894) 16 All 279

[illegible] 36 ... 332 ... 36 ... Mad 194 69 I C 961 (22) A M 332

O. 1, r. 3, 4.

assignment of the mortgage, and that he is not therefore liable for more than the balance *B* denies the alleged payment *C* sues *A* and *B* praying for a mortgage decree in the first instance against *A* for the whole of the mortgage debt if the Rs 200 has not been paid, *and in the alternative*, if the Rs 200 have been paid, for a mortgage decree against *A* for the amount of the mortgage debt less the Rs 200 and for a decree *against B, for Rs 200 by way of damages*. The suit is not bad for misjoinder of defendants, for the right to the relief claimed is in respect of the *same transaction* *Aiyathurai* v *Muhamad Meera* (1908) 31 Mad 252, *Kotiswri* v *Tallapragadha* (1910) 35 Mad 39, 8 I C 1037 See notes, "New Rule," ill (4), p 370 above

Costs where relief is claimed against defendants in the alternative— Where a suit is brought by *A* against *B* and *C* in the alternative, and a decree is passed against *B* with costs, but the suit as against *C* is dismissed, the Court has jurisdiction in a proper case to order *B* (the unsuccessful defendant) to pay in addition to the costs payable by him to *A* (the plaintiff) the costs of *C* (the successful defendant) The rule has thus been stated by Vaughan Williams, L J "The proper way is—do not join any defendant unreasonably, if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame" (*q*) In *Child* v *Stenning* (*r*), Jessel, M R, dealing with a similar question said "It appears to me on principle that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it"

A, representing that he is *B*'s agent, enters into a contract with *C* on *B*s behalf [illegible] *B* denies that he employed *A* as his [illegible]ues *A* and *B* for damages and claims [illegible]ourt finds that *A* untruly represented himself to be *B*s agent [illegible] against *A* for damages, but the suit against *B* is dismissed with costs If the Court is of opinion that *C* reasonably (*s*) took proceedings against *B*, the Court may direct the costs payable by *C* to *B* to be included in the damages payable by *A* to *C* (*t*)

Appeal—An appeal lies under cl 15 of the Letters Patent from an order refusing to allow the plaintiff to proceed in one suit against several defendants on the ground of misjoinder and requiring the plaintiff to elect against which of the defendants he would proceed Such an order is a 'judgment' within the meaning of cl. 15, for it is in substance a decision that the suit does not lie as framed, with the result that if the plaintiff insists on his alleged rights, the suit must be dismissed (*u*)

Court may give judgment for or against one or more of joint parties

4 [Ss. 26, 28.] Judgment may be given without any amendment—

(*a*) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(*q*) *Besterman* v *British Motor Cab Co Ltd* [1914] 3 K B 181 187 *Bullock* v *The London General Omnibus Co* [1907] 1 K B 264 *Sanderson* v *Blyth Theatre Co* [1903] 2 K B 533

(*r*) (18 9) 11 Ch D 82 86

(*s*) See *Low* v *Davis* (1861) 1 B & S 2[illegible]0, 124

P R [illegible]30

(*t*) *Spelling* v *Verell* (1868) L R 4 C P 41[illegible], *Hughes* v *Greante* (1884) 33 L J Q B 41 See Indian Contract Act 18 2 s [illegible]3[illegible]

(*u*) *Jnanendra Nath* v *Brijendra Nath* (1919) 45 Cal. 111, 41 I C 943

(*b*) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

O. I, rr.

Cl (a) of this rule is to be read with r 1 above, and cl (b) with r 3 above

5. [*New.* R. S. C., O. 16, r. 5.] It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Defendant need not be interested in all the relief claimed

This rule is to be read with r 3 above It provides in effect that where a suit is brought against several defendants, the mere fact that every defendant is not interested in *all* the relief claimed in the suit is no ground for objection that the suit is bad for misjoinder of defendants See notes to r. 3 above

6 [S. 29, R S. C., O. 16, r. 6.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract

Several liability on a contract—This rule is confined to suits on *contracts* The liability on a contract may be either (1) several, or (2) joint and several, or (3) joint *A* and *B*, *each for himself*, agrees to pay Rs 5,000 to *C* Here *A* and *B* are *severally* liable on the contract *C* may therefore bring one suit against *A* and *B*, or he may bring a separate suit against *A* and a separate suit against *B* These suits may be brought simultaneously, or they may be brought successively one after the other But if the suit is brought against *A*, and a decree is obtained against him, and the decree *is satisfied*, *C* cannot subsequently sue *B* on the contract But if the decree remains unsatisfied, he (*C*) is not precluded from suing *B*

Joint and several liability on a contract—The legal consequences of a *joint and several* liability on a contract are the same as those of *several* liability Thus if *A* and *B* pass a bond to *C* for Rs 5,000, and the bond provides that *A* and *B* shall *jointly and severally* pay the amount to *C*, *C* may sue *A* and *B* jointly, or he may sue them separately, as in the case where the liability is *several*

Joint liability on a contract—The present rule does not provide for the case of a *joint* liability arising on a contract or negotiable instrument The reason is that so far as liability on a contract is concerned, s 43 of the Indian Contract Act, 1872, makes all joint contract joints and several It allows a promisee to sue one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co promisors (*t*) A partnership firm consisting of two persons *A* and *B*, purchases from *C* goods worth Rs 5 000 The liability of partners is *joint*,

(*t*) *Hemendro* v *Rajendrolall* (1878) 3 Cal 353 360 *Lukmidas* v *Purshotam* (1882) 6 Bom 700 701, *Dick* v *Dhunji* (1901) 25 Bom 378, 386, *Motilal* v *Ghellabhai* (1892) 17 Bom 6 11 *Muhammad* v *Radhe Ram* (1900) 22 All 307, 315 *Narayana* v *Lakshmana* (1898) 21 Mad 256

assignment of the mortgage, and that he is not therefore liable for more than the balance *B* denies the alleged payment. *C* sues *A* and *B* praying for a mortgage decree in the first instance against *A* for the whole of the mortgage debt if the Rs 200 has not been paid, *and in the alternative*, if the Rs 200 have been paid, for a mortgage decree against *A* for the amount of the mortgage debt less the Rs. 200 and for a decree against *B*, for Rs 200 by way of damages The suit is not bad for misjoinder of defendants, for the right to the relief claimed is in respect of the *same transaction* *Aiyathurai* v *Muhamad Meera* (1908) 31 Mad 252, *Kotturi* v *Tallapragadha* (1910) 35 Mad 39, 8 I C 1087 See notes, "New Rule," ill (4), p 370 above

Costs where relief is claimed against defendants in the alternative—Where a suit is brought by *A* against *B* and *C* in the alternative, and a decree is passed against *B* with costs, but the suit as against *C* is dismissed, the Court has jurisdiction in a proper case to order *B* (the unsuccessful defendant) to pay in addition to the costs payable by him to *A* (the plaintiff) the costs of *C* (the successful defendant) The rule has thus been stated by Vaughan Williams, L.J "The proper way is—do not join any defendant unreasonably, if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame" (q) In *Child* v *Stenning* (r), Jessel, M R, dealing with a similar question said It appears to me on principle that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it"

A, representing that he is *B*'s agent, enters into a contract with *C* on *B*'s behalf *C* demands performance of the contract from *B* *B* denies that he employed *A* as his agent and refuses to perform the contract *C* sues *A* and *B* for damages and claims relief against them in the alternative The Court finds that *A* untruly represented himself to be *B*'s agent A decree is passed against *A* for damages, but the suit against *B* is dismissed with costs If the Court is of opinion that *C* reasonably (s) took proceedings against *B*, the Court may direct the costs payable by *C* to *B* to be included in the damages payable by *A* to *C* (t)

Appeal—An appeal lies under cl. 15 of the Letters Patent from an order refusing to allow the plaintiff to proceed in one suit against several defendants on the ground of misjoinder and requiring the plaintiff to elect against which of the defendants he would proceed Such an order is a "judgment" within the meaning of cl 15, for it is in substance a decision that the suit does not lie as framed, with the result that if the plaintiff insists on his alleged rights, the suit must be dismissed (u)

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4 [Ss. 26, 28.] Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(q) *Besterman* v *British Motor Cab Co, Ltd* [1914] 3 K B 181 187 *Bullock* v *The London General Omnibus Co* [1907] 1 K B 264 *Sanderson* v *Blyth Theatre Co* [1903] 2 K B 533

(r) (1879) 11 Ch D 82 86

(s) See *Pow* v *Davis* (1861) 1 B & S 220, 124 R R 530

(t) *Spedding* v *Nevell* (1869) L R 4 C P 412 *Hughes* v *Greame* (1864) 33 L J Q B 412 See Indian Contract Act 1872 s 73

(u) *Ramendra Nath* v *Brajendra Nath* (1918) 45 Cal 111, 41 I C 944

following, however, is a case to which the rule has been held to apply. *M*, purporting to act as agent for *C*, enters into a charter party with *B* for loading *B*'s vessel with a cargo. The cargo is not loaded, and *B* sues *M* for damages, alleging that *M* had no authority to enter into the charter party as agent for *C*. Subsequently *B* finds, upon discovery of documents, that it is probable that *C* did give authority to *M* to bind him [*C*] with the charter party, and applies to add *C* as a defendant. The case is one within this rule and *C* may be added as a defendant (*a*).

Costs where relief is claimed against defendants in the alternative.—See notes to O. 1, r. 3, under the same head on p. 378 above.

8. [S. 30; S. 32, fourth para. *Cf.* R. S. C., O. 16, r. 9.]

One person may sue or defend on behalf of all in same interest.

(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

Object of the rule.—This rule is an exception to the general rule that *all* persons interested in a suit ought to be made parties thereto (*b*). Convenience requires that in suits where there is a community of interest amongst a large number of persons, a few should be allowed to represent the whole (*c*), so that trouble and expense may be saved (*d*).

Application of the rule.—The provisions of this rule apply only if (1) the parties are *numerous*, (2) they have the *same interest*, and (3) the necessary *permission* is obtained and *notice* given.

Representative suit.—A suit filed by one or more persons under this rule on behalf of themselves and others having the same interest in the suit is called a representative suit. The provisions of Explanation VI to s. 11 [res judicata] apply to such a suit.

"Numerous parties"—Fluctuating body.—Where the number of defendants was thirty it was held to be numerous (*e*). It has been held by the High Court of Madras [illegible]

(*a*) *Bennets & Co* v. *McIlwraith & Co* [1896] 2 Q. B. 464.

(*b*) *Chudasama* v. *Partapsang* (1904) 28 Bom. 209.

(*c*) *Srikanti* v. *Inlupuram* (1866) 3 Mad. H. C. 226.

(*d*) *Hiralal* v. *Bhairon* (1883) 5 All. 602; *Srinivasa* v. *Raghava* (1900) 23 Mad. 28.

(*e*) *Andrews* v. *Salmon* (1888) W. N. 102 [Eng.].

(*f*) *Adamson* v. *Arumugam* (1886) 9 Mad. 463.

r 8 brought under this rule on behalf of the *Hindu community* as "the whole Hindu community is *incapable of ascertainment* (g). This decision was dissented from by the same High Court in subsequent cases, where it was held that it was not necessary to the application of this rule that the parties should be capable of being ascertained (h) In this connection it may be observed that property may be owned by a fluctuating body of persons like the inhabitants of a village (i), or the Dhobi community of Naraında (j), and a suit may be brought on their behalf under this rule It has also been held that a person may render himself liable to a community like the Vysia community of Mogarala by agreeing to pay a certain sum of money to it, and a suit to recover it may be brought by *the community under this rule* (k)

"Same Interest"—It is essential that the parties should have the *same* interest in the suit Thus where there are numerous legatees under a will any one legatee may sue the executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands as they have all the same interest in having the will proved (l) Similarly where a person dies leaving numerous creditors, any one creditor may sue on behalf of himself and the other creditors as they all have the same interest in making out the estate of the deceased as large as possible (m) On the same principle of the community of interest any one *rayat* of a village may sue the proprietor of the village for himself and the other *rayats* for a declaration as against the proprietor of their general rights (n) Similarly a villager may bring a suit on behalf of himself and his fellow villagers *for a declaration of a right of way and for an injunction* against the defendant for obstructing the way (o) Likewise any one tax payer may bring a suit against a Municipality on behalf of himself and the other tax payers to restrain the Municipality from misapplying its funds (p)

In *Templeton* v *Russell* (q) a case under the corresponding English rule it was held that the rule only applies to persons who have or claim *some beneficial proprietary right* which they are asserting or defending in the suit But this meaning of the word 'interest was disapproved by the House of Lords in *Bedford (Duke of)* v *Ellis* (r) In the last mentioned case Lord Macnaghten said 'It seems to me that there is no reason whatever for so restricting the rule *Given a common interest and a common grievance* a representative suit was in order *if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent* To limit the rule to persons having a *beneficial proprietary interest* would be opposed to precedent, and not, I think in accordance with common sense Take the case of a creditor s suit which perhaps was the earliest instance of plaintiffs being allowed to sue in a representative character It can hardly be *suggested that a creditor has a proprietary interest in the real or personal estate of his* deceased debtor Thus the disciples of a mutt have sufficient interest' within the meaning of this rule to maintain a representative suit to declare alienations made by the Mahant invalid and have the property alienated handed over to the Mahant for the time being (s) Similarly worshippers of a temple have sufficient 'interest to maintain a representative suit for a declaration that a permanent lease of temple property

(g) *Syedur Raja* v *Baidyanath* (1893) 20 Cal 39
(h) *Monmotho Nath* v *Harish Chandra* (1906) [illegible]) 24 Cal [illegible] 241 [illegible] 206
(i) *Narasimha* [illegible] v *Noola* (1923) 44 Mad L J 24 [illegible] (1923) A M 434
(l) *Cerreeballa* v *Chunder Kunt* (1885) 11 Cal 213
(m) *The Oriental Bank Corporation* v *Gobind* (1883) 9 Cal 604 *Ebrahimbhai* v *Fulbai* (190) 26 Bom 577
(n) *Ahmedbhoy* v *Balkrishna* (1895) 19 Bom 391
(o) *Harish Chandra* v *Kiran Nath* (1911) 26 Cal W N 58 69 I C 910
(p) *Vaman* v *Municipality of Sholapur* (1898) 22 Bom 646
(q) [1893] 1 Q B 435
(r) [1901] A C 1 8
(s) *Chidambaranatha* v *Nallasiva* (1918) 41 Mad 124 42 I C 366

granted to the defendants in possession is invalid (*t*), or for recovering temple property from a trespasser (*u*)

The expression "same interest" must be distinguished from the expression "same transaction" What is required under this rule is that the parties should have the *same interest*, it is not sufficient that their interests arise from the *same transaction* Therefore, where goods of several persons are shipped under separate bills of lading, the mere fact that the goods of all the persons are lost by the same cause does not entitle any one or more of them to bring a representative suit on behalf of themselves and others against the owner of the ship (*v*) But they may all join in one suit under O 1, r 1

When a caste is divided into two parties, one party being in favour of instituting a suit [*e g*, a suit for accounts against the treasurer], and the other consisting of a fairly good number being against it, it is not permissible to any member of the party favouring the suit to institute a suit under this rule *on behalf of himself and all other members of the caste* The reason is that it cannot be said in such a case that all the members have the *same* interest (*w*)

Different interests—Where the parties have not the *same* interest, they must all be on the record Thus in a partition suit all co parceners must be brought before the Court (*x*) Similarly in a suit for contribution brought by a promisor, all the co promisors bound to contribute must be brought before the Court (*y*)

Clubs and other associations—The secretary of a club or other association cannot sue alone in respect of a matter in which the association is interested even if he is authorised so to do by a resolution of the members of the association The suit must be brought by all the members of the association, or by the secretary on his own behalf *and on behalf of the other members* under this rule (*z*) So, if the treasurer of an association misappropriates the funds of the association no one member can sue alone to recover the amount misappropriated, though he may be authorised so to do by a resolution of the association The suit must be brought by all the members, or by any one member on his own behalf *and on behalf of the other members* (*a*) The secretary of a club cannot, unless he has expressly accepted a *personal* liability, be sued personally on a contract, entered into by him on behalf of the club nor can the members of a club collectively be sued through the secretary (*b*) The same remarks apply to an unregistered company (*c*) A suit to eject tenants from property belonging to the caste cannot be brought by the president of the managing committee of the caste, though he may be authorised to do so by a resolution of the committee The suit must be brought by him on behalf of all the members of the caste (*d*) But no suit can be brought under this rule at all if the caste or association is divided into two parties, one party being for the suit and the other against it In such a case it cannot be said that on behalf of all the members of a caste, the members of the caste have the same interest in the 'suit' within the meaning of this rule (*e*) See notes above, 'Numerous parties'

(*t*) *Veerama Chanen* v *Soma* (1920) 43 Mad 410 58 I C 585

(*u*) *Rangaswami* v *Krishnaswami* (1923) 44 Mad L J 116 71 I C 463 (23) A M 276

(*v*) *Markt & Co* v *Knight Steamship Co* [1910] 2 K B 1021

[illegible] *Chhaganlal* (1916) 40 Bom [illegible] [debt due from a member]

(*a*) *Mahomed* v *Husen* (1898) 22 Bom 729

(*b*) *North W P Club* v *Sadullah* (1898) 20 All 497

(*c*) *Ganesha* v *Mundi Forest Co* (1899) 21 All 346

(*d*) *Atmaram* v *Narayan* (1922) 46 Bom 132 64 I C 555 (22) A B 105 See in this connection *Probhat* v *Hari* (1919) 24 Cal W N 206 54 I C 742

(*e*) *Harkisandas* v *Chhaganlal* (1916) 40 Bom 158 164, 33 I C 264

8. **Fraudulent transfer**—A suit to set aside a deed of gift or of trust on the ground that it is in fraud of creditors must be brought by or on behalf of all the creditors Such a suit cannot be entertained if it is brought by only some of the creditors (*f*)

Suit by a member of a community in his own right—This rule is an enabling rule It does not debar a member of a community from maintaining a suit in his own right, though the act complained of is injurious to the whole community Thus if Mahomedans belonging to a particular sect are not allowed to use a mosque for prayer, any member of the sect entitled to use the mosque may sue as plaintiff to enforce the right It is not necessary that the suit should be brought by him on behalf of himself and *all other members* of the sect entitled to use the mosque A Mahomedan entitled to worship in a mosque may sue for a declaration that certain property alienated by the mutavali is wakf property, and for possession thereof from the alienee (*g*) Similarly, any member of a community may bring a suit to set aside unauthorized alienations of endowed property or of property belonging to the community, or for the removal of encroachments upon such property (*h*), or for maladministration of property belonging to the community (*i*)

At what stage of the suit leave should be obtained—The proper course is to obtain permission before the suit is instituted, but there is nothing in the rule that if it is not so done, it cannot be granted afterwards Permission under this rule may be granted even *after* the institution of the suit (*j*)

Whether the leave should be express—It has been held by the High Court of Calcutta that the leave to sue need not be express, it is enough if it can be gathered from the proceedings (*k*) On the other hand, there is a *dictum* of Stuart, C J, in the Allahabad case of *Hiralal* v *Bhairon* (*l*), that the leave to sue must be express

Leave must be granted to definitely named persons—Where this was not done, the suit was dismissed by the High Court of Calcutta (*m*) The other Courts would probably grant fresh leave in such a case See notes above, "At what stage, of the suit, etc

"May be sued"—This rule applies not only to the case of numerous plaintiffs having the same interest but also to the case of numerous defendants having the same interest Thus where the inhabitants of a village assert a right of way over land belonging to the plaintiff, the plaintiff may, with the permission of the Court, sue any one or more of the inhabitants on behalf of them all (*n*) The consent of the defendants on the record is not necessary for this purpose (*o*)

"May defend"—When there are numerous defendants having the same interest any one of them may be sued on his behalf and on behalf of others But where this is not done, and *all* the defendants are on the record any one defendant "may defend the suit on behalf of himself and the rest with the permission of the Court

(*f*) *B*[illegible] v *Derar* (19[illegible] *Maharaj Ba*[illegible] *Hakim Lal* 99[illegible] (*g*) *Ma*[illegible] 403 ([illegible]23) A[illegible] (*h*) *Z*[illegible] All 49 1 8 6 547 680 11 All 19 (1897) (19[illegible]3) *Man*[illegible] 80[illegible] 8[illegible] [illegible]1897) 21 Bom 784, [illegible]0) 23 Mad 28 Mad 399 *Baldeo* 69 *Ahmed Ali* v [illegible]8 33 I C 7 3 v *Gobind* (1883)

(*o*) *Thackersey* v *Hurbhum* (1884) 8 Bom 432

Who should apply for permission—(1) Where a plaintiff intends to *sue* on behalf of himself and others, it is the plaintiff that should apply for leave (2) Similarly where a plaintiff intends to sue one defendant for himself and others, it is the plaintiff that should apply for leave (3) Where numerous defendants having the same interest are all sued, and they are all on the record, and if any one defendant is appointed by the other defendants to defend the suit on behalf of all, it is that defendant that has to apply for leave

Notice and the object of it—Where a person sues or is sued, or defends a suit, on behalf of himself and others, any decree that may be passed in the suit is binding upon them all (s. 11, Explanation VI), unless the decree has been obtained by fraud or collusion (Evidence Act, 1872, s 44) It is therefore necessary that notice of the suit should be given to all the parties who would be bound by the decree, for otherwise a person might be concluded by a suit of which he may never have heard. It is, however, open to any one of the parties, whose name does not stand on the record and who would be bound by the decree under the provisions of this rule and sec. 11, to apply to the Court under sub rule (2) to be made a party to the suit, and the Court will add him as a party, *provided* he satisfies the Court that his interest will be seriously prejudiced if he is not joined as a party (*p*)

Court shall give notice by personal service or by public advertisement—These words show that it is the *duty of the Court* to cause service of the notice or cause an advertisement to be published. It is the duty of the plaintiff, however, to move the Court for that purpose But if he omits to do so, the suit ought not to be dismissed on account of the failure of the Court to perform the duties imposed upon it by this rule The appellate Court should in such a case remand the case to the Court of first instance so that it may issue the notice (*q*)

Title of suit—The title of the suit in such cases is as follows [see Appendix A, Pleadings, (1) Titles of suits] —

A, B on behalf of himself and *all other* creditors of *X Y*	*Plaintiff*
vs	
C D	*Defendant.*

Suit in name of wrong plaintiff—*A* brings a suit under this section on behalf of himself and other creditors of *X* It turns out that *A* is not a creditor of *X* Thereupon *B*, an admitted creditor of *Y*, applies to be added as a plaintiff under O 1, r 10 (1) Has the Court power to grant the application? The question arose in a recent Madras case, but it was left open (*r*) It is submitted that if the suit was instituted by *A* through a bona fide mistake, which it was not in the Madras case, the amendment may be allowed on terms

Addition of plaintiffs after decree—Where the plaintiffs on record neglect to execute the decree passed in a suit brought under this rule, the Court may add other persons having the same interest as the plaintiffs to enable them to execute the decree (*s*)

Decree in a representative suit—The general rule of law is that in suits where one person is allowed to represent others as defendants in a representative capacity, any decree passed can bind those others only with respect to the *property* of those others

(*p*) *Vasonji* v *Esmailbhai* (1910) 34 Bom 4?0, 4 I C 130

(*q*) *Mukh Lal Singh* v *Jagleo Tewari* (1908) 35 Cal 1021 *Sham Lal* v *Musammat Lalli* (1922) 44 All 231 65 I C 259 (2?) A A 16

which he can in law represent, and no *personal* decree can be passed against them, although the party on record *eo nomine* may be made personally liable. This is the principle to be applied to suits brought under this rule (*t*). It has accordingly been held that an injunction in a decree passed in a representative suit brought under this rule is not binding on those who are not actually parties on the record (*u*). See s. 11, Explanation VI.

Costs in a representative suit.—As to costs in a representative suit, see the observations of Marten, J., in the undermentioned case (*v*).

Abatement of suit.—Where a suit is brought under this rule by *A* on behalf of himself and 29 others, and one of the twenty nine who had never applied to the Court to be made a party under sub-r. (2) dies pending the suit, his death does not cause the suit to abate (*w*).

Abatement of appeal.—A suit is brought by *A* and *B* under this rule on behalf of themselves and 387 others against *C*, and a decree is passed in the suit for the plaintiffs. *C* appeals from the decree. Pending the appeal 3 out of the 387 who had never applied to be made parties under sub-r. (2) die. *C* does not apply to bring on record the legal representatives of the three deceased. Does the appeal abate? No, because the three deceased were not parties to the suit *eo nomine* (*x*).

Forty persons institute a suit against *B in their own names* (and not under this rule) and obtain a decree jointly against *B*. *B* appeals from the decree, and applies for and obtains an order from the appellate Court when the appeal is admitted that 4 out of the 40 respondents may be permitted under this rule to defend the appeal. Pending the appeal one of the 36 respondents dies, but no steps are taken to bring his legal representative on the record. Does the appeal abate? Yes, because the decree was obtained by the plaintiffs *for themselves* and not in a representative capacity. Even if the procedure prescribed by this rule is applicable to appeals by the operation of s. 107, the order passed by the appellate Court under this rule did not relieve *B* from the necessity of impleading all those persons who were plaintiffs in the suit and had obtained a decree in their favour, and the representatives of any of those persons who had died. Further, the decree having been passed in favour of all the forty plaintiffs jointly, the appeal abates in its entirety (*y*).

9. [S. 31, R.S.C., O. 16, r. 11.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder and non-joinder.

Misjoinder of parties.—A misjoinder or non-joinder of *parties* is not fatal to the suit (*z*). Where there is a *misjoinder* of parties, the name of the plaintiff or the defendant who has been improperly joined, may be struck out under r. 10, sub-r. (2) below, and the case may be proceeded with. See s. 99 above.

Non-joinder of parties.—As regards non-joinder of parties, a distinction has been drawn between the non-joinder of a person *who ought to have been joined* as a party and the

(*t*) *Sahib Thambi* ... 12 I. C. 1006 ...
(*u*) *Sadagopa Cha*... 12 Mad. 356 ... 33 Mad. 483, ...
(*v*) *Bhuvoobai* v. ... 576-578, 42 I...
(*w*) *Ram Dayal* v. ... no. 46, p. 11...

non joinder of a person whose joinder is only a matter of convenience or expediency [see O 1, r. 10 (2)] A suit by executors, trustees, co owners of immoveable property, partners, etc, for recovery of property in which they are jointly interested, belongs to the former class. As to this class of cases it has been held that if the suit is brought by some only of the persons interested, *e g*, by some of the executors and not all, and if the defendant objects on the ground of non joinder, the plaintiffs may apply for an amendment to join the absent parties as co plaintiffs, in which case the Court should allow the application and not dismiss the suit. But if, after the objection has been raised, the plaintiffs proceed with the suit without bringing on the record the persons whose non-joinder has been objected to, the suit, it has been held, must be dismissed, the reason given is that O 1, r 9, enacts merely a rule of procedure, and it cannot affect rules of substantive law; and, further, that the decree will not be operative, as it must deal with the interest of the absent persons who cannot be bound thereby In the latter class of cases, that is, cases in which the joinder of a person as a party is only a matter of convenience, the absent party may be added or the suit may be tried without him (*a*). The same principle applies in the case of defendants (*b*) See notes to O 1, r. 10, "Limitation Act, sec 22"

As to the stage at which objections as to misjoinder or non joinder of parties should be taken, see r 13 below.

10. [Ss. 27, 32, 33, R. S. C., O. 16, rr. 2, 11, 39.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

Suit in name of wrong plaintiff

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Court may strike out or add parties

should allow amendment]

10. (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

Where defendant is added, plaints to be amended

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary; and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

SUB-RULE (1).

Sub rule (1) is the equivalent of s 27 of the Code of 1882 It corresponds to R S C, O 16, r 2

Scope of sub-rule (1)—Sub rule (1) contemplates cases in which a suit is brought by a plaintiff, and he subsequently finds out that he cannot get the full relief he seeks without joining some other person as co plaintiff (c), or, where it is found that some other person, and not the original plaintiff, is entitled to the relief claimed. In the former case, the application (which must be made by the original plaintiff) will be for *adding*, and in the latter for *substituting* that other person as *plaintiff* But the Court must be satisfied before the application is granted that the amendment has become necessary through a *bona fide* mistake on the part of the original plaintiff The mistake may be either one of fact (d) or of law (e) Where the point is doubtful, it is in itself evidence of a *bona fide* mistake (f) Again where the Court of first instance takes one view of the law and the Court of Appeal takes another, that in itself is evidence of a *bona fide* mistake (g)

Amendment allowed—(1) The Official Assignee of Madras constitutes *A B*, Official Assignee of Bombay, his attorney to institute a suit on his behalf in Bombay *A B*, instead of suing as ' constituted attorney of the Official Assignee of Madras, ' sues by mistake as " Official Assignee of Bombay " The plaint may be amended under sub rule (1) by substituting the former description for the latter. *Sardarmal* v *Arandaval* (1897) 21 Bom 205.

(2) A Hindu appoints *A* guardian of the property of his minor son under his will There is no executor appointed under the will. *A*, believing that his appointment as guardian has the effect of constituting him executor of the will by implication, sues *B* to recover certain property belonging to the estate of the deceased. The Court finds that *A* is not executor by implication. The plaint may be amended by substituting the son as plaintiff *Seshamma* v *Chennappa* (1897) 20 Mad 467 [In this case the amendment was allowed in second appeal.]

Maha
an Lal
C 154

(e) *Hughes* v *Pump House Hotel Co* [1902] 2 K B 485

(f) *Doaba Bank* v *Hiralal* (1920) 2 Lah L. J 402

(g) [1902] 2 K B 485, at p 486 *supra*

(3) *A* sues *B* for work done under a contract *B* contends that the contract has been assigned by *A* to *C*, and *A* therefore has no right to sue *A* admits the assignment, but says that the assignment is not absolute but by way of charge only, and that he has therefore a right to sue It is found that the assignment to *C* is absolute and that there was a *bona fide* mistake on the part of *A* in believing that the assignment was by way of charge only The plaint may be amended by substituting *C* as plaintiff *Hughes* v. *Pump House Hotel Co* [1902] 2 K. B 485

In the last mentioned case, *B* objected to the amendment on the ground that, it having been found that the assignment was an absolute one, *A* had *no cause of action* at the time the action was brought, but the objection was overruled. Cozens Hardy L.J, said "It is said that the rule does not apply when it is shown that the plaintiff has *no right of action* but there are abundant authorities to the contrary effect" The cases cited in the judgment in that case clearly show that the plaint would have been allowed to be amended if that was the application, by *adding C* as plaintiff This interpretation of O 16, r 2, of the English Rules, which corresponds in wording with sub rule (1) of this rule, would seem to be opposed to the view taken by the High Court of Bombay It would seem that the Bombay Court would not allow an amendment if the original plaintiff had *no right of action* at the time the suit was brought (*h*) But this view, it is submitted, is not correct, and one of the cases cited by that Court in support of its view affirms the contrary (*i*) In a recent case, the High Court of Madras expressly held that the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff (*j*)

Amendment not allowed —It would seem that no amendment should be allowed under sub rule (1), if the rights in dispute between the *new plaintiff* and the defendant would not be the same as those in dispute between the *original plaintiff* and the defendant A suit is brought by an importer of Roskopf Patent watches for infringement of trade mark alleging that he has got the *exclusive right to use* the trade mark in India The trade mark belongs to the manufacturer, and *not to the importer* The importer is subsequently advised that he cannot sue on the *manufacturer's* trade mark, and he thereupon applies that the manufacturer may be either added or substituted as plaintiff. If the manufacturer is made a party his claim will raise questions as to how far he is entitled to the trade mark in the *country of its origin* and consequently in India That would be a case wholly different from that of the importer Can the manufacturer be made a party under these circumstances? The question arose in a Bombay case (*k*) Batty, J said that the point was one on which there seemed to be considerable room for doubt Eventually the application was refused on the ground that it was made too late

Upon such terms as the Court thinks fit —Liberty to amend may be given upon the terms that the plaintiff should pay to the defendant his costs of the suit upto and including the order of amendment, and that the new plaintiff should only be entitled to such relief as he could have claimed if the suit had been commenced at the date on which he was added as a party (*l*)

(*h*) *Bhanu* v *Kashinath* (1896) 20 Bom 537 *Sajad Abdul* v *Gulam* (1896) 20 Bom 6 7

(*i*) See *Chunder* v *Gocool* (1881) 6 Cal 3"0 3 3

(*j*) *Krishna Bai* v *The Collector and Government Agent Tanjore* (190) 30 Mad 419

(*k*) *Heinger* v *Droz* (1901) 25 Bom 433 463 66

(*l*) *Ayscough* v *Bullar* (1889) 41 Ch. D 341 346 *Attorney-General* v *Pontypridd Water works Co* [1908] 1 Ch. 388

r. 10. **Consent**—No person can be added or substituted as plaintiff under sub rule (1) without his consent Thus a company cannot be made a plaintiff in a suit without its consent (m) See sub rule (3)

Limitation—Section 22 of the Limitation Act provides that when after the institution of a suit, a party is *substituted* or *added* as a plaintiff or defendant, the date of *substitution* or *addition* is to be deemed, as regards that party, as the date of institution. It has been held that this provision of the law relates only to the addition of parties under sub rule (2), and not under sub rule (1) The result is that a party may be substituted or added under sub rule (1) even after the period of limitation. Thus where an agent sued in his own name, and subsequently, at a time when a new suit would have been barred by limitation, his principals were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation (n)

SUB-RULES (2) to (5)*

Sub rules (2), (3) and (5) correspond to s 32 of the Code of 1882 and to R S C, O 16, r 11 Sub rule (4) corresponds to s 33 of the Code of 1882

Old section—Under the old section 32 there was a distinction between the power of the Court to *strike out* parties and the power to *add* parties Under that section the power to *strike out* parties could only be exercised *on the application* of a party, and that too if the application was made *on or before the first hearing* But the power to *add* parties could be exercised by the Court *at any time*, and *even without any application* Under sub rule (2), the power to *strike out* as well as to *add* parties may be exercised by the Court at *any stage of the proceedings*, and even without any application by a party

"At any stage of the proceedings"—The power to strike out or add parties may be exercised *at any stage of the proceedings* Thus fresh parties were added in one case after a decree had been passed and a reference made to the Commissioner to take accounts and sell the property (o) In another case fresh parties were added *after* a suit had been reinstated under s 103 of the Code 1882 [now O 9, r 13] (p) In a Calcutta case a fresh party was added in a suit for partition after the preliminary decree had been passed and the Commissioner had made his report, but before the drawing up of the final decree (q) Under the corresponding English rule it has been held that the Court has jurisdiction to allow amendment even after final judgment, *so long as anything remains to be done in the action*, though it be only assessment of damages (r)

Parties when added.—Under this rule a person may be added as a party to a suit in the following two cases —

(1) when he *ought* to have been joined as plaintiff or defendant, and is not so joined, or

(2) when, without his presence, the questions in the suit cannot be completely decided

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(m) *Ram Narain* v *Ram Kishen* (1911) Punj Rec no 46 p 165 10 I C 615
(n) *Ratji* v *Mahadev* (1898) 22 Bom 672
(o) *Vakatchand* v *Advocate-General* (1871) 8 B H C 96
(p) *Tikam Singh* v *Kishore* (1898) 20 All 188
(q) *Jotindra* v *Bejoy* (1905) 32 Cal 483
(r) *The Duke of Buccleuch* [1892] 1 201

There is no jurisdiction to add a party in any other case (s) Thus a person should not be added as a defendant merely because he would be *incidentally* affected by the judgment (t)

Parties cannot be added so as to introduce quite a new cause of action—*A* purchased goods from *B* by sample The bulk did not correspond with the sample, and *A* thereupon sued *B* for damages. *B* contended that he had purchased the goods in question from *X* by sample, and applied that *X* should be added as a party to the suit, as the question between him (*B*) and *X* was the same as the question between him (*B*) and *A* (*viz* whether the goods were according to the sample), so as to relieve him (*B*) from the necessity of bringing a fresh suit against *X* in the event of the Court holding that the goods were not according to the sample *Held*, refusing *B*'s application, that *X* was not a person who "ought" to be joined as a party to the suit, nor was his presence necessary to decide "the questions involved in the suit" In this case *A* had nothing to do with *X*, and to add *X* as a party would be to introduce a new cause of action which existed only as between *B* and *X* The Court would then have to inquire into the circumstances under which *B*'s agreement with *X* was entered into, an inquiry with which *A* had nothing to do (u)

Parties cannot be added so as to alter the nature of the suit—*A* sued for his share of the estate of a deceased relative On an application to have other persons interested in the said estate added as parties to the suit, it was held that the Court could not add them as parties, as to do so would be to alter the nature of the suit by converting it into a general administration suit (v) It has similarly been held that parties should not be added in a suit for rent so as to change it into a suit for title though questions of title may be incidentally investigated in a suit for arrears of rent, e g, where the tenant disputes the extent of the title of the plaintiff to the arrears claimed by the plaintiff (w)

Transposing defendant as plaintiff—The Court has power under sub r (2) to transfer a defendant to the category of plaintiffs Thus where *A* and *B* are trustees of certain property, and *A* brings a suit to recover the property from *C* impleading *B* as a defendant, the Court may on *A*'s death transpose *B* as plaintiff for the further conduct of the suit (x) In a Bombay case *A* brought a partnership suit for accounts against 12 defendants He then settled with most of the defendants, and applied to the Court for leave to withdraw the suit or that the suit might be dismissed Two of the defendants objected to the dismissal of the suit, and applied that they might be made plaintiffs, and that the plaintiff might be made a defendant and the suit proceeded with The Court granted the application (y) A defendant may be transferred to the category of plaintiffs on his application even after a preliminary decree for accounts has been passed (z) But the Court should not make an order transferring a defendant to the category of plaintiffs, if the result of so doing would be to change the character of the suit. (a) Again where a plaintiff *A* claims to be solely entitled to a certain sum of money due from a defendant *B*, and he makes a third person *C* who claims title to the money as against *A* a defendant in the suit, the Court should not accede to

(s) *McCheane* v *Gyles* (No 2) [190-] 1 Ch. 911 918

[illegible]

[illegible]

(w) *Abdul Gafur* v *Ali Miah* (1923) 28 Cal W N [illegible]

r. 10. C's application to make him a plaintiff in the suit in place of A, though it may be found that C, and not A, is entitled to the money To do so would be to deprive A of his right to ask for a determination upon his claim (b)

Transposing plaintiff as defendant—In the case of a difference between co plaintiffs, the proper course is to make an order that the name of one of them be struck out as plaintiff and added as a defendant (c) But such an order will be made only on security being given by the plaintiff who continues on the record as plaintiff for the costs of the original defendant up to the date of the amendment (d) Such an order may be supported by the terms of sub r (2), namely, "on such terms as may appear to the Court to be just"

Striking out name of party "improperly joined."—The impropriety referred to in this rule is in introducing a party who has no connection with the relief claimed in the plaint (e)

"Who ought to have been joined"—Sub r (2) provides for the addition of (1) necessary parties and (2) of proper parties. Necessary parties are parties "who ought to have been joined, that is, parties necessary to the constitution of the suit without whom no decree at all can be passed (f) Proper parties are those whose presence enables the Court to adjudicate more "effectually and completely" (g) see next paragraph

Thus all co sharers are necessary parties to a suit for partition and they should all be joined as parties to the suit Similarly, in a suit to recover trust property, all the trustees must be joined as parties [O 31, r 2] But the Official Assignee is not a necessary party in a suit against an insolvent (h) [see O 22, r 10, notes 'Assignment of interest," ills (3) and (4)] In a suit to set aside an order for rateable distribution *all persons interested in the distribution* must to parties to the suit (i), see s 73 See notes below, "Limitation Act.'

"Whose presence before the Court may be necessary"—A person may be added as a defendant to a suit, though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit (j) Such a person is called a *proper* party as distinguished from a *necessary* party Thus if a suit is brought by a legatee against an executor for a legacy, but the estate is not sufficient to pay all the legacies in full the executor may apply under sub rule (2) that the other legatees may be made parties, so that if any rateable abatement is requisite, the extent of such abatement may be ascertained in a manner binding on all the legatees (k). See notes above, "Who ought to have been joined'

"Questions involved in the suit."—This refers to questions as between plaintiffs and defendants, and not to questions which may arise between co plaintiffs or between co defendants *inter se* (l)

Improper addition of plaintiff or defendant.—Sub rule (2) does not enable a Court to override the effect of O 2, r 3 Hence if the joinder of a person as

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(b) *Jarao v Bhagwan* (1921) 19 All L J 833 63 I C 773

(c) [illegible]

plaintiff would result in a *misjoinder of plaintiffs and causes of action*, or the joinder of a person as defendant would result in a misjoinder of *defendants and causes of action*, the application should be refused (*m*)

Joint contractors.—See notes to O 1, r 6, "Joint liability on a contract"

Consent of person added as plaintiffs.—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit The proper course is first to require him to join as plaintiff, and if he refuses to join as plaintiff, then to join him as defendant But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (*n*)

Suit against a dead person.—Where a suit is brought against a person who was dead prior to the institution of the suit, the plaint cannot be amended by bringing his legal representative on the record, though the suit may have been filed in ignorance of his death The reason is that a suit against a dead man is a nullity from the first (*o*)

Limitation Act, sec 22, provides amongst other things that when, after the institution of a suit, a party is added as a plaintiff or defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit It has been held under this section that where necessary parties are not joined within the period of limitation, the suit must be dismissed Necessary parties mean parties necessary to the constitution of the suit (*p*), that is, persons whose joinder is necessary to enable the Court to award such relief as may be given in the suit as framed (*q*) Thus in a suit by one of several joint promisees the other promisees are necessary parties for no relief can be given to one of them The suit is not perfectly constituted unless all the co-promisees join, for the plaintiff can only enforce his claim in conjunction with them If in such a suit the other promisees are not joined within the period of limitation, the suit must be dismissed (*r*) Similarly where *A*, *B* and *C* were three partners, and *A* sued *B* only for partnership accounts, and *C* was added as a *defendant* after the period of limitation, the suit was dismissed (*s*) On the same ground, where a member of a joint Hindu family sued in his own name for a *joint* debt without making the other members parties to the suit, and the defendant raised an objection on the ground of non joinder, and the period of limitation had by that time expired, it was held that it was too late to join the other members as *co plaintiffs*, as the claim was at that date time-barred, and the suit was accordingly dismissed (*t*) And the suit must likewise be dismissed, even if the Court of its own motion adds to the other members as plaintiffs in circumstances such as those mentioned above The mere fact that the Court of its own motion orders that the name of any person be added as a party does not render the provisions of s 22 inapplicable to the case (*u*) There is nothing in sub rule (2) which frees the Court when acting of its own motion, from the restrictions of the Limitation Act, in other words, a Court, acting under sub rule (2), is bound by the provisions of s 22 of the Limitation Act (*v*) On the other hand, when a suit can be, and is, constituted without

(*q*) *Guruvayya* v *Anant* (1904) 28 Bom 11, 17

10. joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed to such a case the provisions of s 22 do not apply (*w*) Thus where a promissory note is passed to the manager of a joint Hindu family he may sue the promisor without joining the other members of the family as co plaintiffs In such a case if the other members are joined as plaintiffs after the statutory period has expired, their joinder, being unnecessary, does not prevent the suit as originally constituted from being in time (*x*) It has similarly been held that that section does not apply when a person is added as a party merely to enable the Court effectually and completely to adjudicate upon the questions involved in the suit without any relief being claimed against him (*y*) Further, the section does not apply where an assignee from a party to a suit, the assignment having been made pending the suit, is joined as a party to the suit (*z*) It has also been held that that section does not apply where a person is joined as a defendant in a suit, and he is subsequently added as a plaintiff (*a*) In a case before the Privy Council, where relief was claimed against a *debuttor* estate, but none of the defendants was impleaded as representing the estate, and subsequently, though after the expiration of the period of limitation prescribed for the suit one of the defendants [*i e*, a person *already a party* to the suit] was impleaded as *sebait* and as representing the estate it was held that s 22 of the Limitation Act did not apply to the case (*b*)

Misdescription.—Where there is a misdescription of a defendant in the title of a suit there is complete power in the Court to make the necessary correction without regard to lapse of time In this class of cases it is material to ascertain against whom the relief is claimed *A* sues the Municipal Committee of Gorakhpur through the Secretary instead of suing the Committee through the President as he should have done The relief claimed is against the Committee *No personal relief* is sought against the Secretary The case is one of misdescription and the plaint ought to be allowed to be amended though the application for amendment was made after the expiry of the period of limitation (*c*) *A* sues ' The Agent, B B & C I Ry Co, Ltd ' The relief claimed is against the railway company No personal relief is claimed against the Agent *A* applies for amendment of the plaint after the expiry of the statutory period by striking out the word ' Agent ' The amendment should be allowed, the suit being substantially against the company (*d*) But if the relief claimed was as against the Agent *personally*, the Court may allow the amendment if there is no question of limitation (*e*), but no such amendment should be allowed after the expiry of the period of limitation for the suit (*f*)

I C 590
(*x*) *Kishen Parshad* v *Har Narain* (1911) 38 I A 45 33 All 272 9 I C 739
(*y*) *Mahamed Ishaq* v *Sheikh Akramul* (1908) 12 C W N 84
(*z*) *Arunachella* v *Orr* (1917) 40 Mad 722 29 I C 634 but see *Abdul Rahman* v *Amir*

(*b*) *Peary Mohan* v *Narendra Nath* (1905) 3 Cal. 582 affirmed (1909) 37 Cal 229 37 I A 27, 5 I C 404
(*c*) *Manni* v *Crooke* (1880) 2 All 296
(*d*) *Saraspur Manufacturing Co* v *B B & C I Ry Co* (1923) 47 Bom 785 73 I C 102 (23) A B 452
(*e*) *India General S N & R Co Ltd* v *Lal*

Appeal.—No appeal lies under this Code from any order made under this rule But where the name of a defendant is struck out under this rule on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such (*g*) Similarly if in a suit for partition the name of one of the defendants is struck out on the ground that he has no interest in the properties, the subject matter of the suit, he may appeal from the order, as the order operates as a decree against him (*h*)

Revision—An order refusing to add a party as a defendant is not subject to revision under s 115 But the High Court may interfere under s 107 of the Government of India Act, 1915, if there is a denial of the right of fair trial (*i*)

Conduct of suit

11. [S. 32, 6th para, *Cf* R. S. C., O. 16, r. 39.] The Court may give the conduct of the suit to such person as it deems proper.

Appearance of one of several plaintiffs or defendants for others

12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

Objections as to non joinder or misjoinder

13. [S. 34.] All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Scope of the rule—This rule refers to two kinds of objections, the one for non joinder of parties and the other for misjoinder of parties. These objections must be [illegible]

Court of first instance, it will be disallowed in appeal. See notes to O 1, r 9, above See also s. 99

"Unless the ground of objection has subsequently arisen."—These words are new. When the ground of objection has arisen subsequent to the settlement of issues, the objection may be taken even after the settlement of issues. In

(*g*) *Rama Rao* v *The Raja of Pittapur* (1910) 42 Mad 219 49 I C 835

(*h*) *Ramji* v *Alafkhan* (1924) 3 Pat 859, 85 I C 90 (25) A P 121

(*i*) *Rabbaba* v *Naorjehan* (1886) 13 Cal 90 *Kali Rai* v *Tulsi Ram* (1925) 4 Pat 723 93 I. C 932, (25) A P 207

(*j*) *Obhoy* v *Hury Churn* (1892) 8 Cal 277 [illegible]

r. 13. fact, it was so held under the old section though the words "unless the ground of objection has subsequently arisen" did not occur in that section. Thus if a co parcener or a reversioner or a remainderman is born *after* the settlement of issues in a suit to which he is a necessary party, the defendant may object to his non-joinder, though it be *after* the settlement of issues, if the plaintiff does not take steps to join him as a party to the suit Thus in a partition suit all co oparceners must be joined as parties, even though some of them may be born after the institution of the suit Similarly, where a woman who is a party to a suit is married *after* the settlement of issues and the nature of the suit is such that the husband is a necessary party to it, the plaintiff should take steps to have the husband made a party to the suit, otherwise the defendant may object for non joinder of the husband, though it be *after* the settlement of issues (n)

As to misjoinder of causes of action, see O 2, r. 7

ORDER II.

Frame of Suit.

.2, 1, 2.

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Frame of suit

From this rule read with rule (2) below, the intention of the Legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit (o)

2. [S. 43.] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Relinquishment of part of claim.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue

Omission to sue for one of several reliefs

(n) *Modhe* v *Dongre* (1881) 6 Bom 609

(o) *Naral Chand* v *Mohun Bibi* (1899) 25 Cal 371. See also *Ramaswami* v *Vythinatha* (1903) 26 Mad 760, 764 766, *Mardamania* v *Thirurengadam* (1908) 31 Mad 385, 394 396

for all such reliefs, he shall not afterwards sue for any relief so omitted. **O. 2, r. 2**

Explanation —For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to *B* at a yearly rent of Rs 1,200 The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid *A* sues *B* in 1908 only for the rent due for 1906 *A* shall not afterwards sue *B* for the rent due for 1905 or 1907

Changes in the section —The words "obtained before the first hearing" after the words "the leave of the Court" [see sub rule (3)] have been omitted. The words "and successive claims arising under the same obligation" have been added into the Explanation The illustration has been expanded so as to comprise the case of rent due for a period *subsequent* to the one for which the suit is brought

Cause of action —In *Pittapur Raja* v *Suriya Rau* (p), their Lordships of the Privy Council, referring to the expression "cause of action" in this rule, said that it meant ' the cause of action for which the suit was brought." Referring to this decision, their Lordships said in the recent case of *Muhammad Hafiz* v *Muhammad Zakariya* (q) · "Their Lordships see no reason to attempt to qualify or to extend those words, because they are in fact nothing but a repetition of the exact words of the Code, the cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. ' See notes to s 20, "Cause of action," on p 90 above

Splitting of claim —This and the preceding rule are aimed against a multiplicity of suits in respect of the same cause of action (r) The object of the present rule is, to use the language of r 1 of this order, "to prevent further litigation.' For that purpose the rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the *same* cause of action. He is not entitled to split his cause of action into parts, and bring *separate* suits in respect thereof If he *omits* to sue in respect of, or *intentionally relinquishes*, any portion of the claim arising from the *same cause of action*, he will be precluded from suing in respect of the portion so omitted or relinquished, though he may allege in his plaint that he intends bringing a second suit for the portion omitted (s) But it cannot be said of a plaintiff that he has *omitted* to sue in respect of a portion of his claim, unless he was, at some time prior to the suit, *aware or informed of* the claim or of the facts which would give him a cause of action (t) If the plaintiff was aware of the claim, and omitted to sue in respect thereof, he could not afterwards sue in respect thereof, *though the omission was accidental or involuntary* (u) Fot the definition of cause of action, see notes to s 20, "Cause of action," p 90 above

Amanat v *Imdad Hosin* (1888) 15 Cal 800, 15

Illustrations

, r. 2. (1) *Relinquishment*—*A* owes *B* Rs 2,200 *B* may relinquish Rs 200 to bring his suit within the jurisdiction of a Presidency Small Cause Court, and may sue *A* in that Court for Rs. 2,000 only Here the relinquishment being *intentional*, *B* cannot afterwards sue *A* for Rs. 200, the portion relinquished. But if the suit is transferred, on *A*'s application, to the High Court, *B* may add Rs 200 to his claim, the High Court having jurisdiction over the entire claim *Ramlall* v *Bhajahari* (1896) 1 C W N 32

(2) *Accidental omission.*—A Mahomedan wife sues her husband to recover property belonging to her including Government paper of the value of Rs. 10 000 and a decree is passed in her favour She afterwards sues the husband to recover from him Government paper of the value of Rs. 500, alleging that she omitted to include it in the previous suit *by an oversight* The suit is barred, for she was *aware of her claim* when she brought the previous suit *Buloor Ruheem* v *Shumsoonnissa* (1867) 11 M I A. 551

(3) *Instalments*—Where a promissory note is payable by instalments, and two or more instalments have become due, and the holder of the note sues only for one of the instalments and *omits* to sue for the other instalments, he cannot afterwards sue for those instalments *Mackintosh* v *Gill* (1874) 12 B L R 37, *Narayan* v *Vimba* (1906) 8 Bom L R 547 Similarly if a promissory note is made payable by instalments, and it is provided that upon a default in the payment of any one instalment on the agreed date, the promisee shall be entitled to payment of the balance due at once, and the promisee, upon a default occurring, sues to recover the amount of the first instalment only, he is precluded from suing afterwards for the balance *Shrinivas* v *Chanbasappagouda* (1923) 25 Bom L.R 203, 72 I C, 290, (23) A. B 201

(4) *Two promises for one debt*—*A* accompanies *B*, a pleader to Hardwar, as *B*'s medical attendance, for which Rs. 1,300 become due to him as his fees. *B* passes a promissory note to *A* for Rs. 700, and agrees as for the balance of Rs 600 to do certain legal work for *A* *B* dies without doing the legal work undertaken by him. *A* sues *C*, *B*'s son, upon the promissory note, and a decree is passed for him He then brings another suit against *C* to recover the Rs. 600, alleging that the legal work which *B* had agreed to do for him had not been done The suit for the recovery of Rs 600 is barred *Preonath* v *Bisnath* (1907) 29 All 256 The above decision has been dissented from by the High Court of Madras, on the ground that if several promissory notes are executed for portions of the same debt, each promissory note creates a distinct cause of action on which a separate suit may be brought *Anantanarayana* v *Savithri* (1913) 36 Mad. 151, 158, 13 I C 458

(5) *Set-off*—*A* sues *B* for Rs 200 As against the said claim, *B* claims to set off Rs. 200, being *part* of a sum of Rs. 1,200 alleged to be due to him by *A*, but omits to counterclaim from *A* the balance of Rs 1,000 *B* cannot afterwards sue *A* to recover Rs. 1,000 *Nawbut* v *Mahesh* (1905) 32 Cal 654

(6) *Continuous account.*—When a tradesman has a bill against a party for any amount in whcih the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but *one cause of action* and cannot be divided *Bonsey* v *Wordsworth* (1856) 18 C B 325, 334, *Kedar Nath* v *Dinabandhu* (1915) 42 Cal 1043, 31 I C. 626.

(7) *Omission of portion of a claim in a suit against one of several promisors*—The omission of a portion of a claim in a suit against one of several promisors is no bar to a subsequent suit against another promisor in respect of the portion so omitted *A* lets a house to *B* and *C* at a yearly rent of Rs. 1,200 The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 for the rent due for 1907 *A*

cannot afterwards sue *B* for the rent due for 1905 or 1906, but he can sue *C* for the rent due for those two years (*t*) See the illustration to the present rule

(8) A suit for redemption of two out of three plots comprised in one mortgage is a bar to a subsequent suit for redemption of the third plot *Bhau Daji* v *Patlu* (1922) 24 Bom L R 1157, 73 I C 862, ('23) A B 63

(9) A suit by a reversioner against *X* to recover two out of three properties alienated to him by a Hindu widow having a limited interest is a bar to a subsequent suit against him to recover the third *Darbari* v *Gobind* (1924) 46 All 822, 80 I C. 31, ('24) A A 902

Explanation to the Rule :—

A Obligation and collateral security for its performance —The Explanation to the present rule is not intended to be an illustration of the foregoing provision, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule (*w*) In a recent case their Lordships of the Privy Council said (*x*) ' The [Explanation] shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as *one and the same cause* of action That provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time " It is important therefore in considering the effect of the code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here " See *notes below*, "*First suit for interest due under a mortgage, second suit for principal*, on p 402,' and " Exceptions to the rule against splitting of reliefs," on p 406

B Successive claims arising under the same obligation constitute a single cause of action —The words " successive claims arising under the same obligation" have been added into the Explanation, and the illustration to the rule has been expanded, to give effect to a Calcutta decision where it was held that a claim in respect of *all* arrears of rent constitutes a *single* cause of action (*y*) The illustration shows that if rent has become due for the years 1905, 1906 and 1907, the landlord can bring only one suit for the whole of the rent in arrears, and that if he sues for the rent due for a particular year only, he will be precluded from suing for the rent due for the other years It must, however, to be noted that though this rule precludes the landlord from bringing *a fresh suit* for rent not included in the former suit, it does not prevent him from adopting *any other remedy* the law gives him to recover the rent Thus though in the case put in the illustration the landlord *cannot sue for the rent* due for the year 1905 or 1907, he *can distrain* for the rent due for those years (*z*) On the same principle as in the illustration, a suit for an annuity for the year 1917 is a bar to a subsequent suit for annuity for the years 1914, 1915, and 1916 (*a*) See also ill (7) above

Interest accruing due from time to time under a mortgage deed maintenance, *malikana*, &c , are other instances of " *successive claims* arising under *the same obligation* "

Distinct causes of action.—If the cause of action in the subsequent suit is

(*v*) *Ramanjulu* v *Aravamudu* (1910) 33 Mad 317 5 I C 735
(*w*) *Payana* v *Pana Lana* (1914) 41 I A 142, 148 26 I C 228
(*x*) *Kishan Narain* v *Pala Mal* (1923) 50 I A 115 117 4 Lah 32 34, 72 I C 187, ('22) A 1 C 412
(*y*) *Taruck Chunder* v *Panchu* (1881) 6 Cal 791, *Mahomedbhai* v *Adamji* (1922) 46 Bom 229, 235 64 I C 919 ('22) A B 152
(*z*) *Eswara Doss* v *Venkataroyer* (1898) 21 Mad 236
(*a*) *Abdul Karim* v *Muhammad* (1922) 44 All 663 68 I C 9*0, ('22) A A 379
(*b*) *Mulluck* v *Sheo Pershad* (1896) 23 Cal 821, 825

O. 2. of action which the plaintiff may have against the defendant (c) When the question is whether the cause of action in the subsequent suit is identical with that in the first suit, one great criterion is whether the same evidence will maintain both actions (d) For the meaning of cause of action see notes above, "Cause of action

Illustrations

(1) *Different properties, different defendants* — A, claiming as his father's heir, sues *B* for possession of a certain piece of land He then sues *C*, *also as his father's heir*, for possession of another piece of land The fact that both pieces of land are claimed by *A under the same title* does not preclude *A* from maintaining separate suits against *B* and *C* *Dampanaboyina* v *Addala* (1902) 25 Mad 736, *Narayan* v *Shamrao* (1903) 27 Bom 379, *Ramchandra* v *Gyanoba* (1920) 44 Bom 372, 382, 56 I C 349

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging *jointly to the family and strangers* *Purushottam* v *Atmaram* (1899) 23 Bom 597

(3) A sues *B* for specific performance of an agreement for the sale to him of *B's* land, and obtains a decree In execution of the decree *A* is put in possession of a portion only of the land as it is found that the rest of the land did not belong to *B*, but to *B's* son A subsequent suit by *A* against *B* for recovery of an aliquot portion of the price to the extent of the son's share is not barred under this rule the cause of action being entirely distinct *Venkatarama* v *Venkata* (1901) 24 Mad 27, *Parangodan* v *Perumtoduka* (1904) 27 Mad 380

(4) A suit by a Mahomedan widow for *dower* is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband's estate in accordance with a proved local custom *Mahomed* v *Hasin Banu* (1894) 21 Cal 157, 20 I A 155

(5) A suit to *eject* a tenant holding under a lease is no bar to a subsequent suit against him for *rent* under the same lease *Subraya* v *Rathnavelu* (1909) 32 Mad 330, 2 I C 313

(6) The dismissal of a suit for a *declaration of title* under s 42 of the Specific Relief Act, 1877, on the ground that the plaintiff, not being in possession, ought to have asked for possession also, is no bar to a subsequent suit for a *declaration of title* and for *possession* *Darbo* v *Keshorai* (1879) 2 All 356, *Sarsuti* v *Kunj Behari Lal* (1883) 5 All 345, *Jibunti Nath* v *Shib Nath* (1882) 8 Cal 819, *Nonoo Singh* v *Anand* (1885) 12 Cal 291, *Mohan Lal* v *Bilaso* (1892) 14 All 512, *Sayed Sulman* v *Bontala* (1915) 38 Mad 247, 20 I C 418 Similarly the dismissal of a suit for an *injunction* to restrain the defendant from interfering with the plaintiff's possession of certain lands on the ground that the plaintiff was not in possession is no bar to a subsequent suit for *possession* *Bande Ali* v *Gokul Misir* (1912) 34 All 172 13 I C 154

(7) *Promissory note—original cause of action* —*A* sues *B* upon a *promissory note*, but the action fails owing to a material alteration in the note *A* is not precluded from subsequently suing *B* on the *original cause of action*, i e, from suing *B* to recover the consideration for which the note was given The two causes of action are quite distinct *Payana* v *Pana Lana* (1914) 41 I A 142, 26 I C 228, *Beni Ram* v *Ram Chandar* (1914) 36 All 560, 26 I. C 302 See also *Bhag Bhari* v *Gujar Mal* (1917) Punj Rec, no 63 p 230, 38 I C 623

(c) *Puttapur Raja* v *Suriya Rau* (1885) 8 Mad 520, 524 12 I A 116 119 *Amanat* v *Imdad* (1888) 15 Cal 800 15 I A 106 *Hanuman* v *Hanuman* (1892) 19 Cal. 123 18 I.A 158 *Payana* v *Pana Lana* (1914) 41 I A 142 148 26 I C 228 *Kulada Prasad* v *Khud ram* (1922) 27 Cal W N 673, 674

(d) [illegible]

(8) *A*, alleging that he is entitled to one moiety of a piece of land and that *B* is entitled to the other moiety, and alleging further that *B*, falsely claiming the ownership of the whole land, demolished the structures standing on *A* s moiety of the land and dispossessed *A* of his moiety, sues *B* for damages for demolition of the structures and appropriation of the materials A decree is passed in the suit for *A* Subsequently *A*, alleging that since the demolition of the structures *B* has been occupying the entire property to the exclusion of *A* by denying *A* s title thereto, sues *B* for a declaration of title to one moiety of the land and for separate possession thereof Here the cause of action is the act of dispossession, and it being the same in both the suits, the second suit is barred under this rule *Khardah Company Ltd* v *Durga Charan* (1919) 46 Cal. 640, 58 I C 636

(9) A suit by *A* against *B* to recover immoveable property in consequence of having been improperly turned out of possession, is no bar to a subsequent suit to recover from the same defendant moveable property in consequence of its wrongful detention *Pittapur Raja* v *Suriya Rau* (1884) 8 Mad 520, 12 I A 116

(10) A suit by reversioners against a Hindu widow for a declaratory decree and for an injunction forbidding alienations of her husband s property is no bar to a subsequent suit by them for a declaration that a gift made by her of the property is inoperative and cannot affect their reversionary rights *Chand Kour* v *Partab Singh* (1888) 15 I A 156, 16 Cal. 98

(11) The dismissal of a suit for specific performance by a purchaser is no bar to a subsequent suit by him for the recovery of earnest *Munni Babu* v *Kunwar Kamta* (1923) 45 All 378, 72 I C 86, ('23) A A 321

(12) The dismissal of a suit for *rent* on the ground that the plaintiff was not the landlord but that he and the defendant held the land as tenants in common, is no bar to a subsequent suit by the same plaintiff against the same defendant for *partition* of the land *Timappa* v *Manjamya* (1923) 25 Bom L R 491, 73 I C 424, ('23) A B 440

(13) The dismissal of a suit for possession by *A* against *B* on the ground that *B* held the property as a mortgagee, is no bar to a subsequent suit by *A* against *B* for redemption *Jaimal* v *Ganeshi Mal* (1923) 4 Lah 187, 75 I. C 528, ('24) A L 143

(14) A mortgage deed contains a stipulation conferring upon the mortgagee the option to sue for interest or for possession in the event of the mortgagor s failure to pay interest at the stipulated time The mortgagor fails to pay interest, and the mortgagee sues him *for the interest* The mortgagor again fails to pay interest, and the mortgagee brings a suit against him for *possession* The previous suit is not a bar to the subsequent suit *Parmeshri Das* v *Fakiria* (1920) 1 Lah 457, 59 I C 71 [F B]

For other cases see foot note (*e*)

First suit for possession subsequent suit for mesne profits prior to suit—It has been held by the High Court of Calcutta (*f*) Madras (*g*) and Bombay (*h*), that a suit for possession of land is not a bar to a subsequent suit for mesne profits of such land accrued due *prior to* the institution of the suit for possession (*i*) the reason given being that the cause of action for possession is quite distinct from the cause of action for mesne profits,

(*e*) *Hansraj* v *Lalji* (1904) 28 Bom 447 Cha

(*h*) *Ramchandra* v *Lodha* (19?1) 26 Bom L. R. 288 80 I C 2?9 ('24) A B 368

(*i*) *Lallessor* v *Janki* (1892) 19 Cal. 615

r. 2. and, conversely, a suit for mesne profits is not a bar to a subsequent suit for possession (j) On the other hand, it has been held by the High Court of Allahabad (k), that a *suit* for possession *is* a bar to a subsequent suit for mesne profits accrued due prior to the date of the suit But it has been held by the same Court that a suit for possession is not a bar to a suit for mesne profits *accrued due subsequent to* the suit for possession (l) See O 20, r 12, see also notes to s 11, on p 67 above

First suit for interest due on a mortgage, second suit for principal—Where the principal secured by a mortgage *has become due*, and the mortgagee sues for interest only, the suit for interest is a bar to a subsequent suit for principal (m), *unless* there is a separate covenant for the payment of interest *secured in a separate manner, e g*, a covenant enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of principal (n)

In *Muhammad Hafiz* v *Muhammad Zakariya* (o), *A* executed a simple mortgage in 1910 The mortgage provided by cl. 2 that the interest should be paid monthly, and that if it was not paid for 6 months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by bringing a suit without waiting for the expiration of the time provided for repayment of the principal By cl. 7 it was provided that if the principal with interest was not paid within 3 years, the mortgagee should be entitled to sue for principal and interest. In 1914, the mortgagee sued in respect of the *interest* due and obtained a decree In 1915 he brought a second suit in respect of the *principal and the interest then due* Their Lordships of the Privy Council held that the second suit could not be maintained, having regard to the provisions of this rule Their Lordships said "What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months or that the three years had elapsed, and the principal was also unpaid, *and in either case they could have sued for realisation to provide for the whole amount secured by the deed*" Not having done so, they were debarred from instituting the second suit

The question came up again before their Lordships of the Privy Council in *Kishan Narain* v *Pala Mal* (p) The rule to be deduced from that decision may be stated thus If a mortgage deed provides for the payment of principal and interest as *independent obligations*, a suit for a *personal* decree for the interest due is no bar to a subsequent suit to realize the principal. In such a case the two causes of action are distinct. But in the case of a mortgage deed which upon a default in the payment of interest gives the mortgagee the right to realize both the principal and interest, if the mortgagee, upon a default occurring sues to realize the interest *from the property*, O 2, r 2, precludes him from afterwards suing to realize the principal due, even if by his plaint in the first suit he has purported to reserve the right to do so The reason is that *in such a case the cause of action—the non payment of the interest—gives rise to two* forms of relief which the Code provides shall not be split see the Explanation to the Rule Their Lordships observed that if the mortgagees in their first suit claimed only a *personal* relief in respect of the unpaid interest, their case "would be on surer ground." But their claim in the first suit was for a decree for interest *recoverable from the mortgaged property*

(j) [illegible]

(m) [illegible]

(n) [illegible] See also Davidson on Conveyancing 3rd ed [illegible]

First suit for produce payable under a mortgage, second suit for possession —By a mortgage bond it is provided that the mortgagor shall pay a share of the produce of the mortgaged land to the mortgagee every year and that in default the mortgagee shall be entitled to take possession of the land The mortgagor fails to pay the produce for the year 1896 In 1897 the mortgagee sues for the value of the produce for 1896, but he does not claim possession of the land as he was entitled to do under the bond This suit is a bar to a subsequent suit for possession on the mortgagor s failure to pay the produce for subsequent years The mortgagee ought to have claimed possession in the first suit (*q*) See notes below Omission to sue for one of several reliefs ill (1)

Properties held under separate titles —A plaintiff is not bound to include in the same suit separate properties held by different persons under different titles (*r*) But he is bound to include in the same suit all properties held by the same defendant though under different titles (*s*)

Different causes of action arising from the same transaction —This rule does not require that when several causes of action arise from *one transaction* the plaintiff should sue for all of them in one suit What the rule lays down is that where there is *one entire cause of action* the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts As observed by their Lordships of the Privy Council in *Payana* v *Pana Lana* (*t*) the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action *even though they arise from the same transaction* It was held in that case that a suit upon a promissory note the suit failing owing to a material alteration in the note was not a bar to a subsequent suit to recover the consideration for which the promissory note was given

In *Anderson* v *Kalagarla* (*u*) *A* agreed to purchase 10 bales of yarn from *B* *A* took delivery of 7 bales but failed to pay the price of those bales and as regards the remaining 3 bales refused to take delivery thereof Garth C J expressed the opinion that a suit by *B* against *A* to recover *damages* for failure to take delivery of the three bales was *not* a bar to a subsequent suit by *B* to recover from *A* the *price* of the 7 bales The learned judge observed that a claim for the *price* of goods sold was a cause of action of a different nature from a claim for *damages* for the non acceptance of goods and the fact that both claims arose under the *same contract* did not constitute them *one and the same cause of action* Wilson J expressed a different opinion stating that the claims having arisen under the *same contract* the cause of action was but *one* and that the subsequent suit was therefore barred The opinion of Wilson J was followed in *Duncan* v *Jeetmull* (*v*) which also was a case of breach of *one and the same contract* These two cases show that all existing breaches of *the same contract* must be joined in the same suit but they have been held not to apply to the case where there are *separate contracts* though contained in the *same instrument* (*w*) Thus where it is expressly provided by an indent that each monthly shipment and item should be treated as a separate contract the plaintiff is entitled to bring a separate suit for damages in respect of each shipment (*x*) Conversely, where goods are delivered under separate orders each order and delivery of goods is a separate contract and a separate cause of action unless it be proved that *all* the goods were delivered as under a *single contract* (*x*2) See notes below "He shall not afterwards sue in respect of the portion so omitted

(*q*) *Chhabil Das* v *Massu* (1914) P R no 4 19 I C 981

(*r*) *Bindo Bibi* v *Ram Chandra* (1919) 41 All. 583

(*s*) *Murti* v *Bhola Ram* (1894) 16 All 165 [F B]

(*t*) (1914) 41 I A 142 148 26 I C 228

(*u*) (1886) 12 Cal 339

(*v*) (189) 19 Cal 3 ? See also *Raja Bahadur* v *Rajeerappa* (1909) 11 Bom L. R 46 1 I C 319

(*w*) *Yashvant* v *Vithal* (1897) 21 Bom 267 271 approved in *Muhammad Hafiz* v *Muhammad Zakariya* (1922) 49 I A 9 15 44 All 121 126 65 I C 79 (22) A PC. 23 See also

. 2. In this connection we may mention a point which was left open by their Lordships of the Privy Council, namely, whether a mortgagee who holds *several mortgages* on *the same property*, can treat them, with respect to the provisions of this rule, as separate causes of action or whether he must bring one suit on all the mortgages (*y*) This question has since been decided by the Indian Courts, as to which see notes to s 11 under the head, Application of the above rules to suits on mortgage, p 46 above

" Omits to sue "—This rule refers to cases where a suit *has been filed* and the plaintiff omits in such suit to sue in respect of a portion of the claim (*z*) It does not apply where no suit has been filed at all, as where a plaint is returned to the plaintiff for presentation to the proper Court and the plaintiff does nothing further in the matter (*a*), nor does it apply where a suit is filed and subsequently withdrawn under O 23, r 1 (1) below (*b*)

" He shall not afterwards sue in respect of the portion so omitted "—The bar is not avoided by an expression of intention to sue again (*c*) Nor is it avoided by obtaining leave to sue in respect of ' the portion so omitted, the reason is that the leave contemplated by this section is the leave to sue for one of several *reliefs*, referred to in sub r (3), it does not relate to ' the portion so omitted ' referred to in sub r (2) (*cc*)

The rule says he shall not *afterwards* sue " It does not therefore apply where the suits are simultaneous and not successive (*d*) But fractions of a day are recognized Hence where two plaints are presented on the same day, it must be presumed until the contrary is proved, that the plaints were presented and admitted in the order in which their numbers appear in the register (*e*) See O 4 rr 1 2

It has been held by the Calcutta High Court that the present rule refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a *decree has been passed* in that suit So long as no decree is passed, a second suit in respect of the portion so omitted is not barred It follows from this that where a suit brought in respect only of a portion of a cause of action has not been heard and decided, the Court may allow the plaint in the suit to be amended by adding the omitted portion of the claim (*f*) Similarly if such a suit is withdrawn under O 23, r 1 (2) with liberty to bring a fresh suit, the plaintiff may include in the fresh suit the portion that was omitted in the suit withdrawn by him (*g*)

A sues *B* in respect of a portion only of a cause of action. *Pending this suit A* brings another suit against *B* in respect of the remaining portion of the same cause of action According to the Calcutta decision cited above neither suit is a bar to the other so long as no decree is passed in either suit It is open, therefore, to *A* to rectify his error in bringing two suits in respect of the same cause of action by applying for leave to amend the plaint in either suit by adding the omitted portion which forms the subject matter of the other suit and then withdrawing the other suit under O 23 r 1 (1) The Chief Court of the Punjab has gone further and held that if in such a case *A* is allowed to withdraw either suit with liberty to bring a fresh suit under s 23, r 1 (2), he is entitled to bring a fresh suit *by virtue of the leave* granted to him, though the other suit has been carried to a decision (*h*)

(*y*) *Sri Gopal* v *Pirthi Singh* (1902) 24 All 429 39 29 I A 118
(*z*) *Upendra* v *Janaki* (1918) 45 Cal. 305 315 47 I C 129
(*a*) *Subba* v *Rama* (1917) 40 Mad 291 32 I C. 899
(*b*) *Venkata* v *Ranga* (1887) 10 Mad 160
(*c*) *Maksud* v *Nargis* (1893) 20 Cal 322
(*cc*) *Raja Bahadur Shivlal* v *Tajurappa* (1909) 11 Bom L. R 46 1 I C 319
[illegible] C [illegible] 0, [illegible] 55, 17.. 113
(*f*) (1918) 45 Cal 305 316 47 I C 129 *supra*
(*g*) *Behari Lal* v *Srimati Baran* (1895) 17 All 53
(*i*) *Ghulam Muhammad* v *Nur Khan* (1917) Punj Rec no 65 p 237, 41 I C 897

Omission to sue for one of several "reliefs."—Where a person is entitled to *more than one relief* in respect of the *same cause of action*, he may sue for the all reliefs or he may sue for one or more of them and reserve his right *with the leave of the Court* to sue for the rest (i) If no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted (j) But if the right to the relief in respect of which a further suit is brought did not exist at the date of the institution of the former suit, the subsequent suit is not barred (k) The words in s. 43 of the Code of 1882 were ' with the leave of the Court *obtained before the first hearing* ' Those words were construed literally, and it was held that leave might be applied for and obtained when the case was called on for first hearing and before anything had been done towards the hearing of the suit (l) The italicized words have been omitted with the result that the leave may now be granted *at any stage of the suit* The leave, however, must be obtained from the Court before which the original suit was pending The leave, if granted, is good even if the pecuniary value of the relief allowed to be omitted from the suit exceeds the pecuniary limits of the Court granting the leave (m)

Illustrations

(1) *Rent and possession.*—*A* lets his land to *B* for a period of five years, on condition that if *B* fails to pay the rent every year, the lease shall be void *B* fails to pay the rent due for the second year Here *A* is entitled to two reliefs, namely, to sue *B* (1) for recovery of the rent, and (2) also for possession of the land on the ground that the lease has become void and he may sue for both these reliefs If he sues for rent only, and does not reserve his right with the *leave* of the Court to sue for possession, he cannot afterwards sue for possession *Subbaraya* v *Krishna* (1883) 6 Mad 159 Similarly if he sues for possession only, and does not reserve his right with the *leave* of the Court to sue for arrears of rent, he cannot afterwards sue for the rent *Kashinath* v *Nathoo* (1914) 38 Bom. 444, 25 I C 73

(2) *Specific performance and possession* —*A* agrees to sell his land to *B* *B* sues *A* for *specific performance* of the agreement, and obtains a decree *B* then sues *A* for *possession* of the land Is the suit for possession barred under this rule? Yes, according to the decision in *Narayana* v *Kandasami* (1899) 22 Mad 24, the reason given being that the right to possession arises *coincidentally* with the right to the execution of conveyance No, according to the decision in *Nathu* v *Budhu* (1894)18 Bom 537, *Krishnammal* v *Soundararaja* (1915) 38 Mad. 698 22 I C. 912 and *Krishnaji* v *Sangappa* (1925) 27 Bom. L R 42 8? I C 132, ('25) A. B 181, the reason given being that the right to possession accrues only on the execution of the deed of conveyance See also *Sundara* v *Sivalingam* (1923) 47 Mad 150 77 I C 542, ('24) A M 360, and *Deonandan* v *Janki* (1920) 5 Lah L J 315, 317

(3) *Possession and specific performance* —On 1st March 1905, *A* enters into an agreement with *B* for the sale of his lands to *B*, the sale to be completed on 1st August 1905 It is agreed that *B* shall pay part of the purchase money on the date of the agreement, and that *A* shall on such payment being made, put *B* in possession of the land *B* pays part of the purchase money and *A* puts him in possession of the land. The sale is not completed on 1st August owing to certain differences between the parties On 15th August, *A* forcibly ejects *B* from the land, and enters into possession. Thereupon *B* sues *A* for *possession*, but omits to sue for *specific performance* of the agreement for sale *B* cannot afterwards sue *A* for specific performance *Rangayya* v *Nanjappa* (1901) 24 Mad. 491, 28 I A 221, with facts slightly varied

(i) *Pestonji* v *Abdool* (1881) 5 Bom 463
(j) *Abdul Hakim* v *Karan Singh* (1915) 37 All 646 30 I C 951
(k) *Ram* v *Khali Ram* (1881) 3 All 6?7
(l) *Pestonji* v *Abdool* (1881) 5 Bom 463
(m) *Muhammad Fayaz* v *Kallu Singh* (1911) 7 All L. J 1201 8 I C 689

r. 2. **Exceptions to the rule against splitting of reliefs—**

1. *Order 34, rule 14*—Sub rule (3) provides that where a person entitled to more than one relief in respect of the same cause of action omits, *except with the leave of the Court*, to sue for all such reliefs, he cannot afterwards sue for any relief so omitted. According to this sub rule, if a mortgagee sues the mortgagor on the *personal* covenant to repay the mortgage debt, and omits to sue for *sale of the mortgaged property*, he cannot afterwards sue for sale *unless he has reserved his right to do so with the leave of the Court*. To this, however, there is an exception, being that contained in O. 34, r. 14. The latter rule may be stated thus: a mortgagee sues the mortgagor to recover the mortgage debt from the mortgagor *personally*, and obtains a decree. He then applies for the attachment and sale of the *mortgaged property* in execution of the decree. The mortgaged property may be attached, but it *cannot be sold in execution proceedings*. The only mode of bringing it to sale is by instituting a *fresh suit for sale*. O. 34, r. 14, says that the mortgagee may institute such a suit notwithstanding anything contained in O. 2, r. 2 (n). The suit will be one under s. 67 of the Transfer of Property Act, 1882. It must, however, be noted that though O. 34, r. 14, allows a mortgagee to split his *remedies*, it does not allow him to split his *claim* (o).

2. *Order 34, rule 6*—The effect of this rule is that where a mortgagee has obtained a *decree for sale* of the mortgaged property, and the property is sold, but the net sale proceeds are not sufficient to pay the mortgage-debt, he may subsequently *apply* for a *decree for the balance*, notwithstanding anything contained in O. 2, r. 2, although a claim to such relief has not been included in his suit (p). This, however, is not strictly an exception, for *no separate suit* has to be brought for a decree for the balance.

3. *Deccan Agriculturists Relief Act*, 1879 (*as amended by Act XXII of* 1882), *s. 15 A*.—The effect of the said section is to allow a *mortgagor* to split his *remedies* by providing in effect that if he sues the mortgagee for an *account*, he will not be precluded from suing him subsequently for *redemption* (q).

Leave to sue.—See notes "He shall not afterwards sue in respect of the portion so omitted," on p. 404 and "Omission to sue for one of several reliefs," on p. 405.

Amendment of plaint.—See notes above, "He shall not afterwards sue in respect of the portion so omitted."

Withdrawal of one of two pending suits.—See notes above, "He shall not afterwards sue in respect of the portion so omitted."

Minors.—The provisions of this rule apply to adults as well as minors. Thus a suit by a minor by his guardian and next friend for rent due for 1903 and 1904 will bar a subsequent suit by the minor, on attaining majority, for the rent due for 1901 and 1902. The acts of a guardian in the conduct of a suit must be upheld, unless it is shown that they were unreasonable or improper (r), or that the minor's interests were not properly safeguarded (s).

Official Assignee.—This rule merely bars a second suit. Therefore the Official Assignee cannot by an application to the Insolvency Court ask for a declaration on behalf of the insolvent mortgagor that the right of the mortgagee to sue for the principal is barred under this rule (ss).

(n) *Indarpal* v. *Mewa Lal* (1914) 36 All. 264, 23 I. C. 429.
(o) *Govind* v. *Parashram* (1901) 25 Bom. 161, *Keshavram* v. *Ranchhod* (1906) 30 Bom. 156.
(p) *Musaheb* v. *Inayatullah* (1892) 14 All. 513, *Hamiduddin* v. *Kedar Nath* (1898) 20 All. 336.
(q) See *Bhau* v. *Hari* (1883) 7 Bom. 377.
(r) *Gopal* v. *Narasinga* (1899) 22 Mad. 309.
(s) *Vyankat* v. *Onkar* (1921) 45 Bom. 805, 809, 61 I. C. 276.
(ss) *Sawmy Rao* v. *Official Assignee* (1925) 48 Mad. 703, ('25) A. M. 1120, 91 I. C. 403.

Execution proceedings—The present rule does not apply to proceedings in execution of a decree A decree holder may therefore present successive applications for realizing different portions of his decree Thus if a decree gives reliefs for *possession* and *costs*, there is nothing in the Code which prevents separate and successive applications for execution as regards either of them (*t*)

3 [S 45 *Cf* R.S.C., O. 18, r. 1] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit

Joinder of causes of action

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit

Scope of the rule—O 1, r 1, deals with joinder of plaintiffs, O 1, r 3 deals with joinder of defendants The present rule deals with joinder of causes of actions It is to be read subject to the provisions of rr 4 and 5 below, as is shown by the words "save as otherwise provided (*u*) It is also to be read subject to the provisions of O 1, rr 1 and 3 The frame of a suit may not be supported by this rule, and yet it may be justified by O 1, r 1, or O 1, r 3 (*v*) Rules 6 and 7 of this Order are to be read with this rule

Cause of action—See notes to s 20 Cause of action,' on p 90 above

One plaintiff, one defendant, and two or more causes of action—Where there is only one plaintiff, and only one defendant, the rule says that the "plaintiff may unite in the same suit several causes of action against the same defendant,' provided, of course that the provisions of rr 4 and 5 of this Order, are not contravened. If the causes of action are so disconnected that they cannot be conveniently tried together, the Court may order separate trials under r 6 below These trials, however, will not be distinct suits but they will be in the nature of sub suits under the title and number of the principal suit from which they spring (*w*) In *Saccharine Corporation Ltd* v *Wild* (*x*) the plaintiff corporation the owners of twenty three patents for saccharin, sued the defendant for alleged infringement of all the trade marks. There were thus twenty three causes of action united in one suit It was ordered that the suit should be confined in the first instance to any three of the patents which the plaintiffs might select Collin M R, said 'Now we start here with a writ launched covering twenty three causes of action *Prima facie*, in old days, one cause of action was thought to be enough That was gradually more or less relaxed, and one cause of action was allowed to be coupled with one or two subordinate or necessarily connected causes of

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[illegible] 45 Cal 111 12 123 41 I C. 944 *Thomas* v *Moore* (1918) 1 K B 555 *Payne* v *British Time Recorder Co* [1921] 2 K B 1

(*w*) *Khadarsaheb* v *Chotubibi* (1884) 8 Bom 616

(*x*) [1903] 1 Ch. 410

r. 3. action. Then came, by the Rules under the Judicature Acts, a still further relaxation, but always subject to the one underlying principle, namely, that the burden lay on the plaintiff to prove his case, and that no extra burden should be imposed on the defendant through the plaintiff needlessly enlarging the area of dispute Prima facie, *a dozen causes of action cannot be combined in one writ they must be so intimately connected as to justify their being included in one writ*, but when one finds no less than twenty three, that seems to me to be an outrageous extension of the latitude given by the rules to the plaintiff" (*y*) Cozens Hardy, L J, said "The action strikes me as almost an abuse of the process of the Court' (*z*)

The rule that a plaintiff may unite in the same suit several causes of action against the same defendant does not apply to suits for rent under the Agra Tenancy Act Hence a plaintiff cannot join in one suit claims for arrears of rent of (1) occupancy and (2) non occupancy holdings, though the claims may be against the same defendant (*a*)

Misjoinder of plaintiffs and causes of action.—Where there are *two or more plaintiffs* and *two or more causes of action*, the rule says that "any plaintiffs having causes of action in which they are *jointly* interested against the same defendant may unite such causes of action in the same suit" But the rule is to be read subject to the provisions of O 1, r 1 The result is that where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit if the right to the relief and the causes of action arise from *the same act or transaction* and that there is a *common question of law or fact*, though they may not all be *jointly* interested in all the causes of action But if the right to the relief claimed does not arise from *the same act or transaction* or if there is no *common question of law or fact*, the plaintiffs cannot all join in one suit unless they are *jointly interested* in the causes of action as provided by this rule (*b*) See notes to O 1, r 1, "New Rule," ills (1) to (4), on p 369 above

Where the plaintiffs are *not jointly interested* in the causes of action united in one suit, the suit is said to be bad for misjoinder of plaintiffs and causes of action. *X* sells to *Y* two plots of land adjoining each other, one of which is claimed by *A* by adverse possession and the other by *B* by adverse possession Under the Code of 1882 *A* and *B* could not join together as plaintiffs in one suit against *X* and *Y*, for the evidence of adverse possession by *A* would not be evidence of adverse possession in favour of *B* and *vice versa* (*c*) The same would be the case under this Code Similarly where five plaintiffs contract separately to sell cotton, though to the same defendant, they cannot all join in one suit for damages for breach of the five contracts (*d*)

Procedure in case of misjoinder of plaintiffs and causes of action:—

Under the Code of 1882 where a plaint was presented which was bad for misjoinder of plaintiffs and causes of action, the Judge to whom the plaint was presented might return it for amendment under s 53 If the plaint, having been returned for amendment, was not amended, it might be rejected under s 54, cl (d) If the defect was not noticed when the plaint was presented, but was brought to the notice of the Court at a later stage, the Court might grant leave to the plaintiffs to amend the plaint within a time fixed by the Court, and might order that if the amendment was not made within the time prescribed, the suit should stand dismissed with costs Where leave to amend was granted, the plaintiffs had to elect as to which of them should proceed with the suit, and the plaint had then

(*y*) [1903] 1 Ch 410, p 422 *supra*
(*z*) *Ib* p 427
(*a*) *Jagannath* v *Tore* (1905) 3 All L J 610 *Hira Lal* v *Hoti Lal* (1924) 22 All L J 459 79 I C 500, (24) A A 720

to be amended by striking out the names of the other plaintiffs and making consequential amendments (e) At the same time liberty was given to the defendant to amend his written statement to meet the case of the particular plaintiff who had elected to proceed with the suit (f) It was also held in some cases under that Code that where a suit was bad for misjoinder of plaintiffs and causes of action, it was not proper to dismiss the suit without giving the plaintiff an opportunity of amendment (g) If the suit was dismissed, and the *plaintiffs* appealed, the appellate Court might set aside the decree and remand the case to the lower Court with a direction to that Court to return the plaint for amendment (h) As to the procedure to be followed under the present Code, see notes to r 7 below

Where the defendant objects to the frame of a suit on the ground that the suit is bad for misjoinder of plaintiffs and causes of action, but the objection is overruled, and a *decree is passed for the plaintiffs*, and the defendant appeals from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and causes of action, the appellate Court should not interfere with the decree, though it may find that the suit is bad for misjoinder of plaintiffs and causes of action, unless the misjoinder has affected the merits of the case Such is the effect of the provisions of s 99 of this Code which provides *inter alia* that no decree shall be reversed or substantially varied in appeal *on account of any misjoinder of parties or causes of action*, where such misjoinder does not affect the merits of the case The italicized words are new They did not occur in the corresponding s 578 of the Code of 1882 They have been added into s 99 to supersede the practice followed by the Courts under the old Code Under that Code, where a decree was passed for the plaintiffs in a suit involving a misjoinder of plaintiffs and causes of action, and an appeal was preferred by the defendant from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and causes of action, the course adopted by the appellate Court was to *reverse* the decree in appeal, and *remand* the case to the lower Court with the directions to that Court to return the plaint to the plaintiffs for amendment, so that the plaintiffs might elect as to which of them should continue as plaintiffs in the suit (i) Such a course would not have been necessary if the Court had held that a misjoinder of plaintiffs and causes of action was an irregularity such as could be condoned under s 578 But it was held that a misjoinder of this kind was outside the scope of that section, and hence the practice followed in appeal of reversing the decree and remanding the case (j) The effect of the provisions of s 99 is to preclude the appellate Court from reversing a decree on the ground of misjoinder of plaintiffs and causes of action and remanding the case to the lower Court as was done under the old Code, unless the misjoinder has affected the merits of the case

Misjoinder of defendants and causes of action—Where there are *two or more defendants* and *two or more causes of action* the rule says that the "plaintiff may unite in the same suit several causes of action against the same defendants *jointly*" "*Joint* interest in the questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants" (k) If the causes of action alleged are *separate* and the defendants are arrayed *in different sets*, the suit is bad

(e) *Aldridge* v *Barrow* (190?) 34 Cal 662

26 Bom 259 *Mohima Chandra* v *Atul*

31 C 135

r. 3. for misjoinder of defendants and causes of action, technically *multifariousness* (l) "There is no provision in the Code allowing *distinct* causes of action against *distinct* sets of defendants, that is to say, causes of action in which the defendants are *not all jointly interested*, to be united in one suit" (m) This rule, however, is to be read subject to the provisions of O I, r 3, which relates to joinder of defendants Hence two or more defendants may be joined as parties in one suit, though there are two or more causes of action, provided the right to the relief claimed arises from *the same act or transaction* and there is a *common question of law or fact*, though they may not all be jointly interested in all the causes of action. But if the right to the relief claimed does not arise from *the same act or transaction*, or if there be no *common question of law or fact* the defendants cannot all be joined in one suit unless they are *jointly interested* in the causes of action as provided by this rule (n) See notes to O I, r 3, "New Rule," ills (4), (5) and (6), pp 374 375 above The following are instances of cases in which it was held that the suit was bad for misjoinder of defendants and causes of action

Suits held to be multifarious

1 *B* agrees to sell certain lands to *A* *A* sues *B* and a third person *C* alleging that *B* was willing to execute the deed of sale, but that he was unable to do so, as *C* held possession of the title deeds under a false claim of an equitable lien upon the lands, and that he had refused to deliver them up As against *B*, *A* claims specific performance of the contract and as against *C* he asks for a declaration that he has no lien upon the lands and for delivery up of the title deeds The suit is bad for misjoinder of defendants and causes of action. The two causes of action are entirely distinct they do not arise from the same transaction nor would their trial involve any common question of law or fact *Luckumsey* v *Fazulla* (1881) 5 Bom. 177, following *De Houghton* v *Money* (1876) L. R 2 Ch App 166, distinguished in *Krishnasami* v *Sundarappayyar* (1895) 18 Mad 415

What is laid down in *De Houghton* v *Money* and *Luckumsey* v *Fa ulla* is that "if on the face of the plaint, or of the plaintiff s case it appears that a third party, who was not a party to the contract upon which the suit was brought, had a *distinct interest*, but [illegible] some eq table ground such

favour of Money, but it was said that that conveyance was executed under such circumstances as would make it a voidable one, and in the case of *Luckumsey* v *Fazulla*, it was distinctly admitted by the plaintiff that the third party, who was not a party to the contract, had a distinct interest" (o) It is different, however, where *A* (purchaser) sues *B* (vendor) and *C* (vendor s benamidar), claiming specific performance against *B* and a declaration against *C* that *C* is a mere benamidar In such a case, the two defendants are identical and there is but one cause of action. There is therefore no misjoinder *Mokund Lall* v *Chotay Lall* (1884) 10 Cal. 1061, 1068 1069

2 Seven different salt manufacturers enter into seven different contracts with *A* to manufacture salt for *A*, deliver it in his factory *A*, alleging that all the seven persons had failed to deliver salt according to the terms of the agreement with them brings one

(l) *Narsingh Das* v *Mangal Dubey* (1883) 5 All 163 171

Cal. 111 122 123 41 I C 944 But see *Compania Sansinena* v *Houlder Brothers & Co* [1910] 2 K B 354 362

(o) *Mokund Lall* v *Chotay Lall* (1884) 10 Cal 1061 1068

suit against them for a decree that they might be directed to deliver the salt to him. The suit is bad for multifariousness, for the breach of each contract gives rise to a distinct cause of action, and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants *Namasivaya* v *Kadir Ammal* (1894) 17 Mad 168

3 *A* and *B* at Madura enter into an agreement to carry on business in partnership at Silangoor, and they send *C* as their agent to Silangoor to conduct the business there. *A*, alleging that *C* had failed to carry out his instructions and to furnish accounts, and that *B* was colluding with *C*, sues *B* and *C*, claiming *dissolution* of partnership as against *B*, and *damages* for breach of contract as agent as against *C* The suit is bad for multifariousness, for there are two distinct causes of action and neither defendant is liable in respect of the cause of action against the other *Muthappa* v *Muthu* (1904) 27 Mad 80 See this case commented upon in *Aiyathurai* v. *Muhamad Meera* (1908) 18 Mad L. J. 238, 243 244

4 A joint Hindu family, consisting of 3 members *A*, *B* and *C*, owns several properties *A* agrees to sell his share to *P* *A* fails to execute the necessary sale deed *P* sues *A* for specific performance, and includes in the suit a claim for partition and possession against all the members of the family, namely, *A*, *B* and *C* The suit is bad for misjoinder The claim for partition cannot be joined with the claim for specific performance, as at the date of the suit the plaintiff had no right to sue for partition not having completed his title by a sale deed. Wallis, C J, said: " The other members of the family were no parties to the alleged contract and therefore were not proper parties to the suit in so far as it is a suit for specific performance, and it would in my opinion be a distinct hardship to them to force them to defend a suit for partition which would not lie if the plaintiff failed to prove his contract " *Rangayya* v *Subramania* (1917) 40 Mad 365, 40 I C 429 [F B] See ill (1) above

In ills (1) and (3) what were really two suits were combined into one In ill (2) what were really seven suits were united in one suit In all these cases it was held that the suit was bad for misjoinder of defendants and causes of action The reason why the law forbids a joinder in one suit of distinct causes of action against different defendants *each of whom is unconnected with the cause of action against the others*, may thus be stated in the words of Peacock C J (p) " Such a joinder . complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others Moreover, it is vexatious and harassing to the different defendants Such a procedure renders it almost compulsory on all the defendants to be present either in person or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested, and, moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present, and to be detained whilst the case of the others is being heard and determined " For further illustrations, see notes to O 1, r 3, under the heads " New Rule," p 373 above, and " Severally," p 376 above

Procedure in case of multifariousness (misjoinder of defendants and causes of action)—Under the Code of 1882 where a plaint was presented which was

(p) *Raja Ram Tewari* v *Luchmun* (1867) 8 W R. 15

. 3. bad for misjoinder of defendants and causes of action, the Judge to whom the plaint was presented *might return it for amendment under s 53 If the plaint, having been returned* for amendment, was not amended it might be rejected under sec 54, cl (d) If the defect was not noticed when the plaint was presented, but was brought to the notice of the Court at a later stage, the Court might, on the application of the plaintiff, and on such terms as to costs as the Court thought proper, grant leave to the plaintiff to withdraw from the suit against those defendants who were not interested in the cause of action in respect of which he elected to proceed with liberty to bring a fresh suit or suits against them (q) [O 23, r 1] or allow the plaintiff to amend *the plaint by striking out the names of those defendants and making consequential amend*ments Where leave to amend was granted to the plaintiff, and the plaintiff did not amend within the time fixed by the Court, and the suit was dismissed the appellate Court might confirm the decree if it found that the suit was multifarious (r) As to the procedure to be followed under the present Code, see notes to r 7 below

Where the defendants object to the frame of a suit on the ground that the suit is multifarious but the objection is overruled, and a *decree is passed for the plaintiff,* and the defendants appeal from the decree on the ground that the suit ought to have been held to be multifarious the appellate Court should not interfere with the decree, though it may find that the suit is multifarious, unless the misjoinder has affected the merits of the case It is so provided by s 99, which declares *inter alia* that no decree shall be reversed or substantially varied in appeal *on account of any misjoinder of parties or causes of action*, where such misjoinder does not affect the merits of the case The words italicized above are new They did not occur in the corresponding s 578 of the Code of 1882 They have been inserted in s 99 to supersede the practice followed by the Courts under the old Code Under that Code, where a decree was passed for the plaintiffs in a suit which was bad for multifariousness, and an appeal was preferred by the defendants from the decree on the ground that the suit ought to have been held to be multifarious the course adopted by the appellate Court was either to *reverse* the decree of the lower Court and dismiss the plaintiff's suit (s), or to sustain the decree of the lower Court as against a particular set of defendants in respect of the causes of action in which they were jointly interested and grant permission to the plaintiff to withdraw from the suit against the other defendants with liberty to bring a fresh suit or suits against them (t) Such a course would not have been necessary had the Courts held that a misjoinder of defendants and causes of action was an irregularity such as could be cured by s 578 But it was held that the section did not apply to a misjoinder of this kind, and that even if it did apply, the misjoinder should be regarded as a defect that *must* affect the merits of the case within the meaning of that section (u) The insertion of the words on account of any misjoinder of parties or causes of action in s 99 makes it quite clear that the appellate Court should not interfere with a decree at all where the only objection to the decree is that of multifariousness, unless the misjoinder has affected the merits of the case

(q) I

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(s) I

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(t) *Ganeshi Lal* v *Khairati Singh* (1894) 16 All 279 283

(u) *Ganeshi Lal* v *Khairati Singh* (1894) 16 All 279 283 *Namasivaya* v *Kadir* (1894) 17 Mad 168 176, *Muthappa* v *Muthu* (1904) 27 Mad 80 84

Two or more defendants and one cause of action—Every case of multifariousness presupposes *more than one* cause of action Hence where there is only one cause of action, there can be no multifariousness

Suits held not to be multifarious

1 *A*, alleging that his brother *B* mortgaged his (*A* s) share in his father s property *to C without his knowledge and consent, and that C was in possession as mortgagee*, sues *B* and *C* for a declaration of title to his share of the property, and for possession of the share The suit is not bad for multifariousness, for there are no two causes of action but only one, namely, the infringement of *A* s right of ownership by *B* The mortgage and dispossession are both acts evidencing the *infringement* of *A* s right *Indur Kuar* v *Gur Prasad* (1889) 11 All. 33 *Mazhar Ali* v *Sajjad Husain* (1902) 24 All. 358, *Kubra Jan* v *Ram Bali* (1908) 30 All. 560

2 *A* sells three properties by private contract to *B* After the sale to *B*, all the three properties are attached in execution of a decree held by *C* against *A*, and they are sold in execution to *D*, *E* and *F*, respectively A suit by *B* against *A* (the vendor), *C* (the decree holder), and *D*, *E* and *F* (execution purchasers), to set aside the execution sale, is not bad for multifariousness *Haranund* v *Prosunno Chunder* (1883) 9 Cal. 763, *Gunami* v *Ram Charan* (1878) 1 All. 555

Note—In the Calcutta case cited above, Garth, C J, said ' The plaintiff has but one object, namely, to establish his private purchase as against the claim in execution, and the defendants who contest his claim *have but one defence, which is common to them all, viz, that the plaintiff s purchase is invalid* '

Unnecessary parties added as defendants—Where persons who are not necessary parties are joined as defendants, they should be deemed not to be parties at all in considering whether or not the suit is bad for multifariousness *A* and *B* are two co sharers of a village *A* and *B* sell their respective shares to *C* by two separate deeds of sale *D*, alleging that he is entitled to pre empt the property, sues *A*, *B* and *C* for pre emption. Here the suit is not bad for multifariousness, for *A* and *B* being vendors they are not necessary parties to a suit for pre emption The suit is really against the vendee *C* (*v*)

Suit for ejectment by the real owner against holders under derivative titles from a trespasser as the common source—In a suit for possession all persons claiming by derivative titles from a trespasser *as the common source* may be joined as defendants *A* obtains a lease of a piece of land from *B*, and enters into possession of the land Subsequently *B*, ignoring the lease, lets the land in separate portions and by *separate leases* to *C*, *D* and *E* *A* sues *B*, *C*, *D* and *E* to eject them from the land The suit is not bad for multifariousness In this as in every action of ejectment, there is but one cause of action, namely, dispossession It is immaterial that *C*, *D* and *E* claim under *different titles* The title by which *they* claim forms no part of t[illegible]
und[illegible]
by[illegible]
possession against *B* *C* and *D* (*x*)

(*v*) I[illegible]

(*w*) [illegible] (1907) 29 All 267 *Umabai* v *Fuhal* (1909) 33 Bom 293 1 I C. 120 *Raghunath* v *Sarosh* (1899) 23 Bom 266

(*x*) *Afzal Shah* v *Lachmi Narain* (1918) 40 All. 7 11 42 I C 856

. 3. **Where two or more persons conspire together to commit a wrong, or to commit a breach of several contracts entered into with them separately by the plaintiff, they may all be joined as defendants in one suit** —The reason is that the plaintiff has in such a case but one cause of action against all the defendants, namely, a conspiracy to do the act complained of Thus if in ill (2) on p 410 above, the seven salt manufacturers had conspired together not to deliver the salt to *A*, *A* could have brought one suit against them all Similarly, if *A* and *B* conspire together to assault *C*, *C* may bring one suit against them for damages for assault (*y*) Upon the same principle where *A* obtained a decree against *B* for possession of certain lands in which 86 persons had distinct and separate tenures, and these 86 persons combined together to keep *A* out of possession and declined to pay the rent to him, it was held that *A* might join the 86 tenants as defendants in one suit for a declaration of his proprietary right to the lands (*z*) But separate suits should be brought if there is no collusion or combination between the tenants (*a*)

Two or more plaintiffs, two or more defendants, and two or more causes of action —In such a case the plaintiffs must be *jointly* interested in the causes of action, and the defendants also must be *jointly* interested in the causes of action The rule says Any plaintiffs having causes of action in which they are *jointly* interested against the same defendants *jointly* may unite such causes of action in the same suit If the plaintiffs are not *jointly* interested in the causes of action, the suit will be bad for misjoinder of plaintiffs and causes of action If the plaintiffs are jointly interested in the several causes of action but the defendants are not, the suit will be bad for multifariousness And if neither the plaintiffs nor the defendants are jointly interested in the causes of action, the suit will be bad for a double misjoinder, namely, misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action Thus if *A* agrees to sell and deliver salt to *B*, and *C* agrees to sell and deliver salt to *D*, and *B* and *D* sue *A* and *C* for damages for breach of the contracts entered into with them respectively, the suit is bad for a double misjoinder Neither plaintiff has any interest in the cause of action of the other, nor has either defendants any interest in the cause of action against the other But if two contracts are entered into each between *B* and *D* of the one part and *A* and *C* of the other part, *B* and *D* may bring one suit against *A* and *C* on the two contracts

Jurisdiction —Where a plaintiff combines several causes of action against the same defendant in one suit, the jurisdiction of the Court as regards the suit depends on the value of the *aggregate* subject matters (*b*) See sub r (2)

Revision —It has been held by the High Court of Madras that a decision on the question whether a suit is bad for misjoinder of parties and causes of action is subject to revision (*c*)

(*y*) *Varajlal* v *Ramdat* (1902) 26 Bom 259 *Singa Reddi* v *Madava Rau* (1897) 20 Mad 360
(*z*) *Loke Nath* v *Keshab Ram* (1886) 13 Cal 147
(*a*) *Ram Narain* v *Annoda* (1887) 14 Cal 681, *Sudhendu* v *Durga* (1887) 14 Cal 435
(*b*) *Chiragh Din* v *Bhagwan Das* (1915) Punj Rec no 100 p 400 32 I C 40
(*c*) *Velappa* v *Chidambara* (1922) 43 Mad L J 277 70 I C 684 ('22) A M 174, *Shanmula* v *Arunachelam* (1922) 45 Mad 194 198, 69 I C. 961 ('22) A M. 332 *Arunachellam* v *Arunachellam* (1922) 43 Mad L. J 218 69 I C 966 ('22) A M 436

4. **[S. 44, R.S.C., O. 18, r. 2]** No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except— **O. 2,**

Only certain claims to be joined for recovery of immoveable property

(*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof,

(*b*) claims for damages for breach of any contract under which the property or any part thereof is held, and

(*c*) claims in which the relief sought is based on the same cause of action

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

Old section —This rule corresponds with s 44, C P C, 1882, except in the following particulars —

1 The rule contained in s 44 applied to (1) suits for the *recovery* of immoveable property, and to (2) suits to obtain a *declaration of title* to immoveable property The words, "or to obtain a declaration of title to immoveable property,' have been omitted in this rule, so that the operation of the present rule is confined only to those cases where a cause of action is sought to be joined with a suit for the *recovery* of immoveable property

2 Clause (*c*) of the rule is new See notes below, Claims in which the relief sought is based on the same cause of action.'

3 The proviso to the rule is also new It is taken from R S C., O 18, r 2.

Joinder of claims —This rule deals with what may be called *joinder of claims* It declares that no claims other than those specified in the three exceptions shall be joined *without the leave* of the Court with a suit for the "recovery of immoveable property' The object of the rule is to prevent a joinder with a claim for the recovery of *immoveable* property of claims of *other and dissimilar* character If it is sought to join such claims with a claim for the recovery of *immoveable* property, the leave of the Court must first be obtained, and such leave may be granted if the two classes of claims can be conveniently disposed of in one suit But no leave is necessary where claims are joined in which the relief sought is based on the *same cause of action* (see cl. (*c*))

This rule does not apply to a joinder of several claims all for the recovery of immoveable property A plaintiff may therefore bring one suit for possession of several immoveable properties without the leave of the Court. Thus if *A* owns 20 parcels of land, and he is dispossessed of all of them by *B*, *A* may *without the leave* of the Court, bring one suit against *B* for the recovery of all the plots. Here there is a joinder of 20 claims but they are all claims for the *recovery* of immoveable property (*d*) Similarly if *A* owns two plots of land in respect of which *B* is entitled to pre-emption, and *A* sells both the plots to *C* on the same day by two separate deeds of sale, *B* may claim pre

(*d*) *Chidambara* v *Ramasami* (1882) 5 Mad 161

. 4. emption of *both* the plots in one suit *without the leave* of the Court (e) On the same principle, a mortgagee holding two mortgage deeds over separate properties from the same person may join both in one suit for *sale or foreclosure*, *without the leave* of the Court (f)

Suit for the recovery of immoveable property.—An action to *establish title* to immoveable property *not* claiming *possession*, is not an action for the *recovery* of immoveable property within the meaning of this rule so as to require the leave of the Court for its joinder with another cause of action (g) Similarly, an action to *restrain trespass* on immoveable property is not an action for the *recovery* of immoveable property (h) A suit for a declaration that an alleged mortgage is not a mortgage and for possession, or in the alternative for an account and for redemption, does not require the leave of the Court under this rule 'In *either* case he [plaintiff] asks *for possession*—possession at once if there is no valid mortgage and possession upon payment of what may be found due if the mortgage is valid " (i) A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the *recovery* of immoveable property within the meaning of this rule (j)

Claims in which the relief sought is based on the same cause of action —

1 *Joinder of claims for recovery both of moveable and immoveable property* —This rule is to be read with r 2 above which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action (k) Hence there is nothing irregular in seeking to recover immoveable and moveable property in one suit *without* the leave of the Court, *if the cause of action is the same in* respect *of both* Nay, if the plaintiff in such a case sues to recover only one of the two kinds of property, he will be precluded from suing for the other by virtue of the provisions of r 2 above Thus where a Mahomedan died leaving two heirs, *A* and *B*, and *C* purchased from *A* certain *immoveable property* which had come to *A*'s share and from *B* certain *moveable property* which had come to *B* s share, and both the properties were at the time of purchase in the wrongful possession of *D*, it was held that not only could *C* sue *D* for the recovery of both the moveable and immoveable property in one suit without the leave of the Court, but that if he did not do so, he would be precluded from afterwards suing for the property omitted in the first suit (l) In the above case, the cause of action in respect of both the properties was the same, namely, *dispossession* and *refusal to deliver* the property on demand. But if the cause of action is not the same, a claim for the recovery of moveable property may *not* be joined with a claim for the recovery of immoveable property *without* the leave of the Court (m) Thus a claim against an administrator for damages for malfeasance under ss 146 and 147 of the Probate and Administration Act, 1881, cannot be joined with a claim for recovery by the plaintiff of his share of immoveable properties alleged to have been bought by the administrator with moneys belonging jointly to the plaintiff and the administrator (n)

2 A plaintiff may join, *without the leave of* the Court, in an action for the recovery of immoveable property, other claims, such as a claim for a declaration of title, for an account of the rents and profits, for the appointment of a receiver, and for an injunction to restrain the defendant from receiving the rents, *provided such claims do not amount to a new cause of action*, and are " mere machinery " (o)

(i) *Hunt* v *Worsfold* [1896] 2 Ch. 224
(j) *Govinda* v *Mana Vikraman* (1891) 14 Mad 284

(k) *Giyana* v *Kandasami* (1887) 10 Mad 3[illegible] 506
(l) *Ganesh* v *Jewach* (1904) 31 Cal 262 31 I A 10 *C Cook* v *Enchmarch* (1876) 2 C D 111
(m) *Hingu Lal* v *Baldeo Ram* (1902) 24 All. 5[illegible]3
(n) *Janardan* v *Jankibati* (1917) 2 Pat L J 642 650 40 I C 860
(o) *Gledhill* v *Hunter* (1880) 14 C D 492 500

Proviso to the rule.—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure *and* possession (*p*).

Leave of Court—Objection as to misjoinder—Leave should be obtained *before* the plaint is filed (*q*) But the leave under this rule is not a *condition precedent* to juris diction, and it may therefore be granted on good cause shown even *after* the institution of the suit (*r*) Under s 44 of the Code of 1882 it was held that an objection that the plaintiff had joined together claims which, under that section could not be joined together without the leave of the Court, should be taken in the Court of first instance, and that if it was not so taken, it should be regarded as waived, and it should not be entertained by the Court of appeal (*s*) Under this Code, the objection should be taken at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement if it is not so taken, it will be deemed to have been waived (r 7 below) And even if the objection is taken in time and disallowed, the appellate Court should not interfere with the decree in appeal merely on the ground that claims which ought not to be joined under this rule have been joined in one suit unless the misjoinder has affected the merits of the case (s 99 above)

Where a claim cannot be joined with a claim for the recovery of immoveable property *without the leave* of the Court, it is optional with the plaintiff either to obtain the leave and bring *one* suit in respect of both the claims, or to bring *separate* suits in respect of each of them The plaintiff is not confined to the first only of these two courses (*t*).

Counterclaim.—This rule applies to a counterclaim as well as to an original action (*u*)

Appeal—No appeal lies from an order under this rule rejecting an application for leave to join a claim with a claim for the recovery of immoveable property (*v*) See s 99 above

Revision.—See notes to r 3, "Revision," on p 414 above

5. [S 44, R. S. C., O 18, r. 5] No claim by or against an executor, administrator, or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Claims by or against executor administrator or heir

Scope of the rule.—This rule provides that no claim by a person in his *representative character* shall be joined in the same suit with claims by him *personally*, nor shall claims against a person in his representative character be joined with claims against him personally—

(1) unless the claims by or against him personally arise with reference to the *estate* which he represents, or

(2) unless he was entitled to, or liable for, those claims *jointly* with the deceased person whom he represents.

[illegible] Tara (1903) 30 Cal 794 800 [illegible]

r. 5. The object of the rule is to prevent an executor or administrator from intermingling the assets of his testator with his own moneys (w)

Illustrations

(a) *A* is a tenant for life of certain property, and *B* is the remainderman *A* gives a lease of the property to *C* *A* dies leaving a will of which *B* is the sole executor Some months after *A*'s death, *B* sues *C* (1) for arrears of rent due to the *estate* of *A*, and (2) for rent due to him *personally* subsequent to *A* s death Here the first claim is by *C* *as executor*, and the second claim is by him *personally* as remainderman The claim by *C* personally does not arise with reference to the estate of *A* of which *C* is executor The two claims therefore cannot be joined together in the same suit *Tredegar* v *Roberts* [1914] 1 K B 283

(b) *A* dies leaving a will of which *B* is the executor By his will *A* directs *B* to continue his business The executor purchases *for the purposes of A's business* certain goods from *C* in *his own* name *C* may in such a case sue *B* for the price of the goods, and he may claim the price against *B personally*, or, in the alternative against him *as executor* The reason is that the personal claim against *B* arises with reference to the *estate* of which he is the executor But if *B* purchased certain goods from *C* *as executor* in the cour e of the administration of *A* s estate, and other goods under a separate contract altogether *in his own name* and expressly for the purpose of his own business *C* cannot join both claims against *B* in one suit (x)

(c) *A* and *B* carry on business in partnership *A* dies leaving a son *S* who obtains letters of administration to his father s estate After *A* s death, *S* and *B* continue the business in partnership with the old partnership assets *S*, *as administrator*, sues *B* for the accounts of the partnership between his father *A* and *B* He also claims dissolution of the partnership between him *personally* and *B*, and for his share in the partnership The suit does not offend the provisions of this rule as the personal claim of *S* in respect of the partnership between him and *B* arises with reference to the estate in respect of which he is suing as administrator *Arunachellam* v *Arunachellam* (1922) 43 Mad L J 218, 69 I C 966 (22) A. M 436

(d) The second branch of the rule may be illustrated by the following case *A* and *B* *jointly* purchase goods from *C* *A* dies leaving a will of which *B* is the executor Here *A* and *B* are jointly liable for the price of the goods. *C* may therefore sue *B* for the price in his (*B* s) personal as well as representative character If *A* and *B* had jur

Heir as such —An heir may sue or be sued in his *personal* capacity, or he may sue or be sued in his *representative* capacity [see notes to O 7, r 4] The words ' claim by an heir as such ' in this rule refer to a claim by him in his *representative* capacity, that is as representing the estate of the deceased whose heir he claims to be (y)

Illustrations

1 A Mahomedan dies leaving a widow and daughters by a predeceased wife The widow sues the daughters (1) for her dower, and (2) for her share of the inheritance in her husband s estate It is contended on behalf of the daughters that the first claim is by the widow *personally* and that the second claim is by her *as an heir*, and that the

(w) *Tredegar* v *Roberts* [1914] 1 K B 283 287
(x) See *Ladwick* v *Scott* (18 6) 2 Ch D 736 743 *Whitworth* v *Darbishire* (1893) 41 W R 317

two claims cannot be joined in one suit This contention is not sound, for the second claim cannot be said to be *by an heir as such* The claim is made by the widow not as *representing* her husband s estate and *for the benefit of the estate*, but *for her own and personal benefit* The two claims may therefore be joined in one suit *Ahmad ud din* v. *Sikander* (1896) 18 All 256

2 A Hindu widow sues her husband s executors to recover (1) certain ornaments forming part of her *stridhana*, and (2) her share in her husband s estate The suit is properly constituted see *Hafi aboo* v *Mahomed* (1907) 31 Bom 105, dissenting from *Ashabai* v *Haji Tyeb* (1882) 6 Bom 390, *Jankibai* v *Shrinivas* (1914) 38 Bom 120, 20 I C. 533, [suit against husband s coparceners for *stridhana* and maintenance]

Procedure —Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them, and the suit may then be proceeded with (z)

Objection as to misjoinder when to be taken —See r 7 below

Appeal —See s 99 above .

Revision —See notes to r 3, "Revision,' on p 414 above

6. **[S. 45, 2nd para. R. S. C., O. 18, r. 1.]** Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials

This rule does not apply to cases of *misjoinder*, but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (*a*) See notes to r 3, "One plaintiff, one defendant, and two or more causes of action," on p 407 above

7. [*New.*] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objection as to misjoinder

Objection as to misjoinder of causes of action —This rule is new Under the Code of 1882 when a plaint was presented which was bad for misjoinder of causes of action, it *might have been returned for amendment under s 53* at any time before the settlement of issues If the plaint, having been returned for amendment, was not amended, it might have been rejected under s 54, cl (d) These provisions were by no means exhaustive, and the procedure followed in cases of misjoinder of causes of action was not uniform These provisions have not been re-enacted, and instead of them we have the present rule which places objections on the ground of misjoinder of causes of action on the same footing as objections on the ground of non joinder and

(z) *Ashabai* v *Haji Tyeb* (1882) 6 Bom 390 394, *Tredegar* v *Roberts* [1914] 1 K B 283

(*a*) *Muthappa* v *Muthu* (1904) 27 Mad 80 84

r. 7. misjoinder of parties [O 1, r 13] Such objections must be taken at the earliest possible opportunity, and any such objection not so taken shall be deemed to have been waived S 99 provides that no decree shall be reversed or varied on account of any misjoinder of causes of action not affecting the merits of the case or the jurisdiction of the Court

But though the provisions of s 53 and s 54, cl (d), of the Code of 1882, are not reproduced in this Code, the Court may allow an amendment under O 6, r 17, on the application of the plaintiff It may also direct the plaintiff under the same rule to amend the plaint on the application of the defendant, or, where there are two or more defendants, *on the application of any one of them O 6, r 18, deals with failure to* amend after order

As under the old Code so under this Code, the Court may, where a suit is bad for misjoinder of plaintiffs and causes of action, direct the plaintiffs to elect as to which of them shall proceed with the suit, and where a suit is bad for misjoinder of defendants and causes of action direct them to elect against which defendants they would proceed, and direct all necessary amendments to be made within a time to be prescribed by the Court If the plaintiff does not comply with the order and amend the plaint, the Court may have the action stayed

The misjoinder of causes of action referred to in this rule is not only the misjoinder contemplated by r 3 above, but that contemplated by rr 4 and 5 above

ORDER III.

Recognised Agents and Pleaders

r. 1. **1** [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf:

Appearance etc may be in person by recognized agent or by pleader

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Appearance—*If* a recognized agent, although able to do so, *does not conduct* the case on behalf of his principal his *mere presence* in Court is not an 'appearance' in the suit within the meaning of r 6 or r 8 of O 9 (*b*) See notes to O 9 r 6, "Meaning of Appearance

Duly appointed—When a suit is brought by a person professing to act as another person's agent the Court has the power to enquire into the agent's authority (*c*) A pleader appointed by an official liquidator who has obtained the sanction of the Court

(*b*) *Soonderlal* v *Goorprasad* (1899) 23 Bom 414 | I A 13
(*c*) *Ram Narain* v *Raghu* (189) 19 Cal 6 8 19 |

to institute a suit is "duly appointed" within the meaning of this rule, though no sanction was obtained for the appointment of the pleader (*d*) Where a party to a suit authorizes an agent by special power of attorney to appoint a pleader to sign execution petitions, a pleader appointed by the agent to support a petition verified by the agent is "a pleader duly appointed to act on his" (the party's) "behalf" within the meaning of this rule (*e*)

Application for leave to sue in forma pauperis.—Such an application cannot be made by a recognized agent (*f*) See O 33, r 3

2. [S. 37.] The recognised agents of parties by whom such appearances, applications and acts may be make or done are—

Recognized agents

(*a*) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(*b*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Clause (a) amended by the Bombay High Court under s 122—See Appendix IV below, Rules made by the High Court of Bombay Where a power-of attorney, instead of being a general power as required by r 2 (a) as amended by the Bombay High Court, was a special power, it was held that it was a defect not affecting the merits of the case within the meaning of s 99, and that the decree should not be disturbed in appeal (*g*)

Clause (b)—Where a plaint is signed and presented by the plaintiff's clerk who has no authority from the plaintiff to carry on business in the plaintiff's name, the plaint cannot be said to have been signed by the plaintiff's "recognized agent" In such a case the Court may rightly dismiss the suit (*h*)

3. [S. 38] (1) Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

Service of process on recognised agent

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent.

(*d*) *Kathiawar and Ahmedabad Banking Corporation, Ltd* v *Gurdas* (1924) 5 Lah. 414, 84 I C 510, ('25) A L 222

(*e*) *Thiruvenkatasami* v *Paradai Pilai* (1921) 48 I A 534, 44 Mad 736, ('22) A PC 403

3, 3-5. **Service of process on recognised agent**—A person holding a power of attorney is not bound to accept service of summons, he may refuse to do so, for he is not bound to act under the power (i)

4. [S 39] (1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf

Appointment of pleader

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court, and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act

Sub rule (2): acceptance by pleader—This rule does not require the *acceptance* of a vakalatnama to be in writing But where, by the rules of the Court, the acceptance is required to be in writing and it is not in writing, the pleader should not be heard by the Court (j)

Sub-rule (3)—The words "and no advocate of any other High Court who is a barrister are new

Delegation of authority by pleader—Where a pleader cannot attend, he has no power to delegate his authority to another pleader (k)

"Until determined with the leave of Court"—A pleader cannot *determine* his appointment without the leave of the ourt after reasonable notice to the client (l) But no formality is necessary about the leave of the Court (m) An attorney s retainer cannot be revoked by his client by a mere letter, it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court as provided in this rule (n)

Advocate—An advocate, unlike a pleader, may be verbally appointed (nn) See sub r (3)

5 [S 40] Any process served on the pleader of any party or left at the office or ordinary residence of such pleader and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and

Service of process on pleader

81 (2) A C 515
(m) *Manickam* v *Mahidam* (1924) 47 Mad 810 82 I C 109 (1925) A M 21 (F B)
(n) *Atul Chunder* v *Lakshman* (190) 36 Cal 609 1 I C 830
(nn) *Laurentius* v *Dhiki* (1925) 4 Pat 766 90 I C 179 (1926) A P 73

made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person

O. 3, rr. 5, 6.

6 [S 41] (1) Besides the recognised agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process

Agent to accept service

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court

Appointment to be in writing and to be filed in Court

ORDER IV

Institution of Suits

1 [S 48] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf

Suit to be commenced by plaint

O 4, rr 1, 2

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable

Plaint presented to judge at club after office hours—There is nothing in this rule to show that the presentation of the plaint must be during office hours or must be to the officer appointed at the Court or at any particular place A judge therefore may accept a plaint at his residence or at his club after office hours if presented to him at that place In so doing the judge constitutes himself an officer to receive the plaint (o)

2 [S 58] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits Such entries shall be numbered in every year according to the order in which the plaints are admitted

Register of suits

(o) *Sattayya* v *Soundaratha* A (19 4) 47 Mad. 31, 9 I C. 1017 (4) A M. 448 *Thakur D n Ram* v *Harilal* (191?) 4 All 4?? 14 L C. 44 [Memorandum of appeal presented at judge's residence]

ORDER V.

Issue and Service of Summons

ISSUE OF SUMMONS

Summons

1 [S 64] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim

(2) A defendant to whom a summons has been issued under sub rule (1) may appear—

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court

Decree without issue of summons—The proviso to sub r (1) contemplates cases where a decree may be passed against a defendant without issue or service of summons upon him (p)

Copy or statement annexed to summons

2 [S 65] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement

Court may order defendant or plaintiff to appear in person

3 [S 66] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance

(p) *Bank of Bengal v. Currie & Co.* (1869) 3 P. L. R. 396.

Consequence of non attendance.—As to the consequence of non attendance in person, see O 9, r 12

Non-attendance of party on adjourned date—Where an order is made under this rule for the personal appearance of a party on a specified day he is not bound to appear personally on any adjourned date unless a fresh order is made requiring his appearance on that date. Where no fresh order is made, and the Court disposes of the suit under O 9, r 12, the order is one made without jurisdiction (q)

No party to be ordered to appear in person unless resident within certain limits

4 [S 67.] No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the court house

Summons to be either to settle issues or for final disposal

5 [S. 68] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit, and the summons shall contain a direction accordingly.

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit

Summons for final disposal—As a general rule summonses for final disposal of suits should be issued only in simple cases (r)

Fixing day for appearance of defendants

6 [S 69] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

(q) *Sundar Nath v Mallu* (1917) 39 All 476 39 I C 631

(r) *Tuljaram v Sitaram* (1914) 38 Bom 377, 380 24 I C 665

11.

7 [S 70] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case

Summons to order defendant to produce documents relied on by him

8 [S 71] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case

On issue of summons for final disposal defendant to be directed to produce his witnesses

Service of Summons

9 [S 72] (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons the summons shall unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates

Delivery or transmission of summons for service

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10 [S 73] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court

Mode of service

Object of service—The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing (s) See notes to r 17 below Service of summons

11 [S 74] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant

Service on several defendants

Partners—As to service on partners see O 30 r 3

(s) *Blon stett* v *Lmobai* (189) 21 Bom 3

12 [S 75] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient

Service to be on defendant in person when practicable or on his agent

13 [S 76] (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service

Service on agent by whom defendant carried on business

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

Manager or agent personally carrying on business —The manager or agent contemplated by this rule is one who has an initiative and independent discretion *albeit subject possibly to general orders for his guidance A mere servant employed to* carry out orders or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts is not such an agent (t)

14 [S 77] Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property

Service on agent in charge in suits for immoveable property

15 [S 78] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him

Where service may be on male member of defendant's family

Explanation —A servant is not a member of the family within the meaning of this rule

Service on adult male member —Where no attempt is made to find the defendant and the summons is served on his son the summons cannot be said to be duly served. The inquiry as to the whereabouts of the defendant must not be perfunctory (u)

(t) *Coc Idas v Ganeshlal* (1880) 4 B [illegible] 416.

(u) *Bhagwan Chand v Kanak* (19[illegible]1) [illegible]6 Cal W N 3[illegible]9 [illegible]

17.

16 [S 79] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons

Person served to sign acknowledgment

Refusal to sign acknowledgment —A mere refusal to sign an acknowledgment of service is not an offence under s 173 or s 180 of the Indian Penal Code (t)

17 [S 80] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed

Procedure when defendant refuses to accept service or cannot be found

The old section —This section corresponds with s 80 of the Code of 1882 except in the following particulars —

1 The words after using all due and reasonable diligence are new They give effect to the decisions cited in the notes below under the head ' After using all due and reasonable diligence '

2 The words or carries on business or personally works for gain ' have been added to remove a doubt which arose under the old section as to whether it was good service to affix a copy of the summons on the outer door of the defendant s *place of business* (w)

3 The words and the name and address etc , at the end of the rule are also new They merely give effect to the existing practice

Service of summons —The Code prescribes three modes of service of summons upon a defendant They are as follows —

1 In the first case the summons is served by delivering a copy thereof to the defendant personally or to an agent or other person on his behalf, and

(t) *Queen Empress* v *Krishna* (1893) 20 Cal 358

(w) *Chanbasappa* v *Mahaba* (18 0) 7 B H C

A C 133

by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons See rr 10—16 and r 18 **O. 5, r. 17**

2 In the second case, that is, cases mentioned in r 17, service is effected *without an order of the Court* by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and the *Court has to declare* after examination of the serving officer that the summons has been duly served When this mode of service is adopted, the provisions of r 19 have to be complied with and the Court concerned has to decide whether the summons has or has not been duly served See rr 17 and 19

3 In the third case, that is, cases mentioned in r 20, service is effected *after obtaining an order of the Court* by affixing a copy of the summons in some conspicuous place *in the Court house* and *also* upon some conspicuous part of the house (if any) in which the defendant is known *to have last resided or carried on business or personally worked for gain*, or *in such other manner as the Court thinks fit* Service so effected is as effectual as if it had been made on the defendant personally This is called *substituted service* See r 20 and the marginal note thereto (x)

Refuses to sign the acknowledgment—Where a defendant refuses to sign the acknowledgment, the provisions of the present rule must be complied with, namely, *that the serving officer shall affix a copy of the summons on the outer door of the defendant s house*, otherwise the summons cannot be said to have been duly served (x) In a recent Patna case the Court expressed the opinion that where a copy of the summons is delivered to the defendant under r 10 above, and the defendant *retains* it but refuses to sign an acknowledgment, the provisions of this rule do not apply and that it was *not necessary to affix a copy of the summons on the door of the defendant s house*, the reason given being that in such a case the serving officer would have *no other copy* of the summons to be affixed on the outer door and that the summons must be deemed to be duly served though no copy was so affixed (y) But it has been held by the same High Court that if the copy of the summons is *not retained* by the defendant, the provisions of this rule must be strictly complied with (z)

"After using all due and reasonable diligence."—The present rule provides that in cases where the defendant cannot be found, the mode of service prescribed by this rule should not be resorted to *until* the serving officer has used *all due and reasonable diligence* to find the defendant, and the defendant could not be found To justify such service, *it must be shown that proper efforts were made to find the defendant, e g*, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found (a) Thus, if a serving officer goes to a defendant's house, but does not find him there, and the defendant's adult son, who is in the house, refuses to accept service on behalf of the father, these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule; he must, before effecting such service, inquire of the son as to where the defendant is and otherwise use due and reasonable diligence in finding the defendant (b) When a

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[illegible] I C 883 (24) A I 446

(z) *Mahadeo* v *Basgit* (1925) 4 Pat 135 91 I C 184 (25) A I 441

(a) *Rajendro* v *Jan Meah* (1899) 26 Cal 101, *Cohen* v *Nursing Dass* (1892) 19 Cal 201, *Sankaralinga* v *Ratnasabhapati* (1898) 21 Mad 324 *Kassim* v *Johurmull* (1916) 43 Cal 447, 34 I C 799 *Baldeodas* v *Sukhdeodas* (1925) 52 Cal 179 88 I C 503 (25) A C 627 *Dina Nath* v *Upendra* (1924) 40 Cal. L J 154 84 I C 703 (24) A C 1004

(b) *Sakaram* v *Padmakar* (1906) 30 Bom 623

defendant is *temporarily* absent from home and is not represented in his house by an agent or male member of his family, the summons should be again taken to the defendant's house to be served upon him when the enquiries made show that he is likely to be at home and to be found there (c) Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (d) much less if the serving officer knows where the defendant is though the defendant may not have been in the house at the time when he went to serve the summons (e) See notes above under the head The old section

Cannot find the defendant —These words are wide enough to cover the case where the serving officer is *not able to obtain access* to a *purdanashin* lady who has to be served and cannot deliver or tender a copy of the summons to her (f) See notes to r 19 below and notes also to O 9 r 13 Grounds on which *ex parte* decree may be set aside

Proof of service —If the plaintiff appears at the hearing of the suit but the defendant does not appear at the hearing the question whether the summons was duly served arises directly for the determination of the Court for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O 9 r 6 (1)] Where a decree is passed *ex parte* against a defendant and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him, the Court may set aside the decree [O 9, r 13]

18 [S 81] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons

Endorsement of time and manner of service

Form of return —See Appendix B to Schedule I Form No 11 The said Form has been altered in certain respects by the Chief Court of the Punjab see Appendix VII below

19 [S 82, 1st para] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit

Examination of serving officer

(c) *Ramshetti* v *Umabai* (18) 21 Bom 3
(d) *Subramania* v *Subramania* (18 8) 1 Mad 419 *Abraham* v *Donald* (1906) 29 Mad 3 4
(e) *Sakina* v *Gauri* (190) 24 All 50
(f) *Ishrode* v *Nahan Chanda* (1915) 19 C W N 1 31 20 I C 64

"Or order such service as it thinks fit"—These words empower the Court even when there has been a technical compliance with the provisions of r 17, to order service in another mode if the Court thinks fit to do so in the interests of justice Thus where the person to be served is a *pardanashin* lady and the serving officer not being able to obtain access to her affixes a copy of the summons on the outer door of her dwelling house as provided by r 17 though the mode of service is not improper, the Court may under this rule direct the service of summons by means of notice by registered post so that the cover may in due course reach the lady herself (g)

Substituted service

20. [S 82, 2nd para, Ss 83, 84] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house, and also upon some conspicuous part of the house [if any] in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit

Effect of substituted service

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally

Where service is substituted time for appearance to be fixed

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require

Substituted service—See notes to r 17 above Service of summons

For any other reason—Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with a summons the Judicial Committee allowed service to be substituted on her *Deewan* [chief servant] (h)

Service of summons where defendant resides within jurisdiction of another Court

21. [S 85, 1st para] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides

Service by registered post—This rule is to be read with s. 27 of the General Clauses Act 10 of 1897 by which it is provided that when any document is required by an Act passed after 11th March 1897 to be served by post and the expression used is send [which is the expression used in the present rule] then unless a different intention appears [and no such intention appears in the present rule] the service shall be

(g) (1915) 19 C W N 1231 33 I C 64 *supra* | (h) *Clark* v *Mullick* (1839) 2 M I A 263 268

O. 5, r. 19. defendant is *temporarily* absent from home, and is not represented in his house by an agent or male member of his family, the summons should be again taken to the defendant's house to be served upon him when the enquiries made show that he is likely to be at home and to be found there (c) Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (d), much less, if the serving officer knows where the defendant is, though the defendant may not have been in the house at the time when he went to serve the summons (e) See notes above under the head "The old section"

Cannot find the defendant —These words are wide enough to cover the case where the serving officer is *not able to obtain access* to a *purdanashin* lady who has to be served, and cannot deliver or tender a copy of the summons to her (f) See notes to r 19 below, and notes also to O 9, r 13, "Grounds on which *ex parte* decree may be set aside"

Proof of service —If the plaintiff appears at the hearing of the suit, but the defendant does not appear at the hearing, the question whether the summons was duly served arises directly for the determination of the Court, for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O 9, r 6 (1)] Where a decree is passed *ex parte* against a defendant, and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him, the Court may set aside the decree [O 9, r 13].

Endorsement of time and manner of service

18. [S. 81.] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Form of return.—See Appendix B to Schedule I, Form No 11. The said Form has been altered in certain respects by the Chief Court of the Punjab, see Appendix VII below

Examination of serving officer

19. [S. 82, 1st para] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit.

(c) *Bhimshetti* v *Umabai* (1897) 21 Bom 223
(d) *Subramania* v *Subramania* (1898) 21 Mad 419 *Abraham* v *Donald* (1906) 29 Mad 324.
(e) *Sakina* v *Gauri* (1902) 24 All 302
(f) *Kshirode* v *Nabin Chandra* (1915) 19 C W. N 1231, 30 I C 64

O. 5, rr. 23-26.

Sufficiency of service.—Where a summons has been transmitted by one Court to another for service by the latter, and the return made by the Court serving the summons states that the service has been duly effected, the presumption will be that the service was sufficient unless the return itself shows the insufficiency (*l*). Similarly when the return made by the Court serving the summons states that the summons has not been duly served, and the summons is returned with that declaration to the Court from which it was issued, the presumption is that the service was not sufficient, and the Court from which the summons was issued should act upon that presumption unless there is good and strong evidence which comes or is brought to its notice going to show that the summons was duly served (*m*). According to the Calcutta High Court, however, the Court issuing the summons must not proceed upon any presumption either way, but must determine for itself whether the service was sufficient or not, the reason given being that the present rule does not require the Court to which the summons is sent for service to make any return touching the *sufficiency* of service (*n*). This view has been dissented from by the High Court of Allahabad on grounds of expediency, and, further, on the ground that it ignores the last sentence of rule 19 above which applies not only to the Court issuing the summons, but also to the Court to which it is sent for service (*o*)

Service on defendant in prison

24. [Ss. 87, 88.] Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

As to the duty of the officer to whom the summons is sent for service, see r 29 below.

Service where defendant resides out of British India and has no agent

25. [S 89] Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service by post.—See notes to s 21 above.

Service in foreign territory through Political Agent or Court

26. [S 90] Where—

(*a*) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(*l*) *Nasur Mohomed v Kabai* (1886) 10 Bom 202

(*m*) *Dwarka Prasad v Brij Mohan Lal* (1911) 33 All 649, 11 I C 39

(*n*) *Romanath v Guggodo* (1895) 22 Cal 849

(*o*) *Dwarka Prasad v Brij Mohan Lal* (1911) 33 All 649, 11 I C 39

O. 5, rr. 26-29.

(*b*) the Governor-General in Council has, by notification in the *Gazette of India*, declared *in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service,*

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant, and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other Officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service

The words italicized in Cl (b) of this rule are new They were inserted in this rule by the Repealing and Amending Act XVII of 1914

Service on civil public officer or on servant of railway company or local authority

27. [S 422] Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Officer belonging to the Indian Marine Service—An officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules as every other person under the Code that is to say, service upon him is to be effected in *the manner prescribed by rr 15 to 17 above (p)*

Service on soldiers

28. [S 468] Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant

Duty of persons to whom summons is delivered or sent for service

29. [*Cf* Ss 87, 88, 468] (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 *or* rule 28, such person shall be bound to serve it, if possible,

(p) *Inti Meol v Darbukh* (1915) 42 Cal 67, 25 I C 390

and to return it under his signature, with a written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

O. 5, rr. 29, 30.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

Substitution of letter for summons

30. [Ss. 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post, or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

ORDER VI.

Pleadings generally.

O. 6, r. 1.

Pleading

1. [*New. Cf.* Jud. Act, 1873, S. 100.] "Pleading" shall mean plaint or written statement.

Introduction of English rules of pleadings—The object of this Order is to introduce into British India the leading rules of pleadings followed in England The whole of this Order, excepting rr 14 and 15, is new. The rules comprised in this Order, except rr 14 and 15, have been taken most of them from Order 19 and the rest from Order 28 of the English Rules made under the Judicature Acts In one respect, however, the rigour of the English Rules has been relaxed by providing that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who alleges it (see O 8, r 5)

Function of pleadings.—"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be discussed and decided was. In fact, *the whole meaning of the system is to narrow the parties to definite issues,* and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing" (q). To attain this end, the plaintiff should state in his plaint all the facts which constitute his cause of action. It is not sufficient to allege what may be a ground of action if something else be added which is not stated in the plaint. "Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action" (r). The defendant also should state in his written statement the material facts on which he relies for his defence. When the result of the pleading on both sides is that a material fact is affirmed on the one side and denied on the other, the question thus raised between the parties is called an issue of *fact*. When one party answers his opponent's pleading by stating an objection in point of law, the legal question thus raised between the parties is called an issue of *law*. See O. 14, r. 1.

A plaintiff's pleading is his plaint (O. 7). A defendant's pleading is his written statement (O. 8). In some cases a plaintiff who has filed his plaint may, with the leave of the Court, file a *written statement,* or the Court may require him to file a *written statement.* In such cases the written statement forms part of the plaintiff's pleadings. Again, there are cases in which a defendant who has filed his written statement may, with the leave of the Court, file an *additional written statement* or the Court may require him to do so. In such cases the *additional written statement* forms part of the defendant's pleadings. The plaintiff's written statement and the defendant's additional written statement are called *subsequent pleadings*. See O. 8, r. 9.

Pleading to state material facts and not evidence.

2. [*New.* R. S. C., O. 19, r. 4.] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

General rules of pleading.—O. 6 deals with Pleadings in general, O. 7 deals with Plaints, and O. 8, with Written Statements. The following is a summary of the rules comprised in this order:—

1. State your *whole* case in your pleading, in other words, set forth in your pleading *all* material facts on which you rely for your claim or defence (r. 2).

2. State facts and *not law* (r. 2). If any matter of law is set out in your opponent's pleading, do not plead to it (s).

3. State the material facts on which you rely, and *not the evidence* by which they are to be proved (rr. 2, 10, 11, 12).

(q) Per Jessel M. R. in *Thorp* v. *Hollsworth* (1876) 3 Ch. D. 637, 639.

(r) *West Rand Central Gold Mining Co.* v. *Rex* [1905] 2 K. B. 391, 400.

(s) *Richardson* v. *Mayor of Oxford* (1793) 2 H. B. 182.

4 State *material* facts only, omit immaterial and unnecessary facts Do not anticipate your opponent's pleading and plead to any matter which is not alleged against you (r 2)

5 State the facts of your case *concisely*, but with precision (r 2)

6 It is not necessary to allege the performance of any condition precedent, an averment of performance is now implied in every pleading (r 6)

7 It is not necessary to set out the whole or any part of a document, unless the precise words thereof are necessary It is sufficient to state the effect of the document as briefly as possible (r 9)

8 It is not necessary to allege any matter of fact which the law presumes in your favour, or as to which the burden of proof lies upon your opponent (r 13)

Fundamental rule—Rule 2 of this Order is the fundamental rule of pleadings When analysed, it will be found to require four things —

I Every pleading must state *facts* and not law

II It must state *material facts*, and material facts only

III It must state only the facts on which the party pleading relies for his claim or defence, and *not the evidence* by which they are to be proved

IV It must state such facts *in a concise form*

"The main object, or one of the main objects, of this rule is that the one party may know what are the facts on which the other party relies in order that he may be prepared to meet the case" (*t*)

I. Every pleading must state facts and not law—A pleading must not set forth a public statute, for the Court is bound to take judicial notice of it (*u*) Nor should parties plead conclusions of law or of mixed law and fact it is for the *Court* to declare the law arising upon the facts before it The parties should only state the *facts* on which they rely for their claim or defence

It is bad pleading to allege merely that a *right* or a *duty* exists, the *facts* must be set out which give rise to the right or create the duty Thus in a suit for damages for negligence it is not enough for the plaintiff to state that the defendant has been guilty of negligence, without showing in what respect he was negligent and how he became bound to use care to prevent injury to others Negligence means a breach of duty to take due care and caution The plaint, therefore, ought to state facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged (*v*) Similarly, it is not sufficient for the plaintiff to aver that the defendant did the act complained of "wrongfully, unlawfully and improperly" or "without any justification therefore or right so to do" He must state the facts upon which he proposes to rely as showing that the act was done wrongfully or unlawfully. "Those epithets, under the present system of pleading, are useless and redundant They add nothing whatever to the plaintiff's case They are merely now epithets of abuse They were formerly in declarations essential, because under that form of pleading *legal rights* were stated for facts, but *facts* alone are stated now" (*w*) Upon like principles, it is not sufficient for the plaintiff to say, "Under and by virtue of a certain deed I am entitled, etc He must state the facts which go to show his title (*x*) In like manner, a plain-

(*t*) *Re* Morgan *Owen* v *Morgan* (1887) 35 C D 492, 496

(*u*) *Partridge* v *Strange* (1816) Plowd 77, 84

(*v*) *Gautret* v *Egerton* (1867) L R 2 C P 371, 374, *West Rand Central Gold Mining Co* v *Rex* [1905] 2 K B 391 400

(*w*) *Per* Jessel M R in *Day* v *Brownrigg* (1878) 10 C D 294 302

(*x*) *Lyddell* v *Earl of Strathmore* (1887) 3 Times L R 329

2. tiff claiming under a *donatio mortis causâ* must state the facts which, according to him, would constitute it a valid *donatio mortis causa* it is not sufficient to say that the deceased ' two days before his death made a good and valid *donatio mortis causa* to the plaintiff ' of the property (*y*) Where a plaintiff claims by inheritance, it is not sufficient to say, ' I am the heir at law " He must state the particulars showing the links of relationship on which he relies as constituting him such heir (*z*)

The same principles apply to a defendant s pleading A defendant may not in his written statement say merely, " I am not liable " He must allege facts which show that he is not liable Thus a defendant, who claims privilege in a suit for defamation, must not plead merely that he published the words on a privileged occasion ' He must state the facts which give rise to the privilege (*a*)

ii. Every pleading must state material facts and material facts only —To begin with, a party should set out in his pleading *all* material facts on which he relies for his claim or defence " What particulars are to be stated must depend on the facts of each case But it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial " (*b*) If a party omits to plead a material fact he will not be allowed to give evidence of that fact at the trial, unless the Court gives him leave to amend his pleadings under r 17 below If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support the r case any fact which is not stated in the pleadings' (*c*) Thus if *A* sues *B* for specific performance of a contract, alleged to have been signed by *B* s agent, and the only fact stated in *B* s written statement as a ground of defence is that the alleged agent was of unsound mind and therefore incompetent to contract *B* will not be allowed to prove at the hearing that the alleged agent *had in fact no authority to sign the contrac* *B* ought to have pleaded want of authority in his written statement, if he intended to rely upon it for his defence Nor will *B* be allowed to amend his written statement in such a case under rule 17 below, for ' if a defendant were to be at liberty to put in a defence inconsistent with the rules of pleading, and then *at the trial* get the case to stand over in order to put in a *new defence*, the consequences might be very prejudicial (*d*)

Matters affecting damages —The present rule provides that every pleading should contain, and contain only, *material facts on which the party pleading relies for his claim or defence*, as the case may ce That is to say, a plaint should contain only those material facts on which the plaintiff relies for his claim and a written statement should contain only those material facts on which the defendant relies for his defence Does this mean that the plaint should be confined to those facts only which constitute the plaintiff s *cause of action*, and that the written statement should be confined to those facts only which constitute the defendant s *defence* ? It has been held, as regards a *plaintiff s claim*, that the words material facts on which the party pleading relies for his claim, ' are not confined to those facts which are essential to the plaintiff s cause of action, *but include any* fact which *the plaintiff is entitled to prove at the hearing* Thus facts which merely tend *to increase* the amount of damages are *not essential to the cause of action*, but they certainly are facts which the plaintiff *is entitled to prove* at the hearing as matters

(*y*) *Re* Parton *Townsend* v *Parton* (1882) 30 W R 28 [Eng]
(*z*) *Palmer* v *Palmer* [1892] 1 Q B 319
(*a*) *Simmonds* v *Dunne* (1871) Ir R 5 C L 358
(*b*) *Per* Cotton L J in *Phillipps* v *Phillipps* (1878) 4 Q B D 127 139
(*c*) *Phillipps* v *Phillipps* (1878) 4 Q B D 127 133 *per* Brett L J, *Brook* v *Brook* (1886) 12 P D 19, *James* v *James* (1894) 26 C D 778
(*d*) *Bird* v *Nunn* (1877) 7 C D 284

in aggravation of damages Such facts are therefore material facts within the meaning of this rule and a plaintiff has to state them in his plaint (e) As observed by Brett, L J, in *Phillipps* v *Phillipps* (f), the words of the rule are not the facts which will be necessary to *support the cause of action* they are, the material facts *on which the party relies* for his claim In *Millington* v *Loring* (g), which was a suit for damages for breach of a contract to marry, the plaint, after alleging the promise to marry in the first paragraph and the breach thereof in the second, went on to allege in the third paragraph that ' the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease Analysing the above plaint, it may be stated that the first and second paragraphs stated facts that were *essential to the cause of action, viz*, facts relating to the *making* of the contract and facts relating to the *breach* of the contract, being facts which constitute the cause of action in a suit for damages for the breach of a contract But the facts stated in the third paragraph were not essential to the *cause of action* Nevertheless they were *material facts* within the meaning of the rule, for the plaintiff *was entitled to prove them* as *matters in aggravation of damages*, and it was held that they were properly set forth in the plaint Turning now to the *defence* in a suit for damages, the rule laid down in *Wood* v *Durham* (h) is, that a defendant is not in general entitled to plead in his defence *matters in mitigation of damages* The ground of the decision in that case is that such matters do not constitute any *defence* to an action, and a defendant can under the rule allege only those material facts on which he relies for his *defence* As to *Millington* v. *Loring*, it was said that it was a case where " there was a good cause of action of a *double character* stated there were damages claimed by reason of an alleged breach of promise of marriage, but there was far more, because *part of the cause of action* was that by reason of that the plaintiff had been ill through the seduction by the defendant, who had ruined her character, and had infected her with a bad disease ' One may be permitted to doubt whether illness through seduction and infection with disease *formed part of the cause of action* Moreover, the decision in *Millington* v *Loring* has been followed in a case later than *Wood* v *Durham*, where it could not be said that there was a cause of action of a double character (i) However this may be, it is to be remarked that the decision in *Wood* v *Durham* turned not only on the construction of the corresponding English rule but on O 21, r 4, which provides in express terms that " no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted " O 21, r 4, of the English rules has not been reproduced in the Code Such being the case, just as the plaintiff may plead any matter in aggravation of damages as to which he could give evidence at the trial, so the defendant may plead any matter in mitigation of damages as to which he could give evidence at the trial See notes to O 8, r 3, " Except damages '

Facts not yet material to a case —The pleadings should only contain such facts as are material at the *present* stage of the suit It is not proper to anticipate the answer of the adversary To do so is " like leaping before one comes to the stile " (j) "It is no part of the statement of claim ['plaint' in our pleadings] to anticipate the defence, and to state what the plaintiff would have to say in answer to it That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant,

(e) " 9)

(f) (

(g) (1880) 6 Q B D 190

2 and make charges in reply to them" (k) Thus it is unnecessary in a suit upon a bond to allege that the defendant was of full age when he executed the bond For if he were a minor when he executed the bond, it is for him to prove it it need not be denied by anticipation (l) Similarly a defendant should not plead to any matter which is not alleged against him Thus if a defendant is sued for slander, the only way to meet the plaintiff's claim is to plead (1) that the words in question were not spoken and published, or (2) that they were spoken and published and are true, or (3) that they were spoken and published and are privileged If, instead of so doing, he pleads that he did not say the words alleged in the plaint but that he said something else, and that the something else which he said was true and spoken on a privileged occasion, the defence will be struck out under r 16 below as one embarrassing the fair trial of the suit (m)

III Every pleading must state facts, and not the evidence by which they are to be proved.—Every pleading must contain a statement of the *material facts on which the party pleading relies but not the evidence* by which those facts are to be proved It is an elementary rule of pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation" (n) No doubt, evidence too consist of facts, but there is a convenient nomenclature to distinguish the two The material facts on which the party pleading relies for his claim or defence are called *facta probanda* The evidence or the facts by means of which they are to be proved are called *facta probantia* Every pleading should contain only *facta probanda*, and not *facta probantia* " The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts Erle, C J, expressed it in this way He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved and they were different from the evidence which was adduced to prove those facts And it was upon that expression of opinion of Erle, C J, that rule 4 [of the English rules, corresponding to the present rule] was drawn The facts which ought to be stated are the material facts on which the party pleading relies (o) Thus where a suit is brought against an Insurance Company on a policy on the life of A, and one of the conditions of the policy is that it should be void if the insured committed suicide, the Company should only plead, if the defence is that A committed suicide, that A died by his own hand It is wrong to state in the written statement that A had been melancholy for weeks, that he bought a pistol and shot himself with it These facts are merely evidence (*facta probantia*) facts by means of which the *factum probandum*, namely, suicide, is to be proved (p) Similarly, it is wrong to set out in the pleading admissions made by the opponent, for admissions are only evidence (q) Thus where a plaintiff alleged that certain windows of his were ancient, and the defendant stated in his defence that the plaintiff had in a former action admitted that they were not ancient the allegation was struck out (r) Upon the same principle, " where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is *evidence* that need not be set out (s)

(k) *Hall* v *Eve* (1876) 4 C D 341 345 *per* James L J

639

(p) See *Borrodaile* v *Hunter* (1846) 5 Man and Gr

(r) *Lumb* v *Beaumont* (1884) 49 L T 772

(s) *Phillipps* v *Phillipps* (1878) 4 Q B D 127, 134 *per* Brett, L.J.

Rule 10, 11 and 12, of this Order are special applications of the general principle laid down in this rule

IV. Every pleading must state material facts in a concise form—To attain this end, the forms in Appendix A when applicable, and, where they are not applicable, forms of the like character, as nearly as may be, should be used for all pleadings (see r 3 below) At the same time the rules given above under the head "General rules of pleading," p 436 above, should be borne in mind But the pleader should not sacrifice precision to conciseness For, as observed by Kay, J, "although pleadings must now be concise, they must also be precise' (t) In fact, rule 4 expressly requires that in all cases "in which particulars may be necessary beyond such as are exemplified in the forms [in Appendix A], particulars (with dates and items if necessary) shall be stated in the pleadings" As to further information on this subject of "certainty" in pleadings, see notes to rr 4 5 below

Alternative and inconsistent allegations—The rule now under consideration does not prohibit inconsistent pleading "A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them, and it appears to me to be far too stric construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark' (u) The rules as to joinder of defendants (O 1, r 3) and causes of action (O 2 r 3), as also the rules as to the reliefs that may be claimed by a plaintiff (O 7, rr 7 8) clearly show that either party may allege in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative (v) A plaintiff may rely "upon several different rights alternatively, although they may be inconsistent' (w) But then 'as to each of those he ought to set out the facts upon which he would have to rely as facts to maintain that right (x) So, too, a defendant may, by his written statement, raise as many distinct and separate, and therefore inconsistent defences as he may think proper (y) But this is subject to the provision contained in rule 16 below which provides that the Court may strike out any matter in a plaint or written statement which may embarrass the fair trial of the suit (z) A pleading, however, is not embarrassing within the meaning of rule 16, *merely because* it sets up inconsistent sets of facts (a) Hence it cannot be struck out solely on that ground To go to the length of saying that no inconsistent pleading can be pleaded, appears to me not warranted by the rules and contrary to the established practice of the Courts (b) It must, however, be noted that ' If alternative cases are alleged, the facts ought not to be mixed up, leaving the [other party] to pick out the facts applicable to each case; but facts ought to be distinctly stated so as to show on what facts each alternative of the relief sought is founded (c) [See O 7, r 8] If the facts are so mixed up that they may *embarrass* the fair trial of the suit, the Court may strike out matters which may embarrass the trial What the rules prohibit are not inconsistent pleadings, but pleadings which set up inconsistent *and* embarrassing claims and inconsistent *and* embarrassing defences See notes to O 7, r 7, 'Alternative relief'

(t) *Townsend* v *Parton* (1884) 30 W R [Eng] 287
(u) *Re Morgan Owen* v *Morgan* (1887) 35 C D 492 499 per Lindley, L J
(v) See *Lagat* v *Easton* (1877) 7 C D 1
(w) *Philipps* v *Philipps* (1878) 4 Q B D 127, 134 per Brett L J
(x) *Ib* See also O 7 r 8
(y) *Berdon* v *Greenwood* (1874) 3 Ex D 251 255, *Re Morgan Owen* v *Morgan* (1887) 35 C D 492 496
(z) *Ib*
(a) (1887) 35 C D 492 *supra*
(b) (1887) 35 C D 492 500 per Lindley L J
(c) *Davy* v *Garrett* (1878) 7 C D 473 489 per Thesiger L J *Official Assignee* v *Bulyasundari* (1919) 24 C W N 145 149 ... I C 700 See also O 8 r 7

A plea that a policy of fire insurance was not in existence at the time of the fire and that there was no contract of insurance at all, coupled with an alternative plea that, if there was a contract, then by reason of certain conditions precedent to the attaching of the liability, the insurance company would not be liable, is not contrary to the law of India (d)

Forms of pleading

3. [*New.* R. S. C., O. 19, r. 5.] The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

Particulars to be given where necessary

4. [*New* R S C, O 19, r 6] In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading

Object of particulars—"Although pleadings must now be concise, they must also be precise (e) For this purpose all necessary particulars must be embodied in the pleadings If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the next rule The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and so save unnecessary expense (f) *Particulars supplement pleadings* which would otherwise be too vague and general, and ensure a fair trial by giving notice of the case intended to be set up (g) "What particulars are to be stated must depend upon the facts of each case' (h) As a general rule it may be stated that "as much certainty and particularity must be insisted on as is reasonable having regard to the circumstances and to the nature of the acts themselves To insist upon less would be to relax old and intelligible principles To insist upon more would be the vainest pedantry" (i) At the same time the distinction between *particulars* and *evidence* must be steadily kept in view ' The Courts have uniformly endeavoured to prevent the plaintiff, or the defendant, as the case may be from prying into the brief of his opponent for finding out *what is to be the evidence which is to be produced at the trial* On the other hand, the Courts have uniformly said that the plaintiff or the defendant is entitled to be told *any and every particular* which *will enable him properly to prepare his case for the trial*, so that he may not be taken by surprise" (j) That is to say, whilst particulars may be ordered to prevent surprise, and to inform the opposite party of the case he has to meet, particulars are not ordered of the mode in which it may be proposed to prove the case set up in the pleading (k) To use the

(d) *Hameed & Co* v *Universal Fire Insurance Co* (1924) 2 Rang 144 83 I C 593 ('24) A R 317

(e) *Townsend* v *Parton* (1882) 30 W R (Eng) 287 per Kay J

(f) *Spedding* v *Fitzpatrick* (1888) 38 C D 413, *Saunders* v *Jones* (1877) 7 C 435 451, *Thompson* v *Birkley* (1883) W R 230 [Eng]

(g) *Milbank* v *Milbank* (1900) 1 Ch. 376 383, 385

(h) *Phillipps* v *Phillipps* (1878) 4 Q B D 127, 139

532 532 *Drug Co*

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plaintiff's witnesses, for that is to require particulars of the *evidence* by which the plaintiff's case is to be proved. But where the names of witnesses form part of the *material facts* constituting a party's case, he is bound to state them in his pleading, and if he does not, an order may be made requiring him to disclose the names (*l*) "If the particulars are those that he ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call" (*m*) This may be explained by an illustration *A* deals in drugs bearing the registered trade mark "Herbalin" *B* uses the word "*Herbaline*" on drugs manufactured by him *A* sues *B* for infringement of his trade mark, alleging in the plaint that the use of his trade-mark by *B* is calculated to induce, and had in fact induced "diverse persons" to purchase *B*'s goods as and for *A*'s goods *B* applies for particulars of the names and addresses of the "diverse persons" *B* is entitled to the particulars, for the names in this case form part of the *material facts* which constitutes *A*'s case The whole question in such a case is has the defendant induced *diverse persons* to buy his goods as and for those of the plaintiff (*n*)

Fraud and coercion—Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges It is not enough to use such general words as "fraud," "deceit," or "machinations" "General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice" (*o*) Where a plaintiff seeks relief on the ground of fraud, but the particulars of the fraud alleged are not set forth in the plaint, the plaint should be ordered to be amended or rejected (*p*) [see O 6, r 17, and O 7, r 11] A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it (*q*) Nor is it proper for the appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings (*r*) The same rules apply when *coercion* is charged in the plaint (*s*)

If the particulars of fraud stated in the plaint are not sufficiently specific, the defendant may apply for further particulars under the next rule Thus, where it is alleged by the plaintiffs that the defendants have made false entries in the plaintiff's books for the purpose of defrauding them, the plaintiffs may be directed to furnish particulars specifying the entries charged to be false, and the nature of their objection to each item (*t*) See notes to rule 5 below, "Discovery before particulars," ill 1, and notes to O 6, r 17, "Amendment by adding plea of fraud"

"**Misrepresentation**"—Where it is alleged in the plaint that "the defendant represented to the plaintiff, etc, it should be stated whether the representation was verbal or in writing (*u*) It is not enough in an action to restrain infringement of a

(*l*) *Marriott* v *Chamberlain* (1886) 17 Q B D 154 161
(*m*) *Zierenberg* v *Labouchere* [1893] 2 Q B 183, 188 189
(*n*) *Humphries* v *The Taylor Drug Co* (1888) 39 Ch D 693 See also *Milbank* v *Milbank* [1900] 1 Ch 376
(*o*) *Wallingford* v *The Mutual Society* (1880) 5 App Cas 685, 697 per Lord Selborne L C, *Bal Gangadhar Tilak* v *Shriniwas Pandit* (1915) 42 I A 135, 151, 39 Bom 441, 467, 29 I C 639
(*p*) *Gunga Narain* v *Tiluckram* (1888) 15 Cal [illegible]
(*q*) [illegible] (188.) 11 Bom 620 14 I A 111
(*r*) *Mahomed Mira* v *Savvasi Vijaya* (1900) 23 Mad 227 237
(*s*) *Purushotam* v *Pandurang* (1914) 39 Bom 142, 28 I C 941
(*t*) *Newport Slipway Dry Dock Co* v *Paynter* (1886) 34 Ch D 88
(*u*) *Seligmann* v *Young* (1884) W N 93

O. 6, r. 5

r 4, the other party may apply under this rule for further and better particulars If the English practice is to be followed here, the application need not be supported by any affidavit except, perhaps, in a special case (*m*)

When application should be made —As a general rule a defendant who claims particulars should apply for them with reasonable promptitude (*n*) and before putting in his defence, but he does not by putting in his defence waive his right to particulars (*o*) Nay, in a proper case, the Court may order an application for particulars to stand over till a written statement has been put in to enable the Court to know what the points raised by the defence are, as where the defendant is the plaintiff s agent and the particulars in question are all in the knowledge of the defendant, but not in the knowledge of the plaintiff (*p*)

Discovery before particulars —The question often arises, where a defendant has applied for particulars, whether the plaintiff should deliver particulars before obtaining discovery and inspection of the defendant s books or whether discovery should be given before particulars are delivered There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances (*q*) The result of the authorities appears to be that where the party pleading does not know the facts necessary to enable him to give the particulars but his opponent knows them, the party applying for particulars may be ordered to give discovery before the party pleading is required to deliver particulars and the application for particulars may be postponed till after discovery It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars (*r*)

1 *Suit by principal against agent for accounts charging agent with fraud* —*A* employs *B* to purchase goods, as his agent, at the lowest possible price *A* sues *B* for an account alleging in the plaint that *B* had purchased goods at prices higher than the current prices and had secretly received commission from the vendors The charges against *B* are stated *in general terms*, no particulars being given. *A* is unable to state the particulars of the fraud charged until he sees *B* s books *A* is entitled to inspection of *B* s books before he can be called upon to deliver particulars of the fraud (*s*)

2 *Suit by a wife s executor against husband* —*A*, who is the executor of *J* sues *B*, *J* s husband to recover from him *all the furniture and other chattels* purchased by *J* with her separate income and included in an inventory of all the goods in *B* s house made sometime before *J* s death *B* applies for particulars of the furniture He is not entitled to the particulars until he declares by an affidavit which of the articles comprised in the inventory belonged to his wife Where the plaintiffs are executors who do not know, and the defendant a person who does know, it is right that discovery should come first (*t*)

(*m*) *Thompson* v *Birkley* (1883) 31 W 230 wher the action was fo and the d fendant applied for of the alleged immoral inter the Court r f used to make unless he made an affidavit t not seduced the girl —approv v *Spedman* (1887) 37 C I B t see *Kelly* v *Briggs* 85 L 78

3 *Suit by a colliery company against a colliery merchant* —A colliery company sues *R*, a coal merchant, for damages for fraudulently passing off coal not gotten from the company s mines as coal gotten from the company s mines The plaintiffs in their plaint give one specific instance of fraud, and allege that on divers other occasions the defendant had taken orders from divers other persons for coal to be supplied from the company's mines, and fraudulently sold coal not purchased from the plaintiff as coal gotten from the company s mines *R* applies for particulars of the names and dates The company then applies for inspection of *R*'s books The company is entitled to discovery before delivering particulars Chitty, J, said Having regard to the circumstances that many of these alleged frauds are within the defendant s means of knowledge and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars (*u*)

The practice followed in the above cases was sought to be applied in a libel case where *A* sued *B* for calling him a charity swindler ' and imposter,' and *B* pleaded justification and, when called upon to give particulars of the charge, said that he could not unless he was allowed inspection of *A* s books of account The Court held that *B* was not entitled to discovery before he had delivered particulars Kay, L J, said To apply this practice to the case of a libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could, by the process of discovery, elicit such facts (*v*)

Further particulars granted —For cases in which further and better particulars have been ordered, see notes to r 4, ' Other cases in which particulars may be necessary," on p 444 above

Objections to particulars —

1 *A* applies for particulars from *B* under this rule It is a valid objection to the application that the particulars applied for by *A* relate to the *mode* in which *B* s case is to be proved, and not to *material facts* constituting *B* s case See notes to r 4 Object of particulars p 442 above

2 Particulars will only be ordered of *material facts* constituting a party's case, but not of any *immaterial* allegation (*w*)

3 Particulars will only be ordered of material facts *alleged* by a party in his pleading but not of those *denied* by him See notes to r 4, "Particulars of defence, p 445 above

4 *A* applies for particulars from *B* under this rule It is no objection to the application that *A* must know the true facts of the case better than *B* (*x*)

5 Where a party from whom particulars are sought is unable to give the particulars without laborious inquiry, the practice is to make an order for the best particulars the party can give" (*y*) This is usually the case where the party fills a representative character (*z*)

"Upon such terms as to costs or otherwise"—Thus an order may be made directing that unless particulars are delivered within a certain time, the suit shall be dismissed (*a*)

(*y*) *Marshall* v *Inter-Oceanic & Co* (1885) 1 Times L R 331, *Williams* v *Lamsdale* (1887) 36 W R 125, *Harford* v *Monk* (1878) 38 L T 411

(*z*) *Higgins* v *Weekes* (1889) 5 Times L R 233

(*a*) *Davey* v *Bentinck* [1893] 1 Q B 185

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Amending or delivering further particulars—Where a party who has delivered particulars under an order afterwards desires to amend them or to deliver further particulars the proper course for him is to obtain an order giving him leave to do so (*b*). And leave, will, in general, be granted, where the amendment will cause no injury to the opposite party except such as can be sufficiently compensated for by costs (*c*) Leave to amend may be refused where it is sought to introduce a new cause of action (*d*), or to add to the amount claimed after the defendant has paid into Court the full amount originally claimed (*e*) An application to amend particulars will, as a rule, be refused if made at the *trial* of the suit (*f*) See s 153 and r 17 of this Order

Condition precedent

6. [*New* **R. S. C., O. 19, r. 14**] Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be , and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading

Neither party need allege the performance of any condition precedent— *A* agrees to build a house for *B* at certain rates specified in the contract It is a condition of the agreement that payment to *A* should only be made upon a certificate signed by *B*'s architect that so much is due. *A* demands payment upon completion of the building but *B* refuses to pay *A* sues *B* claiming Rs 5 000 Here the obtaining of the architect's certificate is a *condition precedent* to *A* s right of action The present rule provides that it is not necessary for *A* expressly to aver in his plaint that he has obtained the architect s certificate Such averment, the rule says, shall be *implied* in his pleading. The rule further provides that if *B* intends to contest the fulfilment of the condition precedent he must distinctly specify the condition precedent in his written statement He must plead that the architect has not certified the amount claimed in the suit If *B* does not plead the non performance of the condition, it will be presumed that the condition has been duly performed If *B* pleads non performance, the burden of *proving* due performance will be on *A*

A condition precedent, it must be observed, *does not strictly speaking form part of the cause of action* Thus in the case put above *A*'s cause of action consists of the *making* of the contract and of the *breach* thereof by *B* The condition of obtaining the architect s certificate is but an additional formality introduced by the express agreement of the parties, *suspending* *A* s right to sue until the condition has been performed

History of the rule—This rule is a reproduction of O 19 r 14, of the English Rules Before the year 1852, it was a recognized rule of English pleadings that the plaintiff should allege *expressly* the performance of *each* necessary condition precedent to the rights claimed Then came the Common Law Procedure Act, 1852, which modified the earlier practice by enabling the plaintiff to aver performance of *conditions precedent generally* For this purpose, the form in use was "all conditions were performed, and

(*b*) *Yorkshire Provident Co* v *Gilbert* (1895) 2 Q B 148 153 *Emdens* v *Burns* (1894) 10 Times L R 400 [illegible] *Coal Association* [illegible]

all things happened, and all times elapsed necessary to entitle the plaintiff to have the said promise performed by the defendant, and to maintain his action for the breach thereof hereinafter alleged" The present rule does away with the necessity of even a *general* averment of performance of condition precedent A plaintiff need not now allege the performance of any condition precedent It is for the *defendant* to object if he intends to dispute the performance of any condition precedent

"Distinctly"—This rule requires that where a party intends to contest the performance of any condition precedent, he must *distinctly* specify the condition precedent in his pleading An allegation in general terms that there was "an express condition" is not enough The pleading must state the terms of the condition, the names of the parties to it, and whether it was in writing or verbal (*g*)

Departure

7: [*New.* R. S. C., O. 19. r. 16] No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same

Departure in pleading—This rule provides against what is called "a departure in pleading" It is a reproduction of O 19, r 16, of the English Rules Its importance in this country is not likely to be so great as in England where the practice is for each party *in turn* to state his own case, and answer that of his opponent before the hearing Not that the Code does not recognize *subsequent pleadings* (see O 8, r 9), but such pleadings are seldom resorted to in this country even in the Presidency towns The general principles on which the system of pleading in England is founded are as follows —

1 The plaintiff by his *statement of claim* alleges the material facts on which he relies in support of his case

2 The defendant, in answer thereto, delivers a *defence* in which he may take all or any of the following courses —
   first, he may deny or refuse to admit the facts stated by the plaintiff,
   secondly, he may confess or admit them, and avoid their effect by answering fresh facts which afford an answer thereto,
   thirdly, he may admit the facts stated by the plaintiff, and may raise a question of law as to their legal effect
   If the defendant adopts the first or third of these three courses, a question of fact or of law is at once raised between the parties

3 If the defendant adopts the second of the three courses, the plaintiff may *reply*—
   first, by denying the fresh facts alleged by the defendant, or
   secondly, by admitting them, and alleging other facts which avoid their effect, or
   thirdly, by raising a question of law as to their effect

4 If the plaintiff pleads a reply of the second kind, that is, if he replies by way of confession and avoidance, the defendant has the same courses open to him in pleading a *rejoinder* (*h*) A rejoinder is now seldom pleaded

5. It is very seldom that further proceedings are taken, but there may be *sur-rejoinders, rebutters, and surrebutters*

(*g*) *Ibbe* v *Matheson & Co*, 104 L. T Journal 263

(*h*) Bullen and Leake, Precedents on Pleadings 6th ed., pp 1 2

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Under the Code a plaintiff commences his suit by presenting a *plaint*. The defendant then puts in his *written statement* in answer to the plaintiff s claim There is nothing corresponding to a *Reply* or *Rejoinder* in the Anglo Indian system of pleadings But the plaintiff may with the leave of the Court tender a *written statement* and the defendant may, with like leave tender an *additional written statement* (O 8 r 9) The Code of 1882 also contained a similar provision (i), but pleadings in this country seldom go beyond the defendant s written statement

The word pleading at the commencement of this rule refers to *subsequent pleadings* Thus in England a plaintiff may not raise in his *Reply* a ground of claim different from that raised in his *Statement of Claim*, nor can he in his *Reply* set up facts inconsistent with those set up in his *Statement of Claim* A reply is not the proper place in which to raise new claims. A plaintiff who wishes to add new claims can do so only by *amending* the Statement of Claim Similar remarks apply to a defendant s Rejoinder As a plaintiff s Reply must be consistent with his Statement of Claim so a defendant s Rejoinder must be consistent with his Defence Thus if a plaintiff alleges merely a *negligent breach of trust in h s Statement of Claim, the Reply must not assert that the* breach of trust was *fraudulent* (j) Similarly if the Defence alleges that the arbitrators *did not make any award* the Rejoinder must not assert that the award *was not tendered by the proper time* for it is one thing not to make an award and another thing not to tender it when made (k) Upon the same principle a plaintiff who claim *rent* on the basis of a lease cannot claim the same sum in his Reply as *damages* for unlawfully ' holding over for by his Statement of Claim he treats the defendant as his tenant and he cannot turn round in his Reply and say If the defendant is not liable as a *tenant* he is liable as a trespasser (l)

8. [*New* R S C, O 19, r 20] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract

Denial of contract —All matters which go to show that the contract sued on is void or unlawful must be *specifically pleaded* If such matters are not expressly pleaded no evidence thereof can as a rule be given at the trial. Thus if *A* sues *B* on a contract and *B* in his written statement *merely denies* the contract such denial will be taken to mean only that there was *in fact* no such contract as alleged it will not be construed as a denial of the *legality* of the contract The result is that if *A* proves the contract sued upon *B* will not be allowed to contend at the hearing that the contract was a *wagering contract* and therefore void *B* ought to have specifically pleaded in his written statement that the contract was a wagering contract (m) But where at the hearing of a suit *the plaint ff s case discloses* that the transaction which is the bas s of his claim is *illegal* the Court cannot properly ignore the illegality, *even if the illegality be not pleaded*

(i) See Code of 188 s 11..
(j) *Kingston* v *Corker* (18) 29 L R Ir 364 5?7
(k) *Roberts* v *Marrez* (18 1) ? Wms S? in I 188
(l) *Duckworth* v *McClelland* (18 8) 2 L R Ir 5?7
(m) *Colborne* v *Stockdale* (179) 1 Str 493 *Grizewood* v *Blane* (1851) 11 C.B 526 *Willis* v *Lovick* (1901) 2 K B 195 *Bull* v *Chapman* (1853) 8 Ex 444

or relied on by the defendant (n) "No Court ought to enforce an *illegal* contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality It matters not whether the defendant has pleaded the illegality or whether he has not *If the evidence adduced by the plaintiff proves the illegality*, the Court ought not to assist him" (o) Note that an agreement by way of wager is void, but not illegal [see Indian Contract Act, 1872, ss 23 and 30] See O 8, r 2

9. [*New.* R.S.C., O. 19, r. 21.] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated

Effect of document to be stated.—This rule provides what is to be the proper method of pleading where a material fact (r 2) is evidenced by a document (p). The intention expressed by the first part of the rule seems clearly to be that, where a document is material, it shall not be necessary to set it out at length, but only to state the legal effect of it, the object apparently being to prevent long pleadings (q) Thus it is sufficient if a plaintiff in a suit for the recovery of immoveable property under a will states in his plaint the *effect* of the will under which he claims He is not bound to set out the precise words of the will, although a question has arisen as to the true construction of those words (r) At the same time, it is not enough for a plaintiff to say that, under and by virtue of a certain deed, he is entitled to the property claimed by him. He must state the *effect* of the document on which he relies (s)

Precise words.—In an action of libel or slander it is always necessary to set out the *exact* words alleged to be libellous (t)

10. [*New.* R S.C., O. 19, r. 22.] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Malice, knowledge, &c.

Condition of mind—*Rules 10, 11 and 12 are no more than practical applications* of the general principle laid down in r 2 above Malice, fraudulent intention, knowledge, etc, constitute in some cases the *material facts* of a party's case; they must therefore be alleged in the party's pleading But the circumstances from which they are to be inferred need not be stated in the pleading

Malice.—Malice is a necessary part of the cause of action in suits for slander of title and for malicious prosecution. It must therefore be alleged by the plaintiff in his plaint. Similarly, where a defendant in an action of libel claims privilege, alleging that

(n) *Gedye v Royal Exchange Assurance Corporation* [1900] 2 Q B 214, *Alice Mary Hill v Clarke* (1904) 27 All 266
(o) *Scott v Brown, Doering Co* [1892] 2 Q B. 724 728
(p) *Darbyshire v Leigh* [1896] 1 Q B 554, 557
(q) [1896] 1 Q B 554 p 558, *supra*
(r) [1896] 1 Q B 554, *supra*
(s) *Philipps v Philipps* (1878) 4 Q B D 127.
(t) *Harris v Warre* (1879) 4 C P D 125.

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the words complained of were used on a privileged occasion, the plaintiff may allege and prove malice, that is, improper motive.

Fraudulent Intention.—See notes to r 4 above, "*Fraud and coercion*," on p 443 above

Knowledge—In a suit by a servant against his master for injury caused by the dangerous condition of a building where he is employed, the plaint must not only affirm the master's knowledge of the danger, but must also negative the servant's knowledge of it (u) To support an action for damages for the bite of a dog, the plaintiff must allege and prove that the dog had to the defendant's *knowledge* bitten or attempted to bite some person before it bit the plaintiff (v)

Notice

11. [*New.* R. S. C, O. 19, r. 23] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice as part of cause of action—Notice, where it forms part of the cause of action, *must be pleaded as a fact, e g, notice of suit proposed to be brought against the* Secretary of State for India [see s 80] or against a Railway Company (w), or against a Municipality, notice of dishonour of a bill of exchange, notice to a tenant to quit, etc It is not necessary to set out the notice *verbatim* in the plaint

Implied contract or relation

12. [*New.* R. S. C., O. 19, r. 24.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Implied contract.—*A contract may be expressed in one document or it may have* to be implied from a series of documents or conversations or from a number of other circumstances. Rule 9 applies in the former case the present rule, in the latter case Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either (x) As regards contracts to be implied from a series of letters, it is to be noted that where a Court has to find a contract in a correspondence and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration (y)

(u) *Griffiths* v *London and St Katharine Docks & Co* (1884) 13 Q B D 259
(v) *Thomas* v *Morgan* (1835) 4 Dowl 223, *Osborne* v *Chocqueel* [1896] 2 Q B 109
(w) Indian Railways Act 1890 ss 77 140
(x) *Brogden* v *Metropolitan Railway Co* (1877) 2 App Cas 666
(y) *Hussey* v *Horne Payne* (1879) 4 App Cas 311

13. [*New.* R S. C, O 19, r. 25.] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (*e g*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).

Presumption of law

Presumptions of law—A plaintiff need not, in his plaint, allege the consideration for which a bill of exchange was given to him, when he sues *only on the bill*, for it will be presumed in his favour that the bill was made for consideration (z) It will be for the defendant to plead that there was no consideration for the bill. But if the plaintiff sues *on the consideration* as a substantive ground of claim, he must allege the consideration specifically

14. [Ss. 51, 115.] Every pleading shall be signed by the party and his pleader (if any): provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Pleading to be signed

Omission to sign plaint.—The signing of plaints is merely a matter of procedure (a) If a plaint is not signed by the plaintiff or by any person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. In any event the appellate Court should not dismiss the suit or otherwise interfere with the decree of the lower Court, merely because the plaint is not signed as required by this rule The reason is that the omission to sign or verify a plaint is not such a defect as could affect the merits of the case or the jurisdiction of the Court (b) see s 99

15. [Ss. 51, 52, 115.] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Verification of pleadings

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies

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(z) See Negotiable Instruments Act 26 of 1881, s 118

(a) *Bisheshar Nath in the matter of*, (1918) 40 All 147, 44 I C 28

(b) *Pasdeo* v *Smelt* (1900) 22 All 55, *Mohini* v *Pungsi* (1890) 17 Cal 580 [P C] *Ma Ngwe* v *Ma Hme* (1923) 1 Rang. 42, 74, I C. 100, (23) A R 206

.6, 5, 16 of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

Verification of plaint.—The verification of a plaint is not evidence on which a suit can be decreed even if the defendant does not appear (c)

Omission to verify pleading.—A pleading which is not verified in the manner required by this rule may be verified at a later stage of the suit, even after the expiry of the limitation period. The omission to verify a pleading is a mere irregularity within the meaning of s 99 of the Code (d) See notes to r 14 above

Striking out pleadings

16. [*New.* R S. C., O. 19, r. 27.] The Court may, at any stage of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

Amending your opponent's pleading.—This rule deals with amendments, which a party desires to be made *in his opponent's pleading* The next rule deals with amendments which a party desires to make *in his own pleading*

Striking out or amending pleadings—"It seems to me," said Bowen, L.J, in *Knowles* v *Roberts* (e) "that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right" It is a recognized principle that "a defendant may claim *ex debito justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery" (f)

"Unnecessary"—This rule has been reproduced verbatim from O 19, r 27 of the English Rules According to the English practice, the mere fact that a pleading contains matters which are unnecessary is no ground for striking out those matters (g) It only affects the costs of the pleading (h) An allegation in a pleading will not be struck out merely because it is unnecessary, unless it is scandalous, or tends to prejudice, embarrass or delay the fair trial of the action. Thus, where in a suit against a Local Board, the plaint alleged that a member of the Board had used his influence with the Board *for his own private interest*, and that in consequence thereof the Board had declined to meet

(c) *Pose & Co* v *Scriven* (1916) 43 Cal 1001

(e) (1888) 38 C D 263 at pp 270 271

(f) *Davy* v *Garrett* (1878) 7 C D 473 486

(g) *Rock* v *Purssell* 84 L T Jo 45, *Heap* v *Marris* (1876) 2 Q B D 630 633

(h) *Weymouth* v *Rich* (1885) 1 Times Rep. 609

the just demands of the plaintiffs, the allegations were ordered to be struck out (i) In such a case, the allegations are not only unnecessary, but they are scandalous For the same reason *unnecessary allegations of dishonest conduct made against the defendant will* be struck out under this rule (j) In an action to enforce a compromise of a former action, it is *unnecessary and embarrassing* for the plaintiff to set out in the plaint the original disputes between the parties such allegations will therefore be struck out (k). Where a statement of claim contained immaterial facts and set out at great length documents which could not be material except as evidence by way of admission, so that the defendant could not know what case he had to meet, it was held that the whole statement *of claim should be struck out as being unnecessarily prolix* and embarrassing (l) In an action for slander it is *unnecessary and embarrassing* for the defendant to state in his defence that he did not say the words alleged in the plaint but that he said something else and that the something else which he said was true, such statements will therefore be struck out (m)

"Scandalous."—Every Court has an inherent power, quite independently of this rule, to strike out scandalous matter in any record or proceedings "The Court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter" (n) 'Scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders, and the Court, in aid of the public morals, is bound to interfere to suppress such indecencies which may stain the reputation and wound the feelings of the parties and their relatives and friends' (o) Thus where an application for bail to the High Court contained *defamatory allegations* against the trying Magistrate which were all irrelevant, the High Court of Bombay refused to allow the application to be filed, and ordered it to be returned (p) Similarly, where a memorandum of appeal alleged partiality against the Judge whose decree was in question, the High Court of Madras ordered the objectionable passages to be expunged (q) It must, however, be noted that "*nothing can be scandalous which is relevant*" (r) Thus matters in aggravation of damages are relevant, they will not, therefore, be struck *out, though scandalous (s) Similarly, allegations of dishonesty or fraud or conspiracy* will not be struck out as scandalous, if they are relevant to the facts in issue They will be struck out only if they are irrelevant (t) An application to strike out scandalous matter may be made by any person, whether or not he is a party to the suit or personally affected by the scandalous matter (u)

"Tend to prejudice, embarrass or delay the fair trial of the suit"—*In considering the question whether a pleading tends 'to prejudice, embarrass or delay* the fair trial of the suit, a liberal interpretation should be given to the words 'trial of the suit. Hence not only a pleading which tends to prejudice or embarrass a party

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(r) *Fisher* v *Owen* (1878) 8 C D 645, 653 *per* Cotton L J

(s) *Millington* v *Loring* (1880) 6 Q B D 190 *Whitney* v *Moignard* (1890) 24 Q B D 630

(t) *Christie* v *Christie* (1873) L R 8 Ch 499 (allegations of fraud struck out) *Fubery* v *Grant* (18) L R 13 Eq 443 (allegations of fraud struck out) *Cashin* v *Cradock* (18 6) 3 C D 3 6 (conspiracy alleged—whole statement of claim struck out as besides containing scandalous and irrelevant matters it was unintelligible), *Brooking* v *Maudslay* (1886) 55 L T 343 (allegations of dishonesty struck out) *Murray* v *Epsom Local Board* [18] 1 Ch. 35 (allegations of bad faith struck out)

(u) *Cracknell* v *Janson* (1879) 11 C D 1 13 *Bright* v *Marner* (1878) W N 211 where the application was made by a co-defendant

6, *at the actual trial* of a suit but a pleading which tends to prejudice or embarrass a party
, 17. *at any stage of the proceedings* in the suit, would be within this rule (*i*)

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (*w*) But a pleading is not embarrassing merely because it is prolix (*x*) Nor is a pleading embarrassing, merely because it contains allegations that are inconsistent or stated in the alternative (*y*) See notes to r. 2 above, "Alternative and inconsistent allegations," on p. 441 above See also notes above "Unnecessary"

The power of the Court under this rule should be exercised with great care and caution Where a defendant sets up a contemporaneous oral agreement, the Court should not strike out his pleading on the ground that evidence of such agreement is inadmissible under s 92 of the Indian Evidence Act, 1872, and that the pleading is therefore embarrassing Whether an oral agreement contemporaneous with a written document is admissible in evidence depends to some extent as to how the case is presented at the trial (*z*)

" At any stage of the proceedings "—The application under this rule should be made with reasonable promptitude, and as a rule before the close of the pleadings If it is not so made, the Court *may*, in its discretion, refuse to make the order, though the rule expressly states that an order may be made " at any stage of the proceedings " The reason is that the power to make the order under this rule is *discretionary* (*a*)

Practice.—The Court may, under this rule, order the whole pleading to be struck out as was done in the undermentioned cases (*b*), where the statement of claim consisted partly of unintelligible matters, partly of irrelevant matters, and the rest of scandalous matter, or it may order the objectionable matter only to be struck out, which appears to be the usual practice (*c*) Where the defect can be remedied by amendment, the Court may give leave to amend (*d*) Where a pleading is not so specific as it ought to be, the Court may direct the party to amend his pleading or give further particulars (*e*).

17. [*New.* R. S. C, O. 28, r. 1.] The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Amendment of pleadings

Different kinds of amendment.—Hitherto we have dealt with four kinds of amendment The present rule deals with one more All these may be grouped together as follows —

1 S 152 [amendment of clerical and arithmetical mistakes in judgments, decrees and orders]

(*v*) *Berdan* v *Greenwood* (1878) 3 Ex D 251, 256

(*w*) *British Land Association* v *Foster* (1888) 4 Times Rep 574, *Stokes* v *Grant* (1878) 4 C P D 25

(*d*) *Knowles* v *Roberts* (1888) 38 C D 263 269

(*e*) *In re Morgan, Owen* v *Morgan* (1887) 35 C D 492 500

O. 6, r. 17.

2 S 153 [amendment of proceedings in a suit by the Court, whether moved thereto by the parties or not, for the purpose of determining the real question or issue between the parties]

3 O 1, r 10, sub r (2) [striking out or adding parties]

4 O 6, r 16 [amending your opponents pleading, compulsory amendment]

5 O 6, r 17 [amending your own pleading *voluntary* amendment]

Amending your own pleading—The preceding rule deals with amendments which a party desires to be made in *his opponent's pleading* as where the pleading contains irrelevant and scandalous matter or where it may tend to prejudice, embarrass or delay the fair trial of the suit The present rule deals with amendments which a party desires to make in *his own pleading*

LEAVE TO AMEND WHEN GIVEN.

As a general rule leave to amend will be granted so as to enable the *real question in issue* between the parties to be raised on the pleadings where the amendment will occasion *no injury to the opposite party, except such* as can be sufficiently compensated for by costs or other terms to be imposed by the order (*f*) "I have had much to do in Chambers" said Bramwell, L J, "with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise (*g*) It does not matter that the original omission arose from negligence or carelessness "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side *There is no injustice if the other side can be compensated by costs* (*h*) "I have found in my experience, said Bowen, L.J, 'that there is one panacea which heals every sore in litigation and that is costs (*i*) It is immaterial to consider whether the error sought to be amended was accidental or not There is no rule that only slips or accidental errors are to be corrected The rule says, all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy There is no kind of error or mistake which, if not fraudulent or intended to overreach the Court ought not to correct if it can be done without injustice to the other party (*j*) Thus a plaintiff in a suit for debt may be allowed to amend the plaint by setting out an acknowledgment passed to him by the defendant even after the defendant has filed his written statement raising the plea of limitation (*k*) Even an admission made by mistake may be allowed to be withdrawn, and the pleading amended accordingly (*l*) Misdescription of immoveable property in a plaint may be corrected even in appeal (*m*) The party applying however must not be acting *mala fide* the application to amend must be *bona fide* and made in good faith (*n*)

LEAVE TO AMEND WHEN REFUSED

It follows from what has been stated above that leave to amend should be refused—

(1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties as where it is—

(*f*) *Tildesley* v *Harper* (1878) 10 C D 393 *Steward* v *North Metropolitan Tramways Co* (1885) 16 Q B D 178 180 and [illegible] A p 558 *Australian Steam Navigation Co* v *Smith* (1889) 14 App Cas 318 320 *Kisandas* v *Rachappa* (1909) 33 Bom 644 655 4 I C 720

(*g*) *Tildesley* v *Harper* (1878) 10 C D 393

(*i*) *Clarapede* v *Commercial Union Association* (1883) 32 W R [Eng] 262 263 *Weldon* v [illegible]

(*l*) See *Hollis* v *Burton* [1892] 3 Ch 226 236

(*m*) *Bhagirathi* v *Chandra* (1922) 20 All L J 159, 66 I C 208 (22) A A 81

(*n*) *Tildesley* v *Harper* (1878) 10 C D 393 397

r. 17.

(i) merely technical, or

(ii) useless and of no substance

(2) Where the plaintiff's suit would be wholly displaced by the proposed amendment

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings

(5) Where the application for amendment is not made in good faith

We shall deal with these five cases in order

1 Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties—This happens where the amendment is merely (1) technical or (2) of no substance

Where the amendment is merely technical—Where after the evidence for the plaintiff has been taken the defendant applies for an amendment for the purpose merely of enabling him to raise a purely technical objection to the plaintiff's right to sue, the application should be refused (o) *B* and *C* wrongfully remove *A*'s furniture *A* sues *B* for damages, and recovers judgment against him [*B* and *C* being joint wrong doers the judgment against *B*, according to English law, precludes *A* from suing *C* for the same wrong] *A* afterwards sues *C* for damages for the same wrong *C* does not plead the judgment against *B* in his defence, but after the evidence for *A* has been taken, applies for leave to amend his written statement by pleading that the judgment against *B* is a bar to the s[illegible] t is to

Where the amendment is useless and of no substance—The object of the present rule being to enable the real questions in dispute being raised on the pleadings, leave to amend should be refused to the *plaintiff* where the proposed amendment would not help him in substantiating his claim (r), and to the *defendant* where the proposed amendment would not help him in supporting his *defence* (s) Thus where *A* sued *B*, and finding that the suit against *B* would fail applied to join *C* as a defendant, the application was refused on the ground that even if the plaint were amended by adding *C* as a party, the case was such that *A* would not be entitled to any relief even against *C* In refusing leave to amend, Vaughan Williams, L J, said One good reason for our not doing so is that looking at the case that he [plaintiff] tells us he would wish to present, that case, if presented by amendment would in my judgment, also fail, so that there is nothing to be gained by amendment (t) Similarly, where *A* sued *B* for a libel, and *B* pleaded justification and *B* afterwards applied to amend his defence by adding a paragraph which virtually contained a plea *in mitigation of damages*, but was no *answer to the action*, the application was refused (u) See notes to r 2 above, "Matters affecting damages" p 438 above

(o) *Collette v Goode* (1878) 7 C D 842 847

(p) *Edevain v Cohen* (1889) 43 C D 187 in app from 41 C D 563

Lawrance v Lord Norreys (1888) 39 C D 213 235

(s) *Machado v Fontes* [1897] 2 Q B 231

(t) *Jones v Hughes* [1905] 1 Ch 180 187 *Ganesha Singh v Mundi Forest Co* (1899) 21 All 346 348

(u) *Wood v Earl of Durham* (1888) 21 Q B D 501

2 Leave to amend will be refused if the plaintiff's suit would be wholly displaced by the proposed amendment —In *Steuard* v *The North Metropolitan Tramways Co* (t), the plaintiff sued a tramway company for damages caused by their negligence in allowing their tramway to be in a defective condition By their defence the company denied negligence It was no part of the defence that the company were not the proper parties to be sued More than six months after the delivery of the defence the company applied for leave to amend the defence by adding an allegation that by a contract between the company and the local authority of the district, the liability to maintain the roadway had been transferred to the local authority and that the company had ceased to be responsible for the roadway At the date of the application the plaintiff s remedy against the local authority had become barred by limitation If the agreement had been pleaded earlier, the plaintiff could have maintained an action against the board Under these circumstances the application was refused It is clear from the above facts that if the amendment were allowed, the plaintiff might fail against the company, the company not being the proper defendants, and if he brought an action against the local authority, it would be too late That would be an injury to the plaintiff such as could not be compensated for by any costs that the Court might order the company to pay to the plaintiff "The test as to whether the amendment should be allowed,' said Pollock, B, "is, whether or not the defendant can amend without placing the plaintiff in such a position that he cannot be recouped as it were, by any allowance of costs or otherwise Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed"

3 Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant a legal right which has accrued to him by lapse of time, except in the special circumstances of a case (w) —The leading English case on the subject is *Weldon* v *Neal* (x) The facts of that case may be stated in the form of an illustration *A* sues *B* for damages for slander *A* afterwards applies for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment These claims are at the date of the application *barred by limitation*, although they were not barred at the date of the suit. The application should be refused, for the effect of allowing it would be to take away from *B* the defence under the law of limitation and therefore unjustly to prejudice him "We must act," said Lord Esher, M R, on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so ' In *Charan Das* v *Amir Khan* (y), their Lordships of the Privy Council said "Though [the power of a Court to amend the plaint] should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of a case ' *Charan Das s case* was a case of that kind, and their Lordships, having regard to the special circumstances of the case, upheld an amendment of the plaint allowed by the Judicial Commissioner of the North West Frontier Province in second appeal In that case the plaintiffs sued for a declaration

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Gnanendra v *Paresh Nath* (1921) 26 Cal. W N 73 65 I C 39 ('22) A C 255, Mr-

r. 17. of their right of pre emption over certain land but omitted to ask for consequential relief, namely possession as required by s 42 of the Specific Relief Act, 1877 The trial Judge and the first appellate Court refused to allow the plaint to be amended by claiming possession on pre emption since the time had expired for bringing a suit to enforce that right Upon a second appeal the Court allowed the amendment to be made, and this was confirmed by the Privy Council There was no ground for suspecting that the plaintiffs had not acted in good faith all that happened was that the plaintiffs through some blundering attempted to assert rights that they undoubtedly possessed under the statute *in a form* which the statute did not permit' The case of *Kisandas v Rachappa* ( ) decided by the High Court of Bombay, is another instance in which such an amendment was allowed on the ground that the circumstances of the case were so peculiar that it should properly be excepted from the general rule The facts of the case may be stated in the form of an illustration. *A* alleging that he had brought in Rs 4 000 as capital under a partnership agreement between him and *B*, sues *B* for dissolution of partnership and for accounts *It is clear from the proceedings before the Court of first instance that though the suit was in form one for dissolution and accounts, A intended from the first to sue only for the recovery of his money and B had actually pleaded to the money claim and the claim had actually been put in issue and evidence given in respect thereof* The lower Court finds as a fact that *the sum was due*, but

Rs. 4 000 At this date the claim for money is barred by limitation The amendment must be allowed notwithstanding the bar The defence of limitation would never have been open to *B* had it not been for the inexpertness of the pleadings There was no *fresh* claim sought to be set up as it was in *Weldon v Neal* cited above *B* knew what *A*'s claim was, though the suit was wrongly framed. Similarly, where the plaintiff sued in the first instance for possession of the books of accounts of his shop from the defendants who he alleged were his servants, and stated in the plaint that he would bring a separate suit for the money due by them, but subsequently applied for leave to amend the plaint by adding a further relief, namely recovery of money, it was held that the amendment should be allowed even though the money claim was barred by limitation between the date of the plaint and the date of the application for amendment (*a*)

4 Leave to amend will be refused where the amendment would introduce a totally different, new and inconsistent case—In *Ma Shwe Mya v Maung Mo Hnaung* (*b*), their Lordships of the Privy Council said All *rules of Court are nothing but provisions intended to secure the proper administration* of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised *but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit* This proposition follows directly from r 17 The object of r 17 is to allow an amendment *for the purpose of determining the real questions in dispute between the parties* That being the purpose for which an amendment is allowed, no amendment should be allowed which would introduce a totally new and different case (*c*)

( ) (1909) 33 Bom 644 4 I C 7-6 *Muhammad v Abdul Majid* (1911) 33 All 616 10 I C 476 *Jalal Din v Qaim Din* (1914) Punj Rec no 62 p 211 25 I C 439 *Satchitananda v Nritya Nath* (1923) 50 Cal 878 891 79 I C 287 (24) A I C 436

(*a*) *Serujan v Krishna* (1913) 36 Mad 378 13 I C 264

(*b*) (1921) 48 I A 214 216 217 48 Cal 832 835, 63 I C 914

(*c*) *Laird v Briggs* (1880) 16 C D 440 446

An amendment of that character does not bring out the real issues in the suit, it implies rather an *abandonment* of the real issues on the part of the party applying for the amendment. The result of the English cases is thus summed up in Bullen and Leake's Precedents of Pleadings (*d*): "Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent."

The above proposition may be split into two —

A Leave to amend a *plaint* should not be granted, if the amendment would convert the suit into another of a different and inconsistent character.

B Leave to amend a *written statement* should not be granted, if the amendment would convert the defence into another of a different and inconsistent character [p 464 below]

We shall deal with these propositions in order.

A *Leave to amend a plaint should not be granted if the amendment would convert the suit into another of a different and inconsistent character* —*A* institutes a suit against *B*. *B* files his written statement. At the hearing of the suit, *A* finds that his case must fail as laid in the plaint, and that he can only succeed on a different case. He then applies for leave to amend the plaint. Should the leave be granted? It has been held under the corresponding English rule that no amendment should be allowed if it would introduce an entirely different case from that which the defendant came to meet (*e*) or, to put it in another form, if it would "change one action into another of a substantially different character" (*f*). Section 53 of the Code of 1882 which dealt with amendment of plaints, expressly provided that "a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character." That section has been omitted in this Code, and the present rule (which is a reproduction of O 28, r 1, of the English Rules) now takes its place. But the decisions under the old section on the point now under consideration are still good law, and we proceed to examine them.

It must be observed at the outset that a plaintiff must in general be limited to the case which he puts forward in his plaint. There are however, cases in which by some mistake or misapprehension the plaintiff has failed to state his case correctly and properly in the plaint. In such cases the Court may allow the plaint to be amended (*g*), for if the amendment is refused the plaintiff may have to bring another suit, and the object of the rule allowing amendment of plaints is to avoid multiplicity of suits (*h*). But the Court ought not to allow an amendment, if it would convert the suit into another of a different and inconsistent character. "We cannot countenance the notion," said Straight, J, "that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegation" (*i*). The law prohibits every amendment that would change *the fundamental char*[illegible]

the fundamental character [illegible]

amend the plaint. As stat[illegible]

amended is subject to the *discretion* of the judge, and is *not cl[ai]mable as a right of the suitor* in all circumstances (*l*).

(*d*) 6th Ed p 16

(*e*) *Ellis* v *Manchester Carriage Co* (1876) 2 C P D 13 16, *Hipgrave* v *Case* (1885) 28 C D 356 361, *Newby* v *Sharpe* (1878) 8 C D 39 49, *Clark* v *Wray* (1885) 31 C D 68

(*f*) *Raleigh* v *Goschen* [1898] 1 Ch 73 81

(*g*) *Lakshmibai* v *Hari* (1872) 9 B H C 1, *Khyro* v *Lekhranee* (1871) 16 W R 123, *Hunoomanpersaud* v *Mussumat Koonweree* (1856) 6 M I A 393 410

(*h*) *Saral Chand* v *Mohun Bibi* (1898) 25 Cal 371

(*i*) *Hamilton* v *The Land Mortgage Bank of India* (1883) 5 All 456 459

(*j*) *Kasinath* v *Sadasiv* (1893) 20 Cal 805

(*k*) *Tapiram* v *Satu* (1897) 21 Bom 570

.17. Rules —"The general rule is that any amendment allowed must be such as is either raised in the pleadings, or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from This is the rule laid down by their Lordships of the Judicial Committee in the case of *Eshen Chunder Singh* v *Shama Churn Bhutto* (l) and this rule has been followed in numerous decisions of our Courts" (m)

From the general rule stated above, we deduce the following three rules each of which is borne out by the cases cited under it —

Rule I —Where a plaintiff bases his claim upon a *specific legal relation* alleged to exist between him and the defendant he may not be allowed to amend the plaint so as to base it on a different legal relation

Note —Even if the legal relation between the plaintiff and the defendant remains unchanged the plaint will not be allowed to be amended, if it completely alters the cause of action [ill (7)]

Rule II —Where a plaintiff bases his claim on a *specific title*, he may not be allowed to amend the plaint so as to base it on a different title

Note —Even if the title by which the plaintiff claims remains unaltered, the plaint will not be allowed to be amended if it completely alters the cause of action

Rule III —When one kind of fraud is charged another kind of fraud cannot, upon failure of proof be substituted for it

Illustrations of Rule I

1 *A* alleging that *B* hired cargo boats from him and that a balance of Rs 3,000 is due to him on that account sues *B* for the amount It is proved at the hearing that *B* did not himself hire the boats but that he was merely *A*'s agent to find hires for the boats *A* then applies to amend his plaint by claiming an account from *B* on the footing that *B* was *A*'s agent The amendment should not be allowed because in the one case the legal relation between *A* and *B* is that of *letter and hirer* and in the other, that of *principal and agent* *Shibkristo* v *Abdool* (1880) 5 Cal 602.

2 *A* sues *B* for the *rent* of a house alleged to have been let by *A* to *B* *B* denies the lease, and contends that he is the owner of the house *A* will not be allowed to amend the plaint by converting the suit into one for a *declaration of ownership* *Bai Shri Majirajba* v *Maganlal* (1895) 19 Bom. 303

3 *A* sues *B* for *damages for wrongful occupation* of his land and for injury done to his land After the issues are framed, *A* applies to amend the plaint by claiming from *B rent* for the land on the basis of a subsisting *tenancy* The amendment should not be allowed because it will convert a claim based on *trespass* into a claim on the basis of a *subsisting lease* *Narayan* v *Hari* (1889) 13 Bom 664, *Jhari Singh* v *Pirthi Nath* (1917) 2 Pat L J 69 38 I C 191 (n) See ill (5) below

4 A suit for possession on the footing of a *subsisting lease* cannot be converted at a late stage of the proceedings into a suit for *ejectment* *Newby* v *Sharp* (1878) 8 C D 39, 49, *Laird* v *Briggs* (1880) 16 C D 440

5 *A suit for rent will not be allowed to be converted at the hearing into a suit for use and occupation* — *A* sues *B* to recover Rs 1,000 alleged to be the *rent* due under a lease executed by *B* The Court finds that *B* was in occupation of the premises during the period for which the rent is claimed, but that the alleged lease was not executed by *B*

(l) (1866) 11 M I A 7 *Mylapore* v *Yeokay* (1887) 14 Cal. 801, 14 I A 168
(m) *Mukhoda* v *Ram Churn* (1882) 8 Cal 871 875, *Hamilton* v. *Land Mortgage Bank* (1883) 5 All 456
(n) See also *Gavrishankar* v *Atmaram* (1894) 18 Bom 611, *Ramchandra* v *Vasudev* (1886) 10 Bom 431

At this stage *A* applies to amend his plaint by alleging that, though the lease was not executed by *B*, he is entitled to recover the amount for *use and occupation* of the premises The amendment will not be allowed (*o*)

6 A suit for possession will not be allowed to be converted into a suit for redemption In the former case the plaintiff sues as *owner* of the land in the latter as *mortgagor* *Laxmishankar* v *Hamjabhai* (1920) 44 Bom 515, 57 I C 426

7 *A*, who is *P*'s agent to manage certain property belonging to *P*, appoints *S* to act as a sub agent for *P*, and gives him Rs 1 000 belonging to *P*, for the payment of Government revenue and other purposes *S* fails to account for the money *P* sues *A* to recover the amount paid by *A* to *S*, claiming the same on the ground that *S* was appointed sub agent without *P*'s authority It is found at the hearing that *S* was appointed sub agent with *P*'s authority *P* will not be allowed to amend the plaint so as to base his claim on the ground that *A* had *not exercised ordinary prudence* in selecting *S* as a sub agent for *P* *Hamilton* v *Land Mortgage Bank* (1883) 5 All 456 [This is an illustration of the proposition in the *Note to Rule* 1 If the amendment were allowed, the legal relation between the plaintiff and the defendant, which is that of principal and agent, would no doubt remain unchanged, but the cause of action would be completely changed]

Illustrations of Rule II

1 *A* alleging that *B* was the adopted son of *C*, and that he (*A*) is the *heir of B*, sues *D* to recover certain property forming part of the estate of *B* The Court finds that the adoption of *B* was not valid *A* then contends for the first time in appeal to the Privy Council that even if the adoption was not valid, he is entitled to recover the property *as the heir of C* This is a totally new case, and *A* cannot be permitted in appeal to set up an entirely new case *Gopee Lal* v *Chundraolee* (1872) 19 W R 12, I A Sup Vol 131

2 *A* obtains a decree against *X*, and after the death of the latter, attaches certain immoveable property in execution of the decree *B* and *C*, sons of *X*, sue *A* for a declaration that the property is joint family property, and it is not liable to be attached and sold in execution of the decree against the father on the ground that the debts contracted by their father were for immoral purposes It is proved that the debts were not incurred for immoral purposes Thereupon *B* and *C* apply to amend the plaint by alleging that they had *separated* from their father before the date of the decree, and that they were not therefore liable to pay the amount of the decree The amendment cannot be allowed because the plaintiff's claim as originally laid was on the footing that there was *no partition* between them and their father *Narayanrar* v *Jarherralu* (1888) 12 Bom 431

3 *A*, a Hindu claiming as the heir of his uncle, sues the executors of his uncle's widow for possession of property left by the widow, alleging that the same belonged to the estate of his uncle, and that the widow *had no power* to dispose of it by will The Court holds that the widow had power to will away the property *A* will not be allowed to amend the plaint by adding that even if the widow *had the power* to dispose of the property by her will, he was entitled to the residue as his uncle's heir as the same was left to charitable objects of an unspecified and general character, and could not therefore be legally applied to charity *Damodar* v *Purmanandas* (1883) 7 Bom 155. [This is an illustration of the *Note to Rule II* If the amendment were allowed, the title by which the plaintiff claims, namely, as his uncle's heir, would no doubt remain unchanged, but the cause of action would be completely altered]

(*o*) *Lukhee Kanto* v *Sumeeruddi* (1874) 13 W R 243 *Lakshmibai* v *Hari* (1872) 9 B H C 1, *Surendra Narain* v *Bhai Lal* (1895) 22 Cal 752 *Pachkea* v *Upendra* (1900) 27 Cal 234 Distinguish *Balmakund* v *Dalu* (1903) 25 All. 498.

17.

Illustration of Rule III.

A, the official assignee of the estate of a deceased insolvent, sues *B* to recover Rs 1,50,000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from *A*'s predecessor in office It is proved that *A*'s predecessor was aware of the payment *A* applies to amend the plaint by alleging that though his predecessor consented to the payment, such consent was illegal as being a fraud, though of a different kind, upon the Court The amendment cannot be allowed, because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character *Abdul Hoosein* v *Turner* (1887) 11 Bom 620, 14 I A 111 See Notes to O 6, r 4, ' Fraud and coercion," p 443 above

B. *Leave to amend a written statement should not be granted if the amendment would convert the defence into another of a different and inconsistent character* —As in the case of a plaint, so in the case of a written statement, the Court will not allow an amendment that would involve a complete change of front in the defence (p)

A agrees to grant a lease of a brickfield to *B* No lease is executed but *B* enters into possession under the agreement *B* then sues *A* for specific performance of the agreement, alleging that *A* though frequently asked to do so, had neglected and refused to grant the lease *A* denies that he was asked to grant the lease and expresses his readiness to execute the lease *A* also counter claims for Rs 1,500 by way of rent After the suit is set down for trial *A* applies for leave to amend his defence and counter claim, and to join therewith a claim for possession of the land The application must be refused To allow *A* to amend would be to allow him to present " a totally distinct, new and inconsistent case *Clark* v *Wray* (1886) 31 C D 68

5. Leave to amend will be refused where the application for amendment is not made in good faith —Leave to amend will not be given if the party applying is acting *mala fide* (q), as where there is no substantial ground for the case proposed to be set up by the amendment (r) Want of bona fides may be inferred from a great delay in making the application (s)

Amendment of plaint by adding new reliefs —The amendment of a plaint by adding a new prayer may or may not convert the suit into another of a different and inconsistent character If the amendment converts the suit into another of a different and inconsistent character, it will not be allowed If the amendment does not convert the suit into another of a different and inconsistent character, it may or may not be allowed at the discretion of the Court In the exercise of this discretion, the Court will not allow an amendment, if the application for amendment is made at such a late stage of the proceedings that, if allowed, it would create a necessity of practically trying the case de novo (t), otherwise the amendment may be allowed (u) Thus a mortgagee suing for *sale* of the mortgaged property may be allowed to amend the plaint by asking merely for a *simple money decree* against the mortgagor. In such a case, the character of the suit is not fundamentally altered, nor could the defendant be possibly taken by surprise (v) Similarly, a purchaser suing for *specific performance* may be allowed to amend his plaint by asking in the alternative for a *refund* of the earnest (w) Where

(p) *Laird* v *Briggs* (1880) 16 C D 440 446
(q) *Tildesley* v *Harper* (1878) 10 C D 393, 396-397
(r) *Lawrence* v *Norreys* (1888) 39 C D 213 235
(s) *Krishna* v *Lachaiyappa* (1924) 47 Mad L J 540, 82 I C 492, ('24) A M 883.
(t) *Narayana* v *Shankunni* (1892) 15 Mad 255

a plaintiff has framed his suit bona fide, believing that consequential relief is not open to him and that he is entitled to a declaration, the plaint may be allowed to be amended even in appeal by adding a prayer for possession (x) See notes "Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant," etc, on p 450 above

Amendment by adding a plea of fraud —It is ' the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance (y) Where facts supporting the charge of fraud were *disclosed in the cross examination of the defendant*, leave was given to amend by adding a plea of fraud (z) Similarly, where the plaintiff sued on a mortgage, and the defendant in his written statement alleged that he was a minor at the date of the mortgage, leave was given to the plaintiff to amend the plaint by raising an alternative case that the loan was obtained by the defendant by the fraudulent representation that he had attained majority at the time (a) See Notes to O 6, r 4, "Fraud and coercion, on p 443 above

"AT ANY STAGE OF THE PROCEEDINGS"

Leave to amend may be granted at any stage of the proceedings It may be granted [illegible] undermentioned [illegible] Privy Council [illegible] was asked for in the Court below or not It may also allow an amendment even if the Court below offered leave to amend but the offer was declined (c)

Mere delay is not a ground for refusing an amendment As a general rule, however late the amendment is sought to be made it should be allowed except in the five cases mentioned above (d) Before the hearing there is as a rule little difficulty, in ordinary cases, in a party obtaining leave to amend on payment of the costs of and occasioned by the amendment and the application (e) Leave to amend may also be given at the hearing on proper terms as to the costs and the postponement of the hearing, if necessary, except, again, in the five cases mentioned above Thus leave to amend has been granted at the trial where there was a defect in the parties and it became necessary to amend the proceedings in the suit (f) It would also be granted where both parties knew what the case was and there was no surprise (g) In a recent Rangoon case *A* sued *B* on a promissory note for Rs 175 *B* denied execution of the note, but admitted receipt of Rs 100 only No alternative cause of action on the original consideration was pleaded. *A* failed to prove execution of the note It was held that the plaint could be amended at any stage of the proceedings by the addition of the alternative plea and a decree passed for the plaintiff for the Rs. 100 after the plaint was amended (h)

Revision —See notes to s. 115, "Interlocutory orders," on p. 307 above

Appeal —No appeal lies under cl. 15 of the Letters Patent from an order amending the title of a plaint by omitting the word ' Summary" before the word "Suit," and transferring the case to the Short Causes List (i)

(x) *Sheopujan* v *Maharaja* (1923) 2 Pat 919 76 I C 347 (24) A P 310
(y) *Bentley* v *Black* (1893) 9 Times Rep 580
(z) *[illegible]* v *Hawkins* (1884) 14 [illegible] D 56
(a) *Saral Chand* v *Mohun Bibi* (1898) 2 C W N 201
(b) *Mohummud Zahoor Ali Khan* v *Tutta Koer* (1867) 11 M I A 468 486
(c) *[illegible]* v *Little* (1887) 19 Q B D 394 *Kusandas* v *Lachappa* (1905) 33 Bom 644 4 I C [illegible]6
(d) *Clarapede* v *Commercial Union Association* (1883) 32 W R 262 (Eng)
(e) *Steward* v *North Metropolitan Tramways Co* [illegible]
[illegible] A R [illegible]
(i) *Mandal* v *Mandal* (192[illegible]) 2[illegible] Bom. L. R. 99, 86 I C 100 (25) A B 159

. 18 **18** [*New* **R S C, O 28, r. 7**] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be unless the time is extended by the Court

Failure to amend after order

ORDER VII

Plaint

r. 1. Particulars to be contained in plaint

1 [**S 50, para 1**] The plaint shall contain the following particulars —

(*a*) the name of the Court in which the suit is brought

(*b*) the name description and place of residence of the plaintiff

(*c*) the name description and place of residence of the defendant so far as they can be ascertained,

(*d*) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect,

(*e*) the facts constituting the cause of action and when it arose,

(*f*) the facts showing that the Court has jurisdiction,

(*g*) the relief which the plaintiff claims,

(*h*) where the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so allowed or relinquished, and

(*i*) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits

'**Facts constituting the cause of action** —As to the meaning of cause of action see notes to s. 20 on p. 90 above See also notes to O 6 r 2.

"**Facts showing that the Court has jurisdiction**'—See ss 16 19 and 20 and cl. 12 of the Charter set forth in Appendix II

Relief which the plaintiff claims —See r 7 below and notes thereto

"Relinquished a portion of his claim"—See O 2 r 2, sub r (2)

Statement of value —See notes to s 15 ' Where the subject matter of a suit does not admit of being satisfactorily valued, on p 79 above

2. [S 50, paras 2, 3] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed

In money suits

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for

Suit for mesne profits or accounts —See notes to s 6, ' Pecuniary jurisdiction in passing decrees on p 15 above

3. [*New*] Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers

Where the subject matter of the suit is immoveable property

4. [50, para 4] Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it

When plaintiff sues as representative

"Where the plaintiff sues in a representative character"—Where a person dies leaving a will the *executor* named in the will may obtain *probate* of the will Where a person dies intestate his *heirs* may apply for *letters of administration* The person to whom letters of administration are granted is called *administrator* The executor or administrator, as the case may be of a deceased person is his *legal representative* for all purposes, and all the property of the deceased vests in him as such A suit by a person as executor or administrator of a deceased person is a suit by him in a *representative* character There are some cases in which the law requires *probate or letters of administration*, as the case may be, to entitle a person suing in a representative character to a decree in respect of the estate of the deceased In a large number of cases however it is not necessary to obtain probate or letters of administration to entitle a plaintiff suing in a representative character to a decree in respect of the estate of the deceased This will be seen from the following statement of the law on the subject —

r. 4. 1 *Europeans, Parsis, Jews and Armenians subject to the provisions of the Indian Succession Act, 39 of 1925* — In this class of cases no decree can be passed in respect of any matter concerning the estates of the deceased unless a probate or letters of administration as the case may be are obtained

2 *Hindu Wills*—Probate is necessary in the case of Hindu wills where such wills are of the class specified in s 57 of the I S Act, 1925 These are wills made by Hindus *within* the territories which on 1st September 1870 were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original Civil Jurisdiction of Madras and Bombay *and* wills made outside those territories and limits so far as relates to *immoveable* property situate within those territories or limits No probate is necessary in the case of other wills See I S Act 1925, s 213

No letters of administration are necessary where a Hindu dies intestate See I S Act 1925 s 212

If a suit is brought to recover a *debt* due to the deceased no decree can be passed against the debtor except on the production of a probate or letters of administration or a succession certificate See I S Act 1925 s 214

3 *Mahomedans* —Neither a probate nor letters of administration are necessary in the case of Mahomedans See I S Act 1925 ss 212-213

If a suit is brought to recover a *debt* due to the deceased it is necessary to take out representation as stated above See I S Act 1925 s 214

4 *Indian Christians* —Up to the year 1901 Indian Christians were governed by the provisions of the Indian Succession Act 1865 Hence it was necessary, where the deceased left a will that the executor should obtain *probate* before he could establish any right as such to the property of the deceased (Succession Act, 1865, s 187) And where the deceased died intestate *letters of administration* were required before any right could be established to any part of the property of the deceased in a Court of law (Succession Act, 1865 s 190) In the year 1901, an Act was passed called the Native Christian Administration of Estates Act (VII of 1901) declaring *inter alia* that the provisions of section 190 of the Succession Act 1865 shall not apply to any part of the property of an Indian Christian who has died intestate, with the result that in case of *intestacy* no letters of administration were any longer necessary Those Acts have now been repealed by the I S Act 1925 but provisions similar to these above are reproduced in ss 212 and 213 Under s 213 a probate is necessary where the deceased has left a will Under s 212 no letters of administration are necessary where the deceased has died intestate

If a suit is brought to recover a *debt* due to the deceased, it is necessary to take out representation as stated above See I S Act, 1925, s 214

"Has taken the steps."—In those cases where a probate is necessary, and those are cases specified in s 213 of the Indian Succession Act 39 of 1925, it has been held by the Privy Council that the grant of probate is not a condition precedent to the institution of the suit, and that the executive or legatee may institute the suit without obtaining

a probate, but that he will not be entitled to a decree until he obtains a probate (j)

Suppose that the deceased has left no will, and the case is one governed by s 212 of the Indian Succession Act 1925 so that letters of administration are necessary to establish a right to the property of the deceased in a Court of Law It it necessary in such a case that letters of administration to the estate of the deceased should be obtained before the institution of the suit, or is it enough if they are obtained before the decree is passed ? It has been held by the High Court of Bombay that if letters of administration are not obtained before the institution of the suit, and the plaint does not show that the plaintiff has obtained letters of administration the plaint should be rejected on presentation but if the plaint is not rejected and the hearing has been allowed to proceed, there is nothing to prevent the Court from passing a decree for the plaintiff if letters of administration are obtained before the decree (k) The English law on the subject may thus be stated in the language of the Judicial Committee in *Meyappa* v *Subramanian* (l) An administrator derives title solely under his grant, and cannot therefore, institute an action as administrator before he gets his grant The law on the point is well settled see Comyns Digest, 'Administration,' B 9 and 10, *Thompson* v *Reynolds* (m), *Woolley* v *Clark* (n)

Title of suit —See Appendix A, (2) Description of Parties in Particular Cases,' the last two forms See also r 9 (2) below

Defendant's interest and liability to be shown

5. [**S 50, para 5.**] The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand

Grounds of exemption from limitation law

6. [**S 50, para 6**] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed

Grounds of exemption from limitation law —These grounds are set forth in section 12 to 20 of the Limitation Act, 1908 If no ground of exemption is shown in the plaint, and the suit appears from the statement in the plaint to be barred by limitation, the plaint shall be rejected [see r 11, cl. (d) below]. But a plaint should not be rejected merely because the exemption is not claimed *specifically* All that the

(j) *Chandra Kishore* v *Prasanna Kumari* (1911) 38 Cal 3.. 38 I A .. 9 I C 122 [a case

rule requires is that the *plaint shall show the ground of exemption* (o) If a plaint does not show any ground of exemption, the Court of first instance should allow the plaint to be amended save under very exceptional circumstances (p) But a plaintiff should not be allowed to rely upon a ground of exemption from the law of limitation for the first time in appeal (q) See notes to O 41, r 2, below

It has been held by the High Court of Bombay that when a plaintiff does satisfy the requirements of this rule by stating what is in his opinion the ground upon which he intends to get over the bar of limitation he ought not to be precluded from taking another and not inconsistent ground should he be later advised that the latter is the true ground (r) According to the Calcutta (s) and Lahore (t) rulings, a plaintiff who has stated one ground of exemption may be allowed to take another and inconsistent ground

Relief to be specifically stated

7. [*New* R. S. C, O 20, r 6] Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for And the same rule shall apply to any relief claimed by the defendant in his written statement

Relief—Every plaint must state specifically the relief which the plaintiff claims, whether it be damages, or specific performance, or an injunction, or a declaration, or an account or the appointment of a receiver, or possession of land, or relief of any other kind A plaintiff who omits except with the leave of the Court, to sue for all the reliefs to which he may be entitled in respect of the same cause of action will not afterwards be allowed to sue for any relief so omitted [O 2, r 2, sub r (3)] But it is not necessary to ask for general or other relief

Where a relief is claimed upon a specific ground the Court may grant it upon a ground different from that on which it is claimed in the plaint, if the ground is disclosed by the allegations in the plaint and the evidence in the case (u) Thus in a case in which a plaintiff claimed an easement by *prescription*, and it was found that he was not entitled to the easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal, decreed the claim on the *presumption of title arising from a grant* (v)

(o) *Raghu Nath* v *Syed Samad* (1909) 12 C W N 617

(r) *Yakub Ebrahim* v *Bai Rahimatbai* (1908) 10 Bom L R 346

(s) *Hingu* v. *Heramba* (1911) 13 Cal L J 139,

(u) *Rasul Jehan* v *Ram Surun* (1895) 22 Cal 589, *Haji Khan* v *Baldeo Das* (1902) 24 All 90

(v) *Rajrup* v *Abul* (1881) 6 Cal 394 7 I A 240, *Achul* v *Rajun* (1881) 6 Cal 812, *Secretary of State* v *Mathurabhai* (1890) 14 Bom 213 220

Where a plaint *asks for more* than what the plaintiff is entitled to, the Court may give him only that much relief as he is entitled to, but the suit must not be dismissed (w) Where a plaint *asks for less* than what the plaintiff is bound to be entitled to, the Court cannot give him more than what is asked for in the plaint, unless the plaint is amended before judgment Thus if a suit is brought upon a balance of accounts or for mesne profits, and the plaintiff, instead of claiming whatever may be found due on the taking of accounts and stating an approximate amount [O 7, r 2], states a specific sum as the amount claimed, the Court cannot, without an amendment of the plaint [O 6, r 17], pass a decree for more than what is claimed (x)

General or other relief—Under the system of pleadings hitherto followed in India, it was usual to add in the plaint a prayer for general relief called *general prayer* which ran thus "The plaintiff claims *such further or other relief* as the nature of the case may require" Under the present rule it is no longer necessary specifically to ask for such relief Such relief may now always be given to the same extent as if it had been asked for, provided it is not inconsistent with that specifically claimed, as well as with the case raised by the pleading (y) In order, however, to entitle a plaintiff to a relief under the claim for general relief, it is necessary that the ground for such relief must be disclosed by the allegations in the plaint (z) "A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings" (a) Thus where a plaintiff sues for a declaration of title to certain property *under a deed of sale* he cannot be allowed to succeed on the basis of title *by adverse possession* (b)

With regard to the *nature* of the general or other relief which a plaintiff may have, the rule is that if the plaint contains allegations, offering issues on facts that are material, the plaintiff is entitled to the relief which those facts will sustain, but he cannot desert the specific relief claimed, and under the claim for general relief ask for specific relief of *another description*, unless the facts and circumstances alleged on the pleadings will, consistently with the rules of the Court, maintain that relief (c)

Where a suit is brought by a reversioner against a Hindu widow (1) for an injunction restraining her from waste, (2) for appointment of a receiver, and (3) for "further relief" the plaintiff if he fails in the substantial heads of his claim, is not entitled, under cover of a request for "further relief," to obtain a declaration that he is the next reversionary heir (d)

In a suit by a mortgagee for *sale* of the mortgaged property, the mortgagee may relinquish his claim for *sale*, and ask for a *simple money* decree, though such relief is not specifically claimed This he may do under the claim for general relief The Court has the power to grant that relief, provided the mortgage contains a *personal* covenant to pay the mortgage debt (e) Similarly the Court may under this rule award interest on a balance of account from the date of the institution of the suit, although interest is not specifically asked for in the plaint (f) But the Court has no power under a claim for general relief, to grant to a *pro forma* plaintiff the relief claimed by the active

(w) *Pitambur* v *Ram Joy* (1867) 7 W R 93, *Lakshman* v *Hari* (1880) 4 Bom 584

(b) *Somasundaram* v *Vadivelu* (1908) 31 Mad 531

(c) *Hiern* v *Mill* (1806) 13 Ves 119 per Lord Eldon *Cockerell* v *Dickens* (1840) 2 M I A 353 383 See also *Kolamal* v *Gulabsing* (1925) 27 Bom L R 277, 87 I C 491 ('25) A B 248 *Ram Gharib* v *Shankar* (1922) 20 All L J 15, 65 I C 242 ('22) A A 5

(d) *Janaki* v *Narayanasami* (1916) 43 I A 207 39 Mad 634 37 I C 161

(e) *Sukhdeo* v *Lachman* (1902) 24 All 456, *Abbakke* v *Kinhiamma* (1906) 29 Mad 491

(f) *Rup Ram* v *Harphul* (1921) 2 Lah. 256, 64 I C 886

7 plaintiff, if it turns out that the *pro forma* plaintiff and not the active plaintiff, is entitled to the relief claimed This may be explained by an illustration *B* sells his interest in certain property in the possession of *C* to *A* *A* and *B* then sue *C* to recover possession of the property *B* makes no claim and he is joined merely as a *formal* party to the suit The Court finds the sale to *A* void as champertous (Contract Act, s 23) Such being the case no decree can be passed in favour of *A* for possession Nor should any decree be passed in favour of *B* awarding possession of the property to him under the claim for general relief though the Court may find that *C* is in wrongful possession of the property and the person really entitled to the property is *B* *B* must bring a separate suit against *C* to recover possession (*g*)

Alternative relief—A plaintiff may rely upon several different rights alternatively although they may be inconsistent (*h*) provided that his pleading is not thereby rendered embarrassing A pleading is not embarrassing within the meaning of O 6 r 16 because it contains inconsistent sets of facts (*i*) Thus a plaintiff may in the same suit claim to have a partnership agreement with the defendant cancelled on the ground that he was induced to enter into it by the fraud of the defendant, or, in the alternative for a dissolution of partnership and accounts (*j*) Similarly a plaintiff may claim over the same plot of land a right of ownership or in the alternative, a right of easement (*k*) A plaintiff may in a suit for pre emption base his claim in the alternative on contract and on Mahomedan law (*l*) He may also in such a suit set up an alternative claim as ... (*m*)

In *Mah... B...h v. H...u B...* (*n*) the Judicial Committee observed that where a plaintiff ... alleging that a deed purporting to be executed by herself is a forgery the Court ought not to admit the ... issue whether it was executed under undue influence The observations were explained away in an Allahabad case where it was held that a plaintiff may sue for the cancellation of a bond on the ground that it was a forgery or in the alternative that it was void for want of consideration (*o*) But quære whether the allegations of forgery and want of consideration are not *inconsistent and embarrassing* The High Court of Calcutta has held that a plaintiff may sue to set aside a deed of gift on the ground that she executed it under a fraudulent representation that it was a power of attorney, or, in the alternative on the ground that it was obtained by undue influence (*p*)

A plaintiff in a suit for specific performance may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled (*q*) A purchaser in a suit for specific performance may claim in the alternative for a return of the earnest money he may at the hearing give up his prayer for specific performance and ask for a return of the earnest money and the Court may direct the defendant to return the earnest money (*r*) In England in a case under the old practice it was held that a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise could not be sustained (*s*) It seems probable that the same conclusion would still be arrived at on the ground that the claims were *inconsistent and embarrassing* (*t*)

(*g*) *Debi Dayal v. Bhan Pertap* (1904) 31 Cal 433
(*h*) *Phillipps v. Phillipps* (1878) 4 Q B D 127, 134 *per* Brett L J
(*i*) *Re Morgan Owen v. Morgan* (1887) 35 C D 49
(*j*) *Bagot v. Easton* (1877) 7 C D 1
(*k*) *Narendra v. Abhoy Charan* (1907) 34 Cal 51
(*l*) *Muhammad v. Shams un Nissa* (1914) 36 All 456 24 I C 425
(*m*) *Bhagwati v. Parmeshar* (1914) 36 All 476 25 I C 293
(*n*) (1888) 15 I A 81 88 15 Cal 684 See also *Iyappa v. Rama Lakshmamma* (1890) 13 Mad 549
(*o*) *Jina v. Manon* (1896) 18 All 125
(*p*) *Official Assignee v. ...* (1919) 24 Cal W N 145 144 54 I C 700
(*q*) See s 37 of the Specific Relief Act 1877 which is based on *Mosley v. Virgin* (1796) 3 Ves 184 *Mapylion v. Scott* (1803) 13 Ves 425
(*r*) *Karsondas v. Chhotalal* (1921) 45 Bom 259 77 I C 273 (1921) A B 119
(*s*) *Cawley v. Poole* H & M 50
(*t*) Fry on Specific Performance 6th ed, para 1058 p 434

For further information on this subject see notes to O. 6, r. 2 "Alternative and inconsistent allegations" on p. 441 above

Relief not founded on pleadings—See notes under the same head to O. 14, r. 1

Events happening after institution of suit Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has by reason of subsequent change of circumstances become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (u) *Cf* O 6 r 7

8 [*New.* R S C, O 20, r 7.] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly

Relief founded on separate grounds

See notes to O 6 r 2 "Alternative and inconsistent allegations" on p 441 above

9 [S 58] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and, if the plaint is admitted shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements

Procedure on admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

Sub-rule (2): representative capacity—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or

(u) *Nuriman* v *Ambica* (1917) 44 Cal 47 5[illegible] 34 I C 869

is sued, although no doubt that is a convenient place to make such a statement It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (t) See O 7, r 4, and Appendix A, "(2) Description of Parties in Particular Cases," the last two forms

10. [S 57] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted

Return of plaint

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint

Return of plaint—Where a suit filed in a Revenue Court is not triable by that Court the Court should not dismiss the suit, but return the plaint to be presented to the proper Court (u)

"At any stage of the suit"—These words are new and they have been added to give effect to the undermentioned decision (x) in which it was held that a plaint may be returned to be presented to the proper Court at any stage of the suit even after the trial has begun and concluded

Court-fee—Where a plaint is returned by a Court to be presented to the proper Court the latter Court is bound to give credit for the fee levied by the former Court (y)

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3 cl (1)]

Appeal—An appeal lies from an order returning a plaint to be presented to the proper Court whether the order is made by the Court of first instance [O 43, r 1, cl (a)] or by the Court of first appeal in the exercise of powers conferred upon it by s 107 (z) But no second appeal lies from the order of the first appellate Court (a) [see s 104 (2)]

A files his plaint in a District Munsif's Court The Munsif returns the plaint for presentation to the proper Court, holding that the suit is beyond his pecuniary jurisdiction On the plaint being presented to a Subordinate Judge's Court, it is again returned by that Court on the ground that the Munsif's Court had jurisdiction Is A entitled to appeal to the District Court from the order of the District Munsif, having regard to the fact that he in obedience to that order filed the plaint in the Subordinate Judge's Court? No according to a Calcutta decision, the reason given being that by electing to file the plaint in the Subordinate Judge's Court, he forfeited his right of appeal (b) Yes, according to the Madras High Court (c)

(t) *Kumarmoni* v *Wasif Ali* (1915) 19 C W N 1193 29 I C 819 *Budhu* v *Kuladaprasad* (1919) 46 Cal 877 883 50 I C 525

(u) *Ram Jas* v *Babu* (1922) 44 All 686 70 I C 98 (22) A N 423

(x) *Prabhakar Bhat* v *Vishwambhar* (1884) 8 Bom 313 [F B] See *Kannuswami* v *Jaganthambal* (1919) 41 Mad 701 708 48 I C 265

(y) *Rameswara* v *Nair* (1912) 35 Mad 567 10 I C 201 [F B]

(z) *Bahuluah* v *Kanhaya Lal* (1903) 25 All 174, *Dalip Singh* v *Kundan Singh* (1914) 36 All 59 22 I C 614 *Nand Kishore* v *Abdur Rahman* (1920) 42 All 74 52 I C 801 *Contra* v *Brij Lal* (1899) 26 Cal 275 *Chinnasami* v *Kuruppa* (1898) 21 Mad 234

(a) *Nilkanth* v *Balwant* (1923) 27 Bom L R 635, 88 I C 773 (25) A B 431

(b) *Beni Madhub* v *Jotendra* (1907) 5 Cal L J 580 doubted in *Baikuntha Nath* v *Nawab Salimulla* (1907) 6 Cal L J 547 556

(c) *Narayanan* v *Cheria* (1918) 41 Mad 721, 45 I C 89

The merits of an order refusing leave under s. 20, cl. (b), cannot be attacked in an appeal from an order returning a plaint to be presented to the proper Court (*d*)

Rejection of plaint

11. [S. 54.] The plaint shall be rejected in the following cases:—

(*a*) where it does not disclose a cause of action;

(*b*) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(*c*) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

(*d*) where the suit appears from the statement in the plaint to be barred by any law.

Change of law.—Clause (a) is new. See notes below, "Clause (a)."

Chartered High Courts.—Clauses (b) and (c) of this rule do not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. See O. 49, r. 3(1).

"Shall be rejected."—This rule may be applied at any stage of a suit. Therefore, a plaint may be rejected under this rule even after it has been numbered and registered as a suit (*e*).

The provision contained in this rule that the plaint shall be rejected in the four cases mentioned in the rule is mandatory. In a case, therefore, where the relief claimed was properly valued, but the plaint was written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper, failed to do so, it was held that the plaintiff should not be allowed to amend the plaint by omitting the prayer in respect of which the extra court fee was directed to be paid and that the plaint should be rejected (*f*).

Rejection of plaint in part.—This rule does not justify the rejection of any particular portion of a plaint (*g*).

Clause (a).—Under the Code of 1882, s. 53, it was not obligatory upon the Court to reject a plaint if it did not disclose cause of action. Under the present rule the Court is bound to reject a plaint if it does not disclose a cause of action. As to the meaning of "cause of action" see notes to s. 20, "Cause of Action," on p. 90 above.

Clause (b): Where the relief claimed is undervalued.—Even if the correct valuation would render the Court incompetent to entertain the suit, the Court should

11. in the first instance require the plaintiff to pay the proper court fee. If the plaintiff does not pay the additional court fee, the Court should not proceed under O. 7, r. 10, but it should reject the plaint. If the plaintiff pays the requisite court fee, and the Court finds that the value of the subject matter exceeds its jurisdiction, it should return the plaint under O. 7, r. 10 (h).

Clause (c): Where a plaint is written upon paper insufficiently stamped.—The following points are to be noted in connection with this clause:—

1. Where a plaint is written upon paper insufficiently stamped, the Court *is bound* to give the plaintiff time to make good the deficiency. This follows from the terms of cl. (c) itself (i).

2. If the plaintiff fails to supply the requisite stamp-paper within the period fixed by the Court, the plaint may be rejected under this rule, even after it has been numbered and registered as a suit. The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered (j). See notes above "Shall be rejected."

3. A plaint is presented on the last day allowed by the law of limitation. It is written upon paper insufficiently stamped. The plaintiff is ordered to supply the requisite stamp paper within a week. The order is complied with on the fourth day after the date of presentation of the plaint. This would necessarily be *after the expiration* of the period of limitation prescribed for the institution of the suit. Can the plaint be admitted under these circumstances? Under the Code it can be (see s. 149). Under the Code of 1882 there was a conflict of decisions on the point. It was held by the High Courts of Calcutta (k), Madras (l) and Bombay (m) that the Court had power to admit the plaint in the circumstances mentioned above, while it was held by the Allahabad High Court that the Court had no such power (n). The view taken by the Calcutta, Madras and Bombay High Courts was that the Court had power under s. 54 of that Code, at any time and without any regard to limitation, to fix a time within which the requisite stamp-paper should be supplied, and if the stamp was made good within the period fixed by the Court, the suit was to be deemed to be *instituted* when the plaint was *first presented* and not when the requisite stamp paper was supplied. On the other hand, the view taken by the Allahabad High Court was that though the Court had the power to give time to a plaintiff within which to supply the requisite stamp paper, it must be a time within limitation, and that s. 54 did not give any power to the Court to extend the period of limitation. This conflict has now been set at rest by the provisions of s. 149 of this Code. That section gives effect to the Calcutta, Madras and Bombay decisions. The Allahabad decisions are no longer law (o). S. 149 empowers the Court *at any stage* to allow a plaintiff to make up the deficiency of court fees, and provides in effect that when the deficiency has been made up, the plaint is as valid as if it had been properly stamped when presented. It follows from the provisions of s. 149 that where a plaint written upon paper insufficiently stamped is presented to the Court on the last day allowed by the law of limitation, and the Judge to whom the plaint is presented directs extra court

(h) *Kandasami* v. *Subbu* (1924) 46 Mad. L.J. 345, 77 I.C. 745, (24) A.M. 846.

(i) *Abdul* v. *Narayya* (1914) 38 Bom. 41, 43, 21 I.C. 337; *Ram Sahay* v. *Kumar Lachmi* (1917) 2 Pat. L.J. 76, 78, 38 I.C. 870; *Radha Kant* v. *Debendra* (1922) 49 Cal. 990, 70 I.C. 101, (22) A.C. 408.

(j) *Prabhamoyee Dasi* v. *Ambika Si* (1900) 27 Cal. 356; *Dharmanand Singh* v. *Anand Lal* (1907) 34 Cal. 23.

(k) *Moti Sahu* v. *Chhatri Das* (1892) 19 Cal. 780; *Hari Mohan* v. *Narendra* (1893) 20 Cal. 41; *Bhaskaran Kuer* v. *Madan Mohan Singh* (1904) 31 Cal. 75.

(l) *Assan* v. *Pathumma* (1899) 22 Mad. 494; *Cheramma* v. *Pala Krishna* (1909) 32 Mad. 303, 4 I.C. 203.

(m) *Chandraram* v. *Tuka Samaldas* (1907) 27 Bom. 321.

(n) *Janki Prasad* v. *Parbu Singh* (1911) 33 All. 65; *Durga Singh* v. *Bisheshar Dayal* (1902) 24 All. 218.

(o) *Ram Dayal* v. *Sher Singh* (1923) 45 All. 554, 74 I.C. 324, (23) A.A. 534.

fee to be paid, *but fixes no time for payment*, and the plaintiff pays the extra court fee though it be *after the expiration* of the period of limitation and the Court accepts it, the plaint should be treated as if the full fee had been paid in the first instance, and the suit cannot be held to be barred by limitation (*f*) In a recent Patna case the plaintiff was given a week's time in which to make up the deficiency Before the expiry of the week the Court closed for the vacation The amount in deficit was tendered two days after the *re-opening of the Court and accepted and the plaint was registered* The period of limitation for the claim had expired prior to the date of the acceptance of the deficit It was held that the acceptance of the fee, although tendered late, and the subsequent registration of the plaint, amounted to an exercise by the Court of its discretion to allow the deficiency to be paid on the day when it was tendered, and, therefore, the suit was not barred by limitation (*q*)

The procedure prescribed by the present rule is not applicable to a case in which an appellate Court acts under s. 12 of the Court Fees Act, 1870 (*r*)

Memorandum of appeal insufficiently stamped—See notes to s 149 "Appeals and Applications for review of judgment," on p 353 above

Clause (*d*):—Suit barred by any law—Where a suit appears from statements in the plaint to be barred by the law of limitation but the plaint is not rejected when presented, the Court may in a proper case allow the plaint to be amended at the hearing (*s*) Where a suit is brought against the Secretary of State without giving the notice required by s 80, the plaint should be rejected under this clause (*t*)

Enlargement of time—The Court may *enlarge* the time fixed under cls (*b*) and (*c*) See s 148

Appeal—An order rejecting a plaint is a decree [s 2 (2)], and appealable as such (*u*)

Where a plaint is rejected under cl (*b*), the order rejecting the plaint is not appealable when such order is based on a question of valuation *pure and simple* But if the order necessarily involves a decision of the category *or class under which a suit* falls, even though it incidentally decides a question of valuation, the order is appealable (*v*) These decisions turn on on s 12 of the Court Fees Act, 1870

Revision—In a suit by *A* against *B*, *B* raises the objection that the relief claimed is under valued The Court may in such a case either uphold the objection and require *A* to pay additional court fee, or it may hold *that A's valuation is correct. Is this decision* open to revision? It has been held by the Chief Court of the Punjab that an *order* directing a plaintiff to make up the deficiency in Court fee is not open to revision The reason given is that if the plaintiff feeling that the order is wrong does not comply with it, it will under this rule result in the rejection of his plaint from which he has a right

(*t*) *Bachchu* v *Secretary of State* (1903) 25 All 187

(*u*) *Sada Kaur* v *Bula Singh* (1914) Punj Rec no. 80 p 278 25 I C 565

(*v*) [illegible]

(*w*) *Nawab* v *Duni Chund* (1912) Punj Rec no 69 p 265, 16 I C 475

that the case did not fall under any of the three clauses of s 115 and on the further ground that the decision may be challenged in appeal from the final decree (x) The High Court of Patna has held that an order demanding an additional court fee *involving the jurisdiction of the Court to try the suit* is open to revision The plaintiff is not bound to wait until his plaint is rejected for non payment of the additional court fee (y)

Review—An order rejecting a plaint under cl (c) of this section is open to review ( ) So also in a proper case an order rejecting a plaint under cl (b) of the section (a)

12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting plaint

Procedure on rejecting memorandum of appeal—The same procedure is to be followed when a memorandum of appeal is rejected (b)

13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action

Where rejection of plaint does not preclude presentation of fresh plaint

Documents relied on in plaint

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint

Production of document on which plaintiff sues

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint

List of other documents

Production of documents relied upon—A horoscope does not require to be entered in the list of documents mentioned in sub-r (2) The reason is that it is not a document to be relied upon as a probative document in itself, but it is a record made by the maker of the horoscope to which he is entitled to refer for the purpose of refreshing his memory in the witness box (c)

Failure to produce documents—The penalty for not producing the documents referred to in this rule is that prescribed in r 18 below, and not the rejection of the plaint (d)

(a) *Adit Prasad v Ramkaran* (1925) 4 Pat 1?0 1?3 91 I C 213 (?) A I R 425
(b) *Jadu Prasad v Raj Nath* (1921) 15 A L J 2?7
(c) *Panwari Lal v Mahesh* (1919) 4? I A 2?4 2?6-2?7 41 All ?? ?? I C 541
(d) *Gopal v Lakhan* (1920) ?? Bom 971

Loss of document after production—Where a promissory note sued upon was produced and delivered to the Court as required by this rule and it subsequently disappeared from the file it was held by the Judicial Committee that the plaintiff was entitled to give secondary evidence under s. 65 (2) of the Evidence Act 1872 without showing how it disappeared (*e*)

15. [S 60] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Statement in case of documents not in his possession or power

16. [S 61] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint

Suits on lost negotiable instruments

17. [S 62] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies

Production of shop book

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so, and return the book to the plaintiff and cause the copy to be filed

Original entry to be marked and returned

Bankers' Books Evidence Act 18 of 1891—The Bankers Books Evidence Act provides a special mode of proof of entries in bankers books by dispensing with the production of the books S 4 of the Act provides that a *certified copy* of any entry in a banker s book is to be received as *prima facie* evidence of the existence of such entry and that it should be admitted as evidence of the matter contained therein to the same extent as the *original* entry

(*e*) *Tulsi Ram* v *Ram Saran Das* (1925) 27 Bom L R 777 86 I C 552 (25) A PC 80

18. **18.** [S 63] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

Inadmissibility of document not produced when plaint filed

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory

In what cases leave may be granted under this rule—The object of rr 14 and 18 is to provide against false documents being set up after the institution of a suit In those cases therefore where there is no doubt of the existence of a document at the date of the suit the Court should as a general rule, admit the document in evidence though it was not produced with the plaint or entered in the list of documents annexed to the plaint as required by r 14 (f) But the Court may even in such a case refuse to receive it in evidence if it is produced at a very late stage of the proceedings e g ten years after the date of the suit and a day before the judgment was delivered as was done in the undermentioned case (g)

ORDER VIII

Written Statement and Set-off

2. **1.** [S 110.] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement

Written statement—The written statement must contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his defence but not the evidence by which those facts are to be proved (O 6 r 2) A defendant may, by his written statement, raise as many distinct and separate, and therefore inconsistent, defences as he may think proper, provided the pleading is not embarrassing (h) A written statement is not embarrassing within the meaning of O 6, r 16 merely because it sets up inconsistent defences (i) But where the defendant relies upon several distinct grounds of defence they must be stated separately and distinctly (r 7 below) See notes to O 6, r 2, 'Alternate and inconsistent allegations on p 441 above

2. [New R S C, O 19, r 15] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or void-

New facts must be specially pleaded

(f) Devidas v Pirjada Begam (1884) 8 Bom 377
(g) Gangadhar v Krishnaji (1920) 44 Bom 625 57 I C 593
(h) Berdan v Greenwood (1878) 3 Ex D 251 255
(i) Re Morgan, Bowen v Morgan (1887) 35 C D 492

able in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

O. 8, rr. 2-4.

Fraud.—See notes to O. 6, r. 4, "Fraud and coercion" on p. 443 above

Facts showing Illegality—When a plaintiff sues upon a bond, and the defence is that there was no consideration, the Court should not entertain the plea that the consideration was unlawful, *e g*, stifling a criminal prosecution, if the point was raised for the first time in the argument of counsel at the close of the hearing The illegality of the consideration must be specifically pleaded (*j*) See notes to O 6, r. 8, on p. 450 above.

Limitation—In India, a suit instituted after the expiry of the period of limitation "*shall* be dismissed, although limitation has not been set up as a defence." Limitation Act, 1908, s. 3 In England, limitation must be specifically set up as a defence.

3. [*New.* R.S.C., O. 19, r. 17.] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Denial to be specific

"Deal specifically with each allegation of fact."—The defendant must take each fact which is alleged against him separately, and say that he admits it, or denies it, or does not admit it "It is not merely denial which is meant, but the rule covers non-admission, for [the defendant] is to *deal specifically* with every allegation of fact of which he does not admit the truth" (*k*) Every allegation of fact in the plaint will be taken to be admitted if it is not denied specifically or by necessary implication or stated to be not admitted (r 5)

A defendant ought not to deny, by his written statement, plain and acknowledged facts which it is neither to his interest nor in his power to disprove (*l*); nor should he plead to any matter which is not alleged against him (*m*) See notes to O. 6, r 2, "Facts not yet material to a case," on p 439 above.

"Except damages."—It is not necessary for a defendant, in a suit for damages, to deny specifically the damages, it is quite sufficient if he pleads generally to the damages (*n*). See notes to O. 6, r. 2, "Matters affecting damages," on p. 438 above.

4 [*New.* R.S.C., O. 19, r. 21.] Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received

Evasive denial

(*j*) *Nur Ilahi* v. *Mawaz Khan* (1925) 7 Lah. L J 86, 86 I C 683, ('25) A. L. 345
(*k*) *Thorp* v *Holdsworth* (1876) 3 C D 637, 640, *per* Jessel, M R
(*l*) *Lee Conservancy Board* v. *Button* (1879) 12 C D 383, *affirmed* (1881) 6 App Cas 685.
(*m*) *Rassam* v *Budge* [1893] 1 Q B. 571
(*n*) *Ross & Co* v *Scriven* (1916) 43 Cal 1001 1010. 34 I C 235

for neither *C* or *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1,000 **O. 8, r. 6**

(b) *A* dies intestate and in debt to *B* *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C* In a suit for the purchase money by *C* against *B*, the latter cannot set off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*

(c) *A* sues *B* on a bill of exchange *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off The amount not being ascertained cannot be set off

(d) *A* sues *B* on a bill of exchange for Rs 500 *B* holds a judgment against *A* for Rs 1,000 The two claims being both definite pecuniary demands may be set off

(e) *A* sues *B* for compensation on account of trespass *B* holds a promissory note for Rs 1,000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands

(f) *A* and *B* sue *C* for Rs 1,000 *C* cannot set off a debt due to him by *A* alone

(g) *A* sues *B* and *C* for Rs 1,000 *B* cannot set off a debt due to him alone by *A*

(h) *A* owes the partnership firm of *B* and *C* Rs 1,000 *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs 1,500 due in his separate character *C* may set off the debt of Rs 1,000

Changes in the rule—Sub rule (3) is new See r 9 below

Conditions of applicability of the rule—A defendant may claim a set off *under this rule* if the following conditions are satisfied, but not otherwise —

I The suit must be one for the recovery of *money*

II As regards the amount claimed to be set off—

(a) it must be an *ascertained* sum of money [see ills (c), (d), and (e) above],

(b) such sum must be *legally* recoverable,

(c) it must be recoverable by *the defendant* or by *all the defendants* if more than one [see ill (g)],

(d) it must be recoverable by the defendant from *the plaintiff* or *all the plaintiffs* if more than one [see ill (f)],

(e) it must *not exceed the pecuniary limits of the jurisdiction* of the Court in which the suit is brought, and

(f) both parties must fill, in the *defendant's claim to set off*, the *same character* as they fill in the *plaintiff's suit* [see ills (a), (b), and (h)]

The suit must be one for the recovery of money—In *Nan Karay* v *Ko Htaw* (*a*), their Lordships of the Privy Council observed that it was doubtful whether a suit for an *account* was a suit for *money* In a subsequent Allahabad case it was held that a suit for a dissolution of partnership and for partnership accounts with a prayer that such *balance* as may be found due to the plaintiff upon taking the partnership accounts may be paid to him was a suit for *money*, and that a plea of set off might therefore be raised by the defendant in such suit (*b*)

(*a*) (1886) 13 Cal 124 13 I A 48 (*b*) *Ramjiwan* v *Chand Mal* (1888) 10 All 587.

is very stringent According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the hearing The fact will be taken to be admitted by him, and the Court has no power to require the plaintiff to prove it in any case Strike out the proviso to the present rule, and you have the rule of English law In fact, the first paragraph of this rule is a reproduction of O 19, r 13 of the English Rules made under the Judicature Acts The proviso has been added to modify the rigour of that rule

But though pleadings in India are not to be construed as strictly as in England neither party will be allowed to set up at the hearing an entirely new and inconsistent case The plaintiff must be held to the state of facts alleged in his plaint or consistent therewith (x) Similarly, the defendant must be held to the state of facts alleged in his written statement or consistent therewith (y)

Omission to file written statement—This rule applies only where a pleading *has been put in* by the defendant Omission to file a written statement does not amount to an admission of the facts stated in the plaint (z)

6. [S. 111] (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off

Particulars of set off to be given in written statement

(2) The written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree

Effect of set off

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set off

Illustrations

(a) A bequeaths Rs 2 000 to B and appoints C his executor and residuary legatee B dies and D takes out administration to B's effects C pays Rs 1 000 as surety for D, then D sues C for the legacy C cannot set off the debt of Rs. 1,000 against the legacy,

(x) *Lakhan Chunder v Shama Churn* (1866) 11 M I A [illegible]
(y) *Chotay Lal* (1870) 1 Bom 403 *Muncherslaw* [illegible]
(z) [illegible] v *New Dhurumsey Co* (1880) 4 Bom 576 *Ross & Co* v *Sviren* (1916) 43 Cal 1001, 1003-1010 34 I C 233

for neither *C* or *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1,000

(b) *A* dies intestate and in debt to *B* *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C* In a suit for the purchase money by *C* against *B*, the latter cannot set off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*

(c) *A* sues *B* on a bill of exchange *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off The amount not being ascertained cannot be set off.

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(f) *A* and *B* sue *C* for Rs 1,000 *C* cannot set off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs 1,000. *B* cannot set off a debt due to him alone by *A*

(h) *A* owes the partnership firm of *B* and *C* Rs 1,000 *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs 1,500 due in his separate character *C* may set off the debt of Rs 1,000

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Conditions of applicability of the rule.—A defendant may claim a set off *under this rule* if the following conditions are satisfied, but not otherwise —

I The suit must be one for the recovery of *money*

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(d) it must be recoverable by the defendant from *the plaintiff* or *all the plaintiffs* if more than one [see ill (f)],

(e) it must *not exceed the pecuniary limits of the jurisdiction* of the Court in which the suit is brought, and

(f) both parties must fill, in the *defendant's claim to set off*, the *same character* as they fill in the *plaintiff's suit* [see ills (a), (b), and (h)]

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(a) (1886) 13 Cal 124, 13 I A 48

(b) *Ramjiwan* v *Chand Mal* (1888) 10 All 587.

r 6. **The amount claimed to be set off must be an ascertained sum of money, and not unliquidated damages**—The expression "ascertained sum" does not mean a sum admitted by the plaintiff It is used in contradistinction to unliquidated damages (c) In ills (d) and (e) the claim is an ascertained sum, not so in ill (c) where the amount claimed to be set off is for unliquidated damages In the case mentioned in ill (c) the defendant may bring a cross suit against the plaintiff In ill (d) the amount claimed to be set off by *B* is the amount of a decree, and this may be set off against *A's claim* It is not necessary that *B* should have taken any steps to enforce the decree (d)

A, a clerk, sues *B*, his employer for arrears of wages due to him *B* alleges that *A* left his employment without notice and that *A* is therefore liable to pay damages which he claims to set off The amount not being ascertained cannot be set off (e) See ill (3) on the next page

Equitable set-off—We now proceed to consider cases in which the defendant may be allowed a set off even in respect of an unascertained sum which sounds in damages These are cases where the cross demands arise out of *the same transaction*, or are so connected in their nature and circumstances that they can be looked upon as part of one transaction In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross suit and that he may be allowed to plead a set off though the amount may be *unascertained* Such a set off is called an *equitable* set off as it is allowed by Courts of *Equity* as distinguished from a *legal* set off which is allowed by Courts of *Common Law* in respect only of an *ascertained* sum It will thus be seen that the present rule is restricted to a *legal* set off, for it requires that the amount to be set off shall be an *ascertained* sum The question therefore arises whether an *equitable* set off can be pleaded in Indian Courts in other words, if the defendant's claim is for an *unascertained* sum but has arisen from the *same transaction* as the plaintiff's claim, the defendant can set off such demand against the plaintiff's claim? It has been held that he can do so not under the provisions of the present rule which is limited to a *legal* set off, but in the exercise of the general right of a defendant to plead a set off whether it is legal or equitable The provisions of the Code regulate *procedure* only, and they have not the effect of taking away any *right* of set off which a defendant may have independently of its provisions. O 20, r 19 (3), recognizes an equitable set off The leading case on the subject is *Clark v Ruthnavaloo* (f) But this right of set off does not exist when the cross demand relates to a *different* transaction (g)

Illustrations

1 *A* sues *B* to recover Rs 6,000 due under a contract *B* admits *A's* claim, but claims to set off several sums of money alleged to be damages sustained by him by reason of *A's* breach of some of the terms of the *same* contract *B* is entitled to claim the set off, for the claim arises from the *same transaction* *Kistnasamy v Municipal Commissioner for Madras* (1868) 4 Mad H C 120, *Pragi Lal v Maxwell* (1885) 7 All 284

2 *A* agrees to sell and *B* agrees to purchase, 200 bales of wool *B* takes delivery of 170 bales and is ready and willing to take delivery of the remaining 30 bales, but *A*

(c) *Edward v Ramdin* (1909) 14 C W N 170 5 I C 67 *Har Prasad v Ram Sarup* (1924) 22 All L J 844 82 I C 340 ('24) A A 87.

(d) *Bharat v Rameshwar* (1903) 30 Cal 1066 See also *Gobind Ram v Kunj Behari Lal* (1924) 46 All 393 ('24) A A 341 83 I C 403 a case under the Agra Tenancy Act 2 of 1901

(e) *Victoria Mills Co Ld v Brij Mohan Lal* (1917) 39 All 382, 38 I C 203

(f) (1865) 2 Mad H C 296 *Kishorchand v Madhowji* (1880) 4 Bom 407, *Bhagbat v Bamdeb* (1885) 11 Cal 557 For other cases see the illustrations

(g) *Ramdeo v Pokhiram* (1894) 21 Cal 419 *Dobson v Bengal Spinning Co* (1897) 21 Bom 126 *Dhundiraj v Ganesh* (1894) 18 Bom 721

fails to deliver them A sues B for the price of the 170 bales B claims to set off the damages sustained by him by reason of A's failure to deliver the remaining bales B is entitled to claim the set off, as the claim arises out of the *same transaction* *Kishorchand* v *Madhowji* (1880) 4 Bom. 407, *Niaz* v *Durga* (1893) 15 All 9, *Nand Ram* v *Ram Prasad* (1903) 27 All 145

3 A sues B, his master, for Rs 800 being arrears of salary B claims to set off Rs 625, being the loss sustained by him by reason of neglect and misconduct on the part of A as his servant. B is entitled to claim the set off as his claim arises out of the *same relation* from which A's claim arose, namely that of master and servant *Chisholm* v *Gopal Chander* (1889) 16 Cal 711 But see *Victoria Mills Co, Ltd* v *Brij Mohan Lal* (1917) 39 All. 362, 38 I C 203

4 A (mortgagee) sues B (mortgagor) to recover the principal and interest due on a usufructuary mortgage B claims to set off the loss alleged to have been occasioned by A's failure as mortgagee in possession to make repairs to the mortgaged property B is entitled to claim the set off *Shiva* v *Jaru* (1892) 15 Mad 290

5 A washerman sues his employer for his wages. The employer may set off the value of articles short returned to him against the wages. *Maiden* v *Bhondu* (1910) Punj Rec no 77, p 220, 7 I C. 1006

6 A sues a limited company to recover the amount of dividends payable to him as a shareholder The company is not entitled to set off damages claimed by the company against A for breach of a contract to sell and deliver cotton to the company *Vithaldas* v *The Hyderabad Spinning and Weaving Co, Ltd* (1923) 47 Bom 182, ('23) A B 24, 67 I C. 326

The amount claimed to be set off must be "legally" recoverable — The amount claimed by way of set off under this rule must be "legally recoverable" It follows from this that if the defendant's claim is barred by the law of limitation *at the date of the suit*, it cannot be set up by way of set off under this rule (h). But this rule relates only to a *legal* set-off The question arises whether a claim by way of *equitable* set off can be allowed if it is barred by limitation *at the date of the suit* It has been laid down that in cases where the plaintiff's claim and the defendant's claim relate both to the same estate or there is a fiduciary relationship between the parties, the defendant's claim to set off, *though barred by limitation at the date of the suit*, may be entertained as an *equitable* set off It has thus been held that in a suit by an heir against his co heirs for his one sixth share of the estate of the deceased, the latter are entitled to set off one sixth of the Government revenue paid by them in respect of the estate, though a separate suit by them to recover from the plaintiff the proportionate part of the revenue payable by him would be barred by limitation (i) Similarly in mortgage suits sums are allowed to be set off in taking accounts of the mortgage even though barred by limitation (j) Upon the same principle it has been held that a trustee in possession of the trust estate is entitled to set up his right to be indemnified out of the trust estate when called upon for an account, although his right to sue for the amount claimed by him by way of indemnity is barred by limitation (k) In a recent case (l), the High Court of Madras held that

(h) *Walker* v *Clements* (1850) 15 Q B 1046 See also *Bachchan Lal* v *Banarsi Das* (1913) 35 All 238 18 I C 763 [cl. im barred according to *lex fori*, but not according to *lex loci contractus*]

(i) *Ramihari Singh* v *Perma and* (1913) 19 C W N 1183 21 I C 716

(j) *Parasurama* v *Venkatachalam* (1913) 25 Mad L J 561 21 I C 701 *Sheo Sharan* v *Mohabir* (1905) 32 Cal 576 *Edward* v *Ramdin* (1909) 14 C W N 170 173 5 I C 67

(k) *Chidambara* v *Krishnaswami* (1915) 28 Mad L J 285 294 28 I C 221

(l) *Vyravan* v *Srinath* (1916) 39 Mad 939 32 I C 80

6. in a suit by a lessor for rent, it is not open to the lessee to set up by way of equitable set-off an unliquidated claim for damages which was *barred at the date of the suit* Seshagiri Ayyar, J, said "An exception to this rule [namely, that a time barred claim cannot be pleaded by way of set off] has been recognized in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and cestui que trust and there is accountability, even barred claims may be taken into account in passing the final accounts This exception has been extended in some of the decided cases in India to mortgages presumably on the ground that there is accountability between the parties See *Parasurama Pallar* v *Venkatachallam Pallar* (m), *Chidambara Mudaliar* v *Krishnaswami Pillai* (n) and *Ramdhari Singh* v *Permanund Singh* (o) It is not necessary to say now whether these cases have been rightly decided I see no reason for extending the exception to suits between a lessor and a lessee

In a Madras case (p) an agent sued his principal to recover money that might be found due to him on the taking of agency accounts The defendant pleaded in his written statement that money would be found due to him on taking accounts and he asked for a decree for such sum as might be found due to him The defendant's claim was *not barred at the date of the suit* but it was barred at the date of the *written statement* It was held that the defendant's claim should be allowed as an *equitable* set-off to the extent of the plaintiff's claim but that the defendant was not entitled to a decree for the balance found due to him as his claim was barred at the date of the written statement To pass a decree for the balance would be it was said to enable the defendant to evade the law of limitation The same view has been taken by the High Court of Bombay (q) In an Allahabad case (r) Oldfield J expressed the opinion that the set off, if not barred at the date of the suit should be allowed in full and not merely to the extent of the plaintiff's claim even it was barred at the date of the written statement See notes to O 20, r 19 Decree in case of set off

Costs awarded to a tenant in a suit brought against him by the benamidar of the landlord cannot be set off by the tenant in a subsequent suit for rent brought against him by the landlord The costs having been awarded against the *benamidar*, they are not *legally* recoverable from the *landlord* (s)

A separate debt cannot be set off against a joint and several debt—Thus in ill (g), *B* cannot set off the debt due to him *alone* by *A*, for it is a separate debt, while the suit is to recover a *joint* and *several* debt It has similarly been held that in a suit by a company against its directors, no individual director is entitled to set off the amount due to him alone from the company (t)

The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought—The valuation of a set off for the purpose of jurisdiction must be taken as relating to the whole amount pleaded as a set off, and without reference to any portion of the plaintiff's claim admitted by the defendant *A* sues *B* in a Presidency Small Cause Court for Rs. 1,000 *B* claims to set off a sum of Rs 2,700, and claims judgment for Rs 1,700, after giving *A* credit for Rs 1,000, admitted by *B* to be due to *A* The Small Cause Court has no jurisdiction to try the claim as to set off, the value of the *amount claimed as set off* being above Rs 2 000 (u)

(m) (1913) 25 M L J 561 21 I C 701
(n) (1915) 28 M L J 285 28 I C 521
(o) (1913) 19 C W N 1183 23 I C 716
(p) *Lanuganti* v *Zamindar of Tiruvur* (1919) 42 Mad 873 53 I C 234
(q) *Sujan* v *Salemahamed* (1922) 24 Bom L R 939 77 I C 943 (23) A B 113
(r) *Lagji Lal* v *Marwell* (1885) 7 All 284 See *Parmanand* v *Jagat Narain* (1910) 32 All 595 8 I C 162
(s) *Tilak Chandra* v *Jaoda Kumar* (1906) 11 C W N 215
(t) *New Fleming Co* v *Kessowji* (1885) 19 Bom 373 403 404 [where set off was claimed]
(u) *Frojendra* v *Budge Budge Jute Mill Co* (1893) 20 Cal 527 *Abraham & Co* v *Ibrahim* (1924) 2 Rang 485, 84 I C 971, (25) A R 65

A plea of payment is distinct from a plea of set off A sues B to recover Rs 1,500 in a Court of which the pecuniary jurisdiction is limited to Rs 2,000 B alleges that he has paid Rs 1,000 to A on account, and admits his liability for the balance of Rs 500, but he claims a set off of Rs 1,700 being the amount due on a promissory note passed to him by A, and asks for a decree for Rs 1,200 The amount claimed to be set off is not Rs 1,000 *plus* Rs 1,700=Rs 2,700, but Rs 1,700 only, and it is therefore within the jurisdiction of the Court (v).

Not only the amount, but also the nature of the set off, must be within the cognizance of the Court in which the suit is brought Hence a Court cannot entertain a claim to a set off unless such claim, if made the subject of a suit, would fall within its jurisdiction (w)

Same character —Ills (a) and (b) are cases in which the parties do *not* fill the same character (x)

A suit is brought by a Hindu son as the heir and representative of his father to recover from B a debt due by B to the father. B claims to set off a debt due to him by A's father B may do so, for both the parties fill the same character as they fill in the plaintiff's suit (y) Similarly in a suit by A against B for an account for goods supplied by A to B, B may claim a set off of the amount due to him from A in respect of wages as A's gumasta (z)

Court-fee —A written statement containing a claim of set off must be regarded as a plaint in regard to such set off, and must be stamped accordingly (a)

Set-off in winding-up proceedings —Though a director has no right to set off a debt due to him from the company against a claim made against him by the liquidator under s 214 of the Indian Companies Act, 1882 [Ind Cos Act, 1913, s 235] which provides a *summary* remedy (b), he is entitled to set off the amount due to him if a regular *suit* is brought against him by the company in respect of that claim (c) In a suit by a liquidator against a debtor of the company, the debtor is entitled to set off the amount of a fixed deposit made by him with the company provided the deposit had matured at the date of the suit though it had not matured at the date of the order for winding up the company (d)

Set-off in insolvency —See Presidency Towns Insolvency Act, 1909, s 47 (e) and Provincial Insolvency Act, 1907, s 30

Solicitor's lien for costs —Before the year 1832 the Courts in England had a discretionary power as regards set off and a discretion as to the terms upon which they would allow it (f) This discretion was taken away under the General Rules of 1832 and the General Rules of 1853 Rule 93 of the General Rules of 1832 was in these words "No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set off is sought, provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party,

(v) *Hoe Moe v Seedat* (1924) 2 Rang 349 84 I C 956 (25) A R 22
(w) [illegible] (1893) 15 All 104
(x) [illegible]
(y) [illegible]
(z) [illegible] 163 39 I C 17
(a) (1892) 15 Mad 29 *supra*
(b) *Ex parte Kelly* (1882) 21 Ch D 492 502 507 *Flitcroft's case* (1882) 21 Ch D 529, 535 *Carriage Supply Association in re* (1884) 27 Ch D 322
Ahmedabad Advance Spg and Wg Co v [illegible]
(f) *Puddephatt v Leith* (No 2) (1916) 2 Ch 168, 178

r. 6 may be deducted' This rule was reproduced in identical terms in 1853 That state of things continued until the Judicature Act, 1873, came into force O 45, r 14, made under that Act, provides exactly the contrary of that which had been the previous rule The previous rule said that there should be no set off allowed, O 45, r 14, says that a set off may be allowed The result is that in England the Courts under O 45, r 14, exercise now in matters of set off the discretion which was taken away by the General Rules of 1832 (g)

Sec 111 of the Code of 1877 provided that the Court may pronounce a final judgment in the same suit both on the original and on the cross claim, but it *shall not affect the lien* upon the amount decreed of any pleader in respect of the costs payable to him under the decree This provision was reproduced in sec 111 of the Code of 1882, and it is reproduced in the present rule also It is clear from the language of this rule that the Courts of this country have no discretion in the matter of a solicitor's lien in cases comprised within this rule

A solicitor has at common law a lien for his costs over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions (h) *The lien attaches to property of every description*, such as, for instance money payable to the client under a judgment including costs ordered to be paid to the client, or the proceeds of an execution in the hands of a Sheriff, money paid into Court, whether as security for costs or by way of defence, or otherwise, and money received by way of compromise [see Halsbury, vol 26, sec 1343, p 821] Where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to a lien on those assets in priority to the creditors of the partnership

It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as had existed in English Courts before the passing of 23 and 24 Vict ch 127 by which that lien was very much extended (i) At common law a solicitor had no lien on *realty* Lien on realty was first conferred by the above statute The High Court of Calcutta has held that in India an attorney is entitled to a lien on immoveable property recovered for his client in the suit (j)

A solicitor's lien for his costs extends to all the moneys of his client *which are lying in Court* It makes no difference that the moneys are brought into Court by attachment at the instance of a decree holder The lien, however, does not exist when moneys are once distributed to the creditors of the client So long as the moneys are in Court, the Court has power to direct payment to the solicitor of his costs out of the moneys (k) *A* obtains a decree against *B* *C* who has obtained a decree against *A* attaches the amount of the decree obtained by *A* against *B* in *B*'s hands *A*'s attorney is entitled to a lien for his costs on the sum so attached, but the only order that can be made in such a case is an order to the defendant *not to pay* the sum attached to any one without notice to the attorney (l)

Parties to an action may *compromise* without the intervention of solicitor, but there must be no intention to cheat the solicitor of his charges, and the Court will exercise its equitable interference to enable a solicitor to proceed in the action for his costs, though

(g) *Reid v Cupper* (1915) 2 K B 147 pp 149-150
(h) *Ex parte Morrison* (1860) L R 4 Q B 153 156 *Bozon v Bolland* (1839) 4 My & C R 354 *Rhodes v Sutjen* (1886) 34 Ch D 155
(i) *Devkabai v Jefferson* (1886) 10 Bom 248
(j) *Kumar Krishna v Hari Narain* (1916) 43 Cal 870, 33 I C 708
(k) *Ved v Wagle & Co* (1925) 49 Bom 505 88 I C 81, (25) A B 551, see also *Subramanyan v Hurry* (1887) 14 Cal 374
(l) *Nawab Nazim v Heeralall* (1873) 10 Beng L R 444

no notice of his lien has been given, in cases where it is made out that there is an intention to cheat the solicitor, but unless there has been notice or collusion, the solicitor, if the client has compromised, can only look to his client for his costs (m)

Although the High Courts possess a summary jurisdiction to enforce a solicitor's lien upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties or compel the Court to go into complicated questions of fact, especially when charges of fraud or collusion are made, or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction In such a case the Court will refer the solicitor to a *regular suit* (n)

On an application by a solicitor made in a suit in which costs have been awarded to his client against the opposite party, the Court has jurisdiction to enforce, in a proper case, the solicitor's lien by making *a direct order* for payment to the solicitor by the opposite party of such costs Thus where the original client was dead and it appeared that his legal representatives were not men of substance and that they were unable to pay, it was held by the High Court of Calcutta that it was a proper case in which the Court in the exercise of its discretion would make a direct order for payment of such costs to the solicitor by the opposite party (o)

A solicitor in England has no right of retainer in moneys realised by him in one cause for his *dues in other causes* conducted by him. An attorney in India has no larger rights (p)

By a decree passed in a suit for redemption of a mortgage brought by *A* against *B*, *A* is directed to pay the mortgage debt to *B*, but *B* is directed to pay to *A* the costs of the suit It has been held by the High Court of Calcutta that the suit being one for redemption, *B*'s attorney is not entitled to a lien for his costs on the whole of the mortgage money, but to the mortgage money *less* the costs payable by *B* to *A*, which costs *A* is entitled to set off against the mortgage money (q) See O 20, r 19, and O 21, r 19

It has been held by the High Court of Calcutta that where *A* obtains a decree against *B* for Rs 1,451, and *B* subsequently obtains a decree against *A* for Rs 1,000, *A* is entitled to have satisfaction of *B*'s decree entered, notwithstanding the lien of *B*'s attorney for his costs Reliance was placed in the judgment on the fact that *B*'s attorney had not stated that there was no chance of recovering his costs from his client [*B*] and that the decree which *B* had against *A* was the only property out of which his claim could be satisfied (r) There is no reference in the judgment to the provisions of O 8, r 6 (2)

Appeal.—Unless the whole suit is disposed of, an appeal does not lie from an order disposing of a defendant's claim as to set off made under this rule, though the question as to that claim may have been tried as a preliminary issue Such an order is not a preliminary decree See O 20, r 19, which shows that there should be only one decree drawn up in a suit in which a set off is claimed (s)

(m)

(n)

(o) *Harnandroy* v *Gooliram* (1919) 46 Cal 1070 54 I C 691

(p)

(q)

(r)

(s)

Res judicata.—A defendant is under no obligation to claim a set off. His omission, therefore, to do so does not preclude him from bringing a separate suit in respect thereof (*t*).

Counterclaim.—Though the Code does not provide for counterclaims, there is nothing to prevent a Court from treating the counterclaim as a plaint in a cross suit, and hearing the two suits together provided that the requisite court fee on the counterclaim has been paid (*u*).

7. [*New*. R. S. C., O. 20, r. 7.] Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly.

Defence or set-off founded on separate grounds.

See notes to rule 1 above. Compare O. 7, r. 8.

8. [*New*.] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

New ground of defence.

See r. 9 below.

9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Subsequent pleadings.

Additional written statement.—The additional written statement should not set up a totally new case, or state facts at direct variance with the original written statement so as completely to change the issue in the case (*v*). See O. 6, r. 7, and notes on p. 449 above.

10. [S. 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

Appeal.—An appeal lies from an order under this rule pronouncing judgment against a party [O. 43, r. 1, (*b*)].

(*t*) *Amritsar National Banking Co. Ld. v. Fazl Ilahi* (1910) Punj. Rec. no. 74, p. 1851, 52 I. C. 840.

(*v*) *Sa a Bya v. Maung Kyaw Shun* (1924) 2 Rang. 276, 82 I. C. 721, ('24) A. R. 346.

(*u*) *Douglas v. Collector of Benares* (1851) 5 M. I. A. 271, 290.

ORDER IX

Appearance of Parties and Consequence of Non-appearance

O. 9, rr. 1-3.

1. [s 96] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court

Parties to appear on day fixed in summons for defendant to appear and answer

2. [s 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court fee or postal charges (*if any*) chargeable for such service, the Court may make an order that the suit be dismissed

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent

Defendant —The expression defendant in this rule does not include the guardian ad litem of a minor defendant (*u*)

Appeal —The order or dismissal under this rule is a form of dismissal for default It is not a decree [s 2 (2)] and no appeal lies from it The plaintiff's remedy is under r 4 of this Order (*x*)

Revision —The Court has no power under this rule to dismiss the suit in a case where the plaintiff has paid the requisite Court fee for the service of the summons but the office does not issue the summons in time If the Court dismisses the suit in such a case the High Court has power to set aside the order in revision (*y*)

3. [s. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed

Where neither party appears suit to be dismissed

Where neither party appears —*A* sues *B* and *C* *A* and *C* do not appear when the suit is called on for hearing but *B* appears The Court makes an order dismissing the suit As between *A* and *B* the order is one under r 8 so as to attract the applicability of r 9 But as between *A* and *C* the order is one under the present rule so that r 4 applies and not r 9 ( )

(*u*) *Gobind Ram* v *Mahan mad* (1912) Punj Rec no 35 p 115 11 I C 317

(*x*) *Jaimi Narain* v *Darbari Lal* (1916) 38 All 357 33 I C 737 *Lucky Chunder* v *Budurr un nissa* (1883) 9 Cal. 677

(*y*) *Ralla Ram* v *Raj* (19) 4 Lah L J 71 67 I C 945 (2) A L 63

( ) *Da nu* v *Lakrya* (19 0) 44 Bom 767 56 I C 455

9,
-5.

If the plaintiff appears on the date fixed for the hearing, but the defendant does not appear, and the suit is dismissed owing to failure on the part of the plaintiff to adduce evidence in support of his claim, the dismissal is on the merits and not under this rule (a)

"May make an order that the suit be dismissed"—These words have been substituted for the words "the suit shall be dismissed" [Code of 1882, s 98] to make it clear that the dismissal under this rule is not a decree, but an order See s 2 (2)

Plaintiff may bring fresh suit or Court may restore suit to file

4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Sufficient excuse for plaintiff's non-appearance.—A *bona fide* mistake which is not unreasonable is a sufficient excuse within the meaning of this rule (b)

Whether this rule applies to proceedings in execution.—See notes to r 9 under the same head on p 502 below

Dismissal of suit where plaintiff after summons returned unserved fails for three months to apply for fresh summons

5. [S. 99A.] (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time,

(a) *Hingu Singh v. Jhuri Singh* (1918) 40 All. 590, 46 I. C. 891.

(b) *Handoram v. Victoria Finance and Bullion Association* ([illegible]) 3 B. H. C. O. C. 60.

in which case the Court may extend the time for making such application for such period as it thinks fit.

O. 9, rr. 5, 6.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit

Amendment of sub-r. (1)—Sub rule (1) was substituted for the original sub rule by Act 24 of 1920, the material changes being the substitution of "three months" for "one year," "shall make an order" for "may make an order", and the addition of cl (c)

Period of three months from date of return—The period of three months is to be calculated from the date of the return *made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers* The italicized are new In the absence of these words in the corresponding section of the Code of 1882, the question arose whether the period of one year was to be calculated from the date of the return made by the *serving officer*, or from the date of return made by the *officer whose duty it is to certify to the Court returns made by the serving officer*. It was held that the period was to be calculated from the date of return made by the latter officer, and not that made by the serving officer (c) The words italicized above have been added into the present rule to give effect to that decision The procedure is this after the writ of summons is issued, it is delivered by the Court to the proper officer for service on the defendant The officer then delivers the summons to the serving officer whose duty it is to serve it on the defendant After effecting service, the serving officer has to endorse on the original summons a "return" stating the manner in which the summons was served If, for any reason, the summons cannot be served upon the defendant, the serving officer has to make a return to that effect This "return" is then *countersigned* by the officer to whom the summons was delivered by the Court, and the summons is then returned by the officer to the Court It is from the date of the *countersignature* that the period of three months is to be calculated and not from the date of the return made by the serving officer

"Make an order that the suit be dismissed"—These words have been substituted for the words 'may dismiss the suit' [Code of 1882, s 99A] to make it clear that a dismissal under this rule is not a decree, but an order See s 2 (2)

Procedure when only plaintiff appears

6 [S 100.] (1) Where the plaintiff appears and defendant does not appear when the suit is called on for hearing, then—

When summons duly served

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*,

When summons not duly served

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant,

When summons served but not in due time

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall

(c) *Parsotam* v *Abd d* (1889) 13 Bom 500

postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Ex parte decree—If the defendant does not appear, and it is proved that the summons was duly served upon him the Court may proceed *ex parte* If the plaintiff makes out a *prima facie* case the Court may pass a decree for the plaintiff If the plaintiff fails to make out a *prima facie* case the Court may dismiss the plaintiff's suit Every Judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *prima facie* proved The mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true (*d*) The Court has no jurisdiction to pass an *ex parte* decree without any evidence being given by or on behalf of the plaintiff (*e*) It is to be noted that the Court has no power to pass an ex parte decree *before* the returnable date mentioned in the summons (*f*)

Ex parte decree for amount in excess of sum actually due—If the plaintiff obtains an ex parte decree for a sum in excess of that which is due to him, the defendant is entitled ex debito justitae to have such decree set aside (*ff*) except where the error was due to an accidental slip within the meaning of s 152 in which case the Court may on the plaintiff's application allow the decree to be amended by reducing it to the proper amount (*fff*)

"Appears."—As to the meaning of the word "appears" see notes to r 9, "Appearance," on p 498 below

Remedies open to a defendant in the case of an ex parte decree.—See r 13 and notes "Remedies in case of ex parte decree," on p 504 below

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance

7. [S. 101.] Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

This rule was applied in the undermentioned case (*j*)

Procedure where defendant only appears

8 [S 102.] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless

(*d*) [illegible] (18[illegible]) 15 W R [illegible]3 [illegible] (19[illegible]) 33 [illegible] 867 [illegible] 806 [illegible] (19[illegible]) 2[illegible] [illegible] 77 I C [illegible] A [illegible] 647

(*e*) [illegible] (1916) 43 Cal 1001 34 I C 2[illegible]

(*f*) [illegible] v Horn[illegible] (1908) 37 Bom 534

(*ff*) *Hughes* v [illegible] (1894) 1 Q B 667 [illegible] v *Jenks* (1919) 2 K B 41[illegible]

(*fff*) [illegible] v *Parsons* (1908) 2 K B 410 [where the excess was 8 s]

(*j*) [illegible] v *Lakshm*[illegible] (19[illegible]) 49 Mad L J 273 91 I C 545 ([illegible]) A I R [illegible]74

the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

O. 9, rr. 8, 9.

Non-appearance of parties —If neither party appears on the day fixed for the hearing of the suit, the procedure laid down in r 3 is to be followed If the plaintiff appears and the defendant does not appear, the procedure laid down in r 6 is to be followed If the defendant appears and the plaintiff does not appear, the procedure laid down in the present rule is to be followed All that a defendant is entitled to under this rule is to have the plaintiff s suit dismissed He is not entitled to call any evidence, even though it be to disprove charges of fraud or the like that may have been made against him in the plaint (*h*)

If the plaintiff does not appear —See notes to r 9 Appearance, on p 498 below This rule does not apply to the case of non appearance by reason of death Where a sole plaintiff dies before the hearing of a suit, and the suit is dismissed for non appearance under this rule, the fact of his death not being known to the Court, there is inherent jurisdiction in the Court under s 151 to set aside the dismissal, and thus rectify the mistake which has been inadvertently made It is then for the legal representative of the plaintiff to apply to be brought on the record under O 22, r 3 (*i*)

More plaintiffs than one —This rule provides for the case where a single plaintiff, or *all* the plaintiffs if there are more than one, do not appear Rule 10 provides for a case where there are more plaintiffs than one and *one or more* of them appear and others do not appear (*j*)

Remedies in case of dismissal under r 8 —See notes to r 9, on p 498 below

"The Court shall make an order that the suit be dismissed."—These words have been substituted for the words the Court shall dismiss the suit [Code of 1882, s 102] An order of dismissal under this rule for default of plaintiff s appearance is not a decree and is not therefore appealable See s 2 (2) (*b*) and notes Order of dismissal for default on p 8 above

9. [S 103] (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

Decree against plaintiff by default bars fresh suit

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

(*h*) Kesri Chand v National Jute Mills Co (1913) 40 Cal 119 17 I C 87
(*i*) Debi Bakhsh v Habib Shah (1913) 35 All 331 40 I A 151 19 I C 256
(*j*) Kalendra v Rai Kishori (1921) 48 Cal 57, 6? I C 112

r. 9. **Remedies in case of dismissal under r. 8.**—A plaintiff, whose suit is dismissed under r 8 for default of appearance on the day fixed for the hearing, cannot appeal from the order of dismissal, as such an order is not a decree [s 2, cl (2), sub cl (b)], but he may—

(1) apply for a review of the order under O 47, r 1 (*k*) But the High Court of Bombay (*k2*) has held that since the decision of the Privy Council in *Chajju Ram* v *Neki* (*k3*) a plaintiff whose suit has been dismissed under r 8 has no remedy by way of review Or he may

(2) apply under this rule for an order to set aside the order of dismissal

He is entitled to apply for a review without a previous application to set aside the dismissal under this rule (*k4*) The period of limitation for an application for a review of the order is 10 days from the date of the order in the case of an order made by the Provincial Court of Small Causes, 20 days from the date of the order in the case of an order made by any of the chartered High Courts in the exercise of its original jurisdiction, and 90 days from the date of the order in other cases (*l*) The period of limitation for an application under this section is 30 days from the date of the dismissal of the suit (*m*)

The first remedy is open to any plaintiff whose suit has been dismissed, *whatever the ground of dismissal may be*, whether it is dismissed for default of appearance at the hearing or on the merits after a hearing But the second remedy, that is, the remedy provided by this rule, can only be availed of by a plaintiff who *does not appear* at the hearing and the suit is dismissed for default of appearance under r 8 above The remedy given by this rule is not open to a plaintiff whose suit is dismissed *on any ground other than default of appearance* Hence if a plaintiff's suit is dismissed on his failure to establish his case by reason of *non attendance of his witnesses* (*n*) or for *want of evidence* (*o*), the dismissal is not one under r 8, and he cannot therefore avail himself of the remedy provided by this rule

There is a conflict of decisions whether if a defendent does not apply under this rule within the 30 days allowed by law, he is entitled to apply for a review under O 47, r 1, after the expiration of that period The Patna High Court has held (*p*), following an earlier decision of the Calcutta High Court (*q*), that he is not, on the other hand, the Calcutta High Court has held in a latter case that he is (*r*) The ground of the Patna decision is that to allow a review in such a case would be an evasion of the rule of limitation

"Appearance"—A plaintiff or a defendant will be deemed to have "appeared *on the day fixed for the hearing of the suit*, if he appears—

(1) in person, or

(2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some person able to answer such questions [O 5, r 1, sub r (2)]

First, as regards Appearance of a party in person—The *mere presence* of a *party* in Court at the hearing is sufficient to constitute "appearance" within the meaning of this Order It does not matter for what purpose he appears or what action he takes on the appearance A plaintiff appearing and applying for an *adjournment* on the ground that his witnesses are not present will be deemed to have "appeared" If the applica

(*k*) *Raj Narain* v *Ananga* (1899) 26 Cal 598
(*k2*) *Mahadeo* v *Lakshmi Narayen* (1925) 49 Bom 839 90 I C 610 ('25) A B 521
(*k3*) (1922) 49 I A 144 3 Lah 127 79 I C 945 ('24) A A 730
(*k4*) (1899) 26 Cal 598
(*l*) Limitation Act 1908 Sch I arts 161 162 and 173
(*m*) Limitation Act 1908 Sch I art 163, *Hinga* v *Munna* (1904) 31 Cal 150
(*n*) *Mahomed* v *Ali Baksh* (1873) 5 All H C 74
(*o*) *Kartick* v *Sridhar* (1886) 12 Cal 563
(*p*) *Deodip Singh* v *Gopal Singh* (1916) 1 Pat L J 547 38 I C 53
(*q*) *Kailas* v *Nobadwip* (1898) 2 Cal W N 318
(*r*) *Lala Chet Narain* v *Rampal* (1912) 16 Cal W N 643 15 I C 554 following *Raj Narain* v *Ananga* (1899) 26 Cal 598

tion is refused, and the suit is dismissed owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r 8, for the plaintiff *did appear*, and he cannot therefore avail himself of the provisions of this rule (s) Similarly a defendant appearing and applying for an *adjournment* on the ground that he had no time to prepare his case, will be deemed to have "appeared If the application is refused, and a decree is passed against him *owing to his unpreparedness to defend the suit*, the decree is not *ex parte* under r 6 for he *did appear*, and he cannot therefore avail himself of the provisions of r 13 below (t)

Next, as regards Appearance of a party by a pleader —Different considerations arise when a party is represented by a pleader Appearance by a pleader within the meaning of this Order does not, like appearance by a party in person, mean mere presence in Court it means appearance by a pleader duly instructed and able to answer all material questions relating to the suit or by a pleader accompanied by some person able to answer all such questions [O 5, r 1] Hence a party cannot be said to 'appear' by a pleader if the pleader appears at the hearing and states that though he has filed his vakalatnama, he has not received any instructions from his client with regard to the case, and that he is therefore unable to go on with the suit (u) Similarly, a party cannot be said to 'appear by a pleader if the pleader has no intructions other than to apply for an adjournment, and, on the adjournment being refused, withdraws from the suit, stating that he has no further instructions to go on with the case (v) In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit* But what if the party himself is *also* present in person in Court at the time? According to the Madras (u), and Patna (x) High Courts, it makes no difference that the party himself is present in Court and he cannot be deemed to have appeared According to the Bombay High Court, he must be deemed to have 'appeared,' the reason given being that if the pleader is not duly instructed to answer material questions, the Court may under O 10, r 1, ask the party questions relating to the suit and it may examine his witnesses (y) A different view, however, was taken in a subsequent Bombay case where it was held that even if a party is present in person he cannot be said to have appeared if he is accompanied b a pleader who is not duly instructed within the meaning of O 5 r 1 (z)

A pleader appears at the hearing on behalf of a plaintiff, and applies for an adjournment on the ground that he had no time to prepare himself with the case, or on the ground that the papers being left with his senior he could not proceed with the case The application is refused, and the pleader being unable to go on with the case, the suit is dismissed Can it be said under these circumstances that the plaintiff *appeared by a pleader?* It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader, and that the order of dismissal could not therefore be said to be one made under r 8 so as to entitle the plaintiff to apply under this rule (a)

(s)
(t)
(u)

(v) (22) A 1 485

r. 9. **Remedies in case of dismissal under r. 8.**—A plaintiff, whose suit is dismissed under r 8 for default of appearance on the day fixed for the hearing, cannot appeal from the order of dismissal, as such an order is not a decree [s 2, cl (2), sub cl (b)]; but he may—

(1) apply for a review of the order under O 47, r 1 (*l*) But the High Court of Bombay (*l*2) has held that since the decision of the Privy Council in *Chajju Ram* v *Neki* (*l*3) a plaintiff whose suit has been dismissed under r. 8 has no remedy by way of review Or he may

(2) apply under this rule for an order to set aside the order of dismissal

He is entitled to apply for a review without a previous application to set aside the dismissal under this rule (*l*4) The period of limitation for an application for a review of the order is 10 days from the date of the order in the case of an order made by the Provincial Court of Small Causes, 20 days from the date of the order in the case of an order made by any of the chartered High Courts in the exercise of its original jurisdiction, and 90 days from the date of the order in other cases (*l*) The period of limitation for an application under this section is 30 days from the date of the dismissal of the suit (*m*)

The first remedy is open to any plaintiff whose suit has been dismissed, *whatever the ground of dismissal may be*, whether it is dismissed for default of appearance at the hearing or on the merits after a hearing But the second remedy, that is, the remedy provided by this rule, can only be availed of by a plaintiff who *does not appear* at the hearing and the suit is dismissed for default of appearance under r 8 above The remedy given by this rule is not open to a plaintiff whose suit is dismissed *on any ground other than default of appearance* Hence if a plaintiff's suit is dismissed on his failure to establish his case by reason of *non attendance of his witnesses* (*n*) or for *want of evidence* (*o*), the dismissal is not one under r 8, and he cannot therefore avail himself of the remedy provided by this rule

There is a conflict of decisions whether if a defendent does not apply under this rule within the 30 days allowed by law, he is entitled to apply for a review under O 47, r 1, after the expiration of that period. The Patna High Court has held (*p*), following an earlier decision of the Calcutta High Court (*q*), that he is not, on the other hand, the Calcutta High Court has held in a latter case that he is (*r*) The ground of the Patna decision is that to allow a review in such a case would be an evasion of the rule of limitation

"Appearance"—A plaintiff or a defendant will be deemed to have "appeared" on the day fixed for the hearing of the suit, if he appears—

(1) in person, or

(2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some person able to answer such questions [O 5, r 1, sub r (2)]

First, as regards Appearance of a party in person—The mere presence of a party in Court at the hearing is sufficient to constitute "appearance" within the meaning of this Order It does not matter for what purpose he appears or what action he takes on the appearance A plaintiff appearing and applying for an *adjournment* on the ground that his witnesses are not present will be deemed to have "appeared." If the applica

(*l*) *Raj Narain* v *Ananga* (1899) 26 Cal 598
(*l*2) *Mahadeo* v *Lakshmi Narayen* (1925) 49 Bom 839 90 I C 610 (25) A B 521
(*l*3) (19) 49 I A 144 3 Lah 127 73 I C 945 (24) A A 730
(*l*4) (1899) 6 Cal 598
(*l*) Limitation Act 1908 Sch I arts 161 162 and 173
(*m*) Limitation Act 1908 Sch I art 163 *Hinga* v *Munna* (1904) 31 Cal 150
(*n*) *Mahomed* v *Ali Baksh* (1873) 5 All H C 74
(*o*) *Kartick* v *Sridhar* (1886) 12 Cal 563
(*p*) *Deodip Singh* v *Gopal Singh* (1916) 1 Pat L J 547 33 I C 53
(*q*) *Kailas* v *Nabadwip* (1898) 2 Cal W N 318
(*r*) *Lala Chet Narain* v *Jampol* (1912) 16 Cal W N 843 15 I C 554 following *Raj Narain* v *Ananga* (1899) 26 Cal 598

(2) Where it was the duty of an attorney's clerk to examine every evening the board for the next day, and to inform his master what cases in which he was engaged as attorney were on the board for hearing and the clerk neglecting his duty, did not inform the master, and no one appearing for the plaintiff the suit was dismissed it was held that the absence was caused by a *bona fide* mistake and the suit was restored on payment by the attorney of the costs of the hearing *The Oriental Corporation v. The Mercantile Corporation Ld* (18[illegible]) 2 B H 267

(3) The rule of practice to be observed in the subordinate Courts in the Bombay Presidency is that when a party arrives late before the Judge, and finds that his suit has been dismissed before his arrival, he is entitled to have his suit restored, though there may be no sufficient cause for his late arrival on payment of such costs as may have been incurred by reason of his default by the defendant *Chhotalal v. Ambalal* (1925) 27 Bom L R 185, 89 I C 225, ('23) A B 423, *Soraiji v. Ramjilal* (1924) 26 Bom L R 321, 80 I C 237, ('24) A B 302

(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part *Arunachala v Subbaramal* (1923) 46 Mad 60, 63, 68 I C 971, ('23) A M 13 [delay caused by inevitable accident]

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (j), and Bombay (k), that this rule does not take away the inherent power of a Court to restore a suit dismissed for default, if there be a just and reasonable cause for restoring it even if no sufficient cause is shown within the meaning of this rule for the plaintiff's non appearance Thus where a case was called on at 12 o'clock, and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts and the plaintiff himself was waiting in his pleader's room and neither the plaintiff nor his pleader appearing the suit was dismissed, it was held that though there was no sufficient cause for non appearance within the meaning of this rule, the case was one in which the Court should in the exercise of its inherent powers restore the suit to the file (l) Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court but went to bring his principal witness, and the suit being called on in the meantime his counsel applied for an adjournment on the ground that his client was not in Court but the application was refused and the suit dismissed it was held that even if there was no sufficient cause within the meaning of this section, the Court had inherent power to restore the suit having regard to the special facts of the case (m) On the other hand, it has been held by a Full Bench of the Madras High Court, that a Court has no power apart from the provisions of *this rule to restore a suit, or apart from the provisions of r 13 to* set aside an ex parte decree (n) The Patna High Court has followed the Madras ruling (o)

Appeal—An appeal lies under O 43, r 1 (c), from an order *rejecting* an application (in a case open to appeal) made under this rule, but no appeal lies from an order *granting* the application (p) As regards an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the *High*

(j) *Lalta Prasad v. Ram Karan* (1912) 34 All 426 14 I C 187

(k) *Bilasiram v. Cursondas* (1919) 21 Bom L R 95[illegible] 53 I C 2[illegible]2

(l) [illegible] I C 187 [illegible]

(m) [illegible]

(n) [illegible] 53 I C 847, approving *Venkatarama v Nataraja* (1913) 24 Mad L J 235 18 I C 360 and overruling *Somayya v Subbamma* (1903) 26 Mad 599

(o) [illegible]

(p) [illegible]

r. 9. *Court*, it has been held by the High Court of Calcutta that it is appealable not only *under O 43, r 1 (c), but also as a "judgment" within the meaning of cl 15 of the Letters* Patent (*q*), but that an order granting the application is not appealable either under O 43, r 1 (c), or as a "judgment" under cl. 15 of the Letters Patent (*r*)

Where an application is made by a plaintiff under this rule, but the *application* is dismissed *for default*, no appeal lies from the order of dismissal (*s*)

Revision—Where there is no sufficient cause for setting aside the dismissal, the Court has no power to make an order setting it aside as a matter of grace because the amount involved is large If the lower Court does so, the High Court has power to set aside the order in revision, though the suit has been subsequently tried and decreed (*t*)

Whether this rule applies to proceedings in execution—We now proceed to consider whether the provisions of Order 9 which relate to *suits* apply to proceedings in execution. Let us take an illustration *A*, a judgment debtor, whose property is sold in execution of a decree, applies under O 21, r 90, to set aside the sale on the ground of material irregularity in conducting the sale Notice of the hearing of the application is given to *B*, the decree holder and to *C*, the auction purchaser Suppose, *first*, that none of the parties appears at the hearing of the application and that the application is *dismissed for non appearance* Suppose, *next*, that *B* and *C* appear at the hearing, but *A* does not and the application is dismissed for *A*'s non appearance Suppose, *lastly that A appears at the hearing but B and C do not, and that an ex parte order is made* granting *A*'s application and setting aside the sale The question is whether the provisions of Order 9 apply to *A*'s application which is a proceeding in execution If Order 9 applies, the dismissal of the application in the *first* case may be treated as a dismissal under O 9, r 3, and the provisions of O 9, r 4, will apply Similarly the dismissal in the second case may be treated as a dismissal under O 9, r 8, and the provisions of O 9, r 9, will apply Likewise the ex parte order made in the *last* case may be treated as one made under O 9, r 6, and the provisions of O 9, r 13, will apply Now the provisions of Order 9 which relate to suits can apply to execution proceedings, if at all, only through the medium of s 141 of the Code corresponding with s 647 of the Code of 1882 As to s 647 it was held by the Judicial Committee that the proceedings spoken of in that section included original matter in the nature of suits, such as proceedings in probates, guardianships and so forth, and *not proceedings in execution* (*u*) S 141 is a reproduction *of the old s 647 with some alterations in language* Having regard to these alterations the question arose whether it was intended by s 141 to alter the law and to make it applicable to proceedings in execution. *After some conflict of opinion it has now* been held that s 141 has not effected any change in the law and that it does not apply to proceedings in execution, with the result that the provisions of Order 9, which could only apply to execution proceedings through the medium of s 141, do not apply to proceedings in execution This is the effect of the decisions of the High Courts of Calcutta (*v*), Patna (*w*) and Madras (*x*) cited in the foot notes See notes to s. 141, "This section does not apply to execution proceedings," on p 335 above.

(*q*) *Mathura v Haran Chandra* (1916) 43 Cal 857, 34 I C 634

(*r*) *Mahiraj Kishore v Kiran* (1922) 49 Cal 616

(*s*) *Jagdish v Harbans* (1917) 2 Pat L J 720 43 I C 54 *Hara Kumar v Murari* (1922) 36 Cal L J 184 69 I C 1003 (22) A C 572

(*t*) *Manickam v Mahudam* (1925) 48 Mad L J 15- 85 I C 499 (25) A M 209

(*u*) *Thakur Pershad v Sheikh Fakir-ulla* (1895) 22 I A 44 17 All 106

(*v*) *Hari Charan v Manmatha* (1913) 41 Cal 1 19 I C 683 (O 21 rr 100-101 and O 9 r 13), *Charu Chandra v Chandi* (1915) 19 C W N 25, 27 I C 492 [O 21 r 90 and O 9 r 9]; *Bharat Chandra v Iaan* (1917) 21 C W N 769 [s 47 and O 9 r 9] *Narendra v Fakhaldas* (1925) 41 Cal L J 286 79 I C 391 (25) A C 510 [O 21 r 90 and O 9 r 4]

(*w*) *Bhudaneswar v Tulakdhari* (1919) 4 Pat L J 135 49 I C 617 [O 21 r 90 and O 9 r 9] *Labu v Alakhdeo* (1919) 4 Pat L J 330, 49 I C 683 [s 47, and O 9]

(*x*) *Kaljuluru v Sooryanarayana* (1924) 47 Mad L J 269 81 I C 841, (25) A M 126 (O 21, r 90 and O 9 r 9)

Dismissal for default of application for restoration of suit.—This rule provides for the revival of a *suit* dismissed for default. Does it apply where an *application* to set aside the dismissal of a suit is itself dismissed for default? A suit by A against B is dismissed for A's default. A applies under this rule to set aside the dismissal. A does not appear at the hearing of the application and the *application* is dismissed for A's default. Can the *application* be restored under this rule? No, according to the Patna High Court, the reason given being that O. 9 does not apply to such an application (y). On the other hand, it has been held by the High Courts of Calcutta (z), and Allahabad (a), that such an application may itself be treated as an application to restore the suit, provided it is made within the period prescribed for the original application. In a later Allahabad case (b), the Court held that the second application may be entertained under s. 151. The same principles apply to applications to restore an application to set aside an ex parte decree which has been dismissed for default.

Limitation.—Where no application to set aside a dismissal is made within the period of limitation, the Court has no inherent power under s. 151 to set aside the dismissal after the expiry of the period (c). See notes above, "Remedies in case of dismissal under r. 8."

10. [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs

More plaintiffs than one.—See notes to r. 8 above under the same head.

11. [S. 106.] Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants

12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance without sufficient cause shown, of party ordered to appear in person

(y) *Ramgulam* v. *Sheo Deonarain* (1919) 4 Pat. L. J. 287, 51 I. C. 152.
(z) *Bipin Behari* v. *Abdul Barik* (1917) 44 Cal. 950, 35 I. C. 813.
(a) *Pitambar Lal* v. *Dodee Singh* (1924) 46 All. 819, 78 I. C. 358, ('24) A. A. 503.
(b)
(c)

9, 13.

Where party directed to appear in person.—This rule applies to *all cases where a party has been ordered to appear in person and fails to do so* This is clear from the fact that the words "under the provisions of section 66 or section 436" [now O 5, r 3 and O 29, r 3, respectively] which occurred in the corresponding s 107 of the Code of 1882 have been *omitted from the present rule* (*d*)

Setting aside Decrees ex parte.

Setting aside decree ex parte against defendant

13. [S. 108.] In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Old section—This rule corresponds with s 108 of the Code of 1882 The words "as against him" have been added after the words "shall make an order setting aside the decree" The proviso to the rule is also new See as to the effect of these changes notes, "Proviso to the Rule," on p 508 below

Remedies in case of ex parte decree—A defendant against whom an ex parte decree has been passed under r 6 *for default of appearance at the hearing*, has the following courses open to him (*e*):—

(1) he may appeal from the ex parte decree under s 96,

(2) he may apply for a review of judgment under O 47, r 1 (*f*);

(3) he may apply under this rule for an order to set aside the ex parte decree, provided the application is made, in cases to which the Limitation Act, 1908, applies, within 30 days from the *date of the decree*, or where the summons was not duly served, when he has *knowledge of the decree* (*g*), and in cases to which the Limitation Act, 1877, applies, within 30 days from the *date of executing any process for enforcing the judgment* (*h*) As to "knowledge of the decree," it has been held that it must be knowledge of a particular decree passed against the defendant in a particular Court in favour of a particular person and for a particular sum and not merely the knowledge that a decree has been passed by some Court against him (*i*)

Where the right to make the application is barred under the Act of 1877, the bar arising before the Act of 1908 came into force, the provisions of the Act of 1908 cannot revive the right (*j*) Save as aforesaid, the law of limitation to be applied to applications under the present rule made after January 1, 1909, is art 164 of the Limitation Act of

(*d*) *Lakshmi Ammal* v. *Valli Ammal* (1918) 41 Mad 256 258 41 I C 713
(*e*) *Jethalal* v. *Lalbhai* (1922) 46 Bom 134 137 (22) A B 287
(*f*) *Lala Mulli* v. *Babu Lepua* (1884) 6 All 65
(*g*) Limitation Act 1908 Sch I art 164
(*h*) Limitation Act 1877 Sch II art 164
(*i*) *Bapurao* v. *Sadhu* (1923) 47 Bom 455 72 I C 130 (23) A B 193
(*j*) *Nepal Chandra* v. *Niroda* (1912) 39 Cal 506, 15 I C 531

1908, and not art 164 of the Limitation Act of 1877, though the ex parte decree was passed when the Limitation Act of 1877 was in force (*k*)

The first two remedies, that is, the remedies by way of appeal and review, may be availed of by any person against whom a decree is passed, whether the decree is ex parte or not. But the third remedy, being the one provided by this rule can only be availed of if the decree is passed ex parte, that is to say, it is passed against the defendant for *default of appearance under r. 6* The remedy given by this rule is not open to a defendant if the decree is passed on *grounds other than his non appearance*

Whether remedies concurrent.—A defendant against whom an ex parte decree is passed is at liberty, as stated above, to apply to set aside the decree under this rule, or to appeal from the decree, or to apply for a review of the judgment He is entitled to apply under this rule to set aside the decree, and at the same time to appeal from the decree Further, he is entitled to appeal from the decree without a previous application to set aside the decree under this rule (*l*) Similarly he is entitled to apply for a review without previously applying under this rule (*m*) If he applies under this rule, and his application is rejected, he is entitled under O 43, r 1 (d), to appeal from *the order rejecting the application But he is not bound to appeal from the order, he* may appeal under s 96 from the ex parte decree itself

Suppose that a defendant against whom an ex parte decree is passed does not apply under this rule to set aside the decree, but appeals from the decree In such a case two questions arise for consideration, namely,—

(1) Whether the appellate Court can go into the question touching the defendant's *non appearance* at the hearing and determine whether the lower Court was right in hearing the suit ex parte, or whether the only question with which the appellate Court is concerned is whether the evidence on the record is sufficient to support the ex parte decree, in other words, whether the decree can be sustained on the *merits*, and

(2) whether, if the appellate Court can deal with the question touching the defendant's non appearance, and does deal with it, and comes to the conclusion that the suit ought not to have been heard ex parte it has the power to remand the case for re hearing to the lower Court

Upon these points there is a conflict of decisions In a case under the Code of 1882, the Calcutta High Court held that the only question with which the appellate Court was concerned was whether the decree was wrong in law or based on insufficient evidence, and that it could not deal with the question whether the lower Court was right in proceeding ex parte (*n*) In a Bombay case also decided under the Code of 1882, it was held that the appellate Court may deal with the question touching the defendant's non appearance, but it had no power to remand the case to the lower Court for re hearing, the reason given being that an order of remand can only be made under s 562 [now O 41, r 23] when a suit is disposed of on a *preliminary* point, and the disposal of a suit ex parte was not a disposal on a preliminary point (*o*). These decisions were dissented from by a full Bench of the Madras High Court in *Sadhu* v *Kuppan* (*p*), which also was a case under the Code of 1882, where it was held that the appellate Court may deal with the question touching the defendant's non appearance, and, further, that if it came to the conclusion that the lower Court ought not to have proceeded ex parte, it had the power to remand the case

(*k*)

(*l*)

(*m*) See *Raj Narain* v *Ananga* (1899) 26 Cal 598
(*n*) *Jonardan* v *Ramdhone* (1896) 23 Cal 738 743
(*o*) *Ichharamshankar* v *Bai Natal* (1892) 17 Bom 733
(*p*) (1907) 30 Mad 54, 59

r. 13. to that Court for re hearing The Madras ruling was followed by the High Court of Bombay in *Jethalal* v *Laraylal* (p2), where it was held that even if the appellate Court had no power under the Code of 1882 to remand a case except under s 562, it has power *now* to make an order of remand under s 151 of the present Code and also under O 41, r 33 The High Court of Rangoon has followed the Calcutta ruling (p3)

Suppose that a defendant against whom an ex parte decree is passed applies under this rule, and his application is rejected, but he does not appeal from the *order* rejecting the application under O 43, r 1 (d) and appeals from the ex parte *decree* In such a case it has been held that the appellate Court has no power to go into any question touching his non appearance at the hearing but it can only hear the appeal on the merits (p4).

As to review see notes to r 9, 'Remedies in case of dismissal under r 8,' on p 498 above

Where written statement filed —A defendant against whom a decree is passed ex parte for default of appearance is entitled to apply under this rule to set aside the decree though he may have filed his written statement (q)

Prevented from appearing.—As to the meaning of 'appearing,' see notes to O 9 r 9, Appearance, on p 498 above

Hearing of application pending appeal —It has been held by the High Courts of Calcutta (r), Madras (s) and Allahabad (t), that where a defendant against whom an ex parte decree is passed applies under this rule to set it aside, and at the same time prefers an appeal from it, the proper Court to hear the application is the Court which passed the decree, and not the appellate Court *A* obtains an ex parte decree against *B* *B* applies under this rule to have the decree set aside At the same time he prefers an appeal from the decree Has the Court that passed the decree jurisdiction to hear the application, or should the application be heard by the appellate Court? The answer is that the only Court that has jurisdiction to hear the application is the Court that passed the decree The reason is that the matter for investigation in a proceeding under this rule is entirely distinct from the matter for determination in the appeal from the ex parte decree, the one being concerned with the due service of summons, and the other with the determination of the merits of the controversy between the parties Suppose now that *A* sues *B* and *C*, that *B* does not appear and an ex parte decree is passed against him, and that *C* appears and defends the suit and a decree is passed against him after a hearing Suppose, further, that *B* applies under this rule to have the ex parte decree set aside, and that *C* appeals from the decree passed against him (c) Which is the proper Court to hear *B*'s application? The answer is that the only Court that has power to hear the application is the Court which passed the decree It makes no difference that the *application is* made by *one defendant* and the *appeal* is preferred by *another defendant*, provided the decree was one and indivisible

Hearing of application after disposal of appeal —It has been held by the High Courts of Calcutta (u), Madras (v), and Allahabad (w), that where an appeal is

(p2) (1922) 46 Bom 184 (22) A B 267
(p3) *Raj Chandra* v *A D O C Pay* (1924) 2 Rang 108 79 I C 506 (1924) A R 137
(p4) *Hemma* v *Aziz ud-din* (1917) 39 All 143 36 I C 277
(q) *Munappan* v *Balavan* (1908) 31 Mad 503
(r) *Damodar* v *Sarat Chandra* (1908) 13 Cal W N 846 *Kumud Nath* v *Jotindra Nath* (1911) 38 Cal 394 9 I C 149 *Kalimuddin* v *Esahakuddin* (1924) 51 Cal 715 732 733 83 I C 220 (24) A C 630
(s) *Jalanappa* v *Subramania* (1921) 44 Mad 731 62 I C 753
(t) *Mirza Abdullah* v *Raman* (1923) 21 All L J 901 79 I C 351 (24) A A 143
(u) *Dhonai* v *Taraknath* (1910) 12 Cal L J 53 5 I C 525 *Kalimuddin* v *Esahakuddin* (1924) 51 Cal 715 733 83 I C 220 (24) A C 830 but see *Abdul Ohad* v *Amdali* (1911) 43 Cal 153 57 I C 962
(v) *Sankara* v *Subroya* (1907) 30 Mad 235 as explained in 44 Mad 731 at p 733 62 I C 755
(w) *Mathura* v *Ram Charan* (1915) 37 All 204 28 I C 261

preferred from an ex parte decree, and the decree is confirmed or otherwise disposed of in appeal under O 41, r 32, the Court which passed the ex parte decree has no longer any power to entertain an application under this rule to set aside the ex parte decree, even though the application was made before the appeal was filed But it is otherwise where the appeal is dismissed for default under O 41, r 11, in such a case the Court which passed the ex parte decree has power to entertain the application to set aside the decree The reason is that where the decree of the lower Court is confirmed or otherwise disposed of under O 41, r 32, it is merged in the decree of the appellate Court, but an order dismissing an appeal for default is not a decree [s 2 (2)] and there can therefore be no such merger (x) See notes to s 36, ' Merger of decree on p 116 above

Where a defendant against whom an ex parte decree is passed is not joined as a party to the appeal preferred by other parties to the suit and the appellate Court has not adjudicated upon his case the ex parte decree against him does not merge in the decree of the Court of appeal so as to preclude him from applying under this rule to the Court that passed the ex parte decree to set aside the decree *A* sues *B*, *C*, and *D*, and obtains an ex parte decree against *B* and a decree after a hearing on the merits against *C* and *D* *C* and *D* appeal from the decree *B* is not joined as a party to the appeal The appellate Court confirms the decree of the Court of first instance passed against *C* and *D* This does not preclude *B* from applying to the Court of first instance to set aside the ex parte decree against him (y)

Ex parte decree obtained by fraud.—A regular *suit* does not lie to set aside an ex parte decree on the ground solely of non service of summons (z) But where an ex parte decree is alleged to have been obtained by a plaintiff by fraud, the defendant is entitled to institute a regular *suit* to set aside the decree on the ground of fraud (a) The suit is maintainable even though the defendant was unsuccessful in his application made under this rule to set aside the ex parte decree and though he did not appeal from the order rejecting his application (b) But if the very fraud that is set up by the defendant in his suit was set up in his application and the Court after going into the question of fraud rejected the application the suit would be barred as *res judicata* unless the fraud alleged was of such a nature that it could not properly come within the scope of enquiry under this rule *A* applies under this rule to set aside an ex parte decree on the ground of fraud in respect of the service of summons upon him The Court after going into the question of fraud, rejects the application *A* then institutes a regular suit to set aside the ex parte decree basing his suit on the very fraud that was alleged by him in the application The suit is barred as *res judicata* (c) In a recent Calcutta case *A* sued *B* in a Munsif's Court on a hand note and obtained an ex parte decree for Rs 59 *B* applied to set aside the decree but the application was refused *B* then sued *A* in the Munsif's Court to set aside the decree on the grounds (1) that the summons was not duly served, and (2) that the decree was obtained by perjured evidence. It was held that the issue as to service of summons was not res judicata the reason given being that the suit included matters which could not have been raised on the application to set aside the decree (d) This decision it is submitted, is not good law

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(x)

(y) *Gajraj v Swami Nath* (1917) 39 All 13 36 I C 307

(z)

(a)

(b)

(c)

(d) *Nalini Kanta v Hari* (19[illegible]) 29 Cal W N 32[illegible] 86 I C 779 ([illegible]) A [illegible] 663

13. Application by legal representative of deceased defendant.—Under the Code of 1882, it was not settled whether, where a defendant against whom an ex parte decree was passed died, his *legal representative* could apply for an order to set aside the ex parte decree. The High Court of Calcutta held that he could (e). The High Courts of Madras (f), and Allahabad (g), held that he could not. But the Allahabad Court maintained that if the application was made by the defendant, and he died during the pendency of the application, the proceedings could be *continued* by his legal representative (h). Under this Code (s. 146) such an application may be made by the legal representative of the deceased defendant (i).

Grounds on which ex parte decree may be set aside.—These are stated in the second paragraph of the rule, the one being that the summons was not duly served upon the defendant (j), and the other that though the summons was duly served, the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing (k). A summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceedings which are contemplated and having no reference to the order ultimately passed (l). When a summons was served upon a *pardanashin* lady, to whom the serving officer was not able to obtain access, by affixing a copy of the summons on the outer door of her dwelling house under O. 5, r. 17, and it appeared that the lady had no knowledge of the suit against her, the Court set aside the ex parte decree passed against her on the ground that she was prevented by 'sufficient cause' from appearing at the hearing of the suit (m).

"Upon such terms as to payment into Court."—In restoring a case under this rule the Court *may* make it a condition that the decretal amount or some portion thereof be paid into Court (n). As to 'sufficient cause' see notes to r. 9 under the same head on p. 500 above.

Inherent power to set aside ex parte decree.—See notes to r. 9, 'Inherent power to restore suit dismissed for default,' on p. 501 above.

Ex parte decree against minor defendant.—It is no ground for setting aside an ex parte decree passed against a minor defendant, that the Nazir who was appointed guardian *ad litem* of the minor did not appear and defend the suit where the failure to defend was owing to the fact that the Nazir did not receive instructions from any person to defend the suit. It would be otherwise if fraud, collusion, or gross negligence on the part of the Nazir were proved (o). See notes to r. 9, 'Minor plaintiff,' on p. 500 above.

Proviso to the rule.—We now proceed to consider the cases in which there are two or more defendants, and

(1) where the decree is ex parte against *all* the defendants, but the application to set aside the decree is made by *some of them only*,

(2) where against some of the defendants the decree is passed ex parte, but against others who have appeared and defended the suit, it is passed after a hearing and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed ex parte.

The question is, whether if the decree is set aside as *against the applicant*, the Court can set aside the decree *as against the other defendants also*, so as to re-open the whole

(e) *Canode v. Sheikh Nazim* (190) 29 Cal. 33.
(f) *Sambasiva v. Veeru* (190) 24 Mad. 361.
(g) *Janki v. Sukhrani* (1899) 22 All. 274.
(h) *Lel Bibi v. Sham Behari Lal* (1907) 29 All. 574.
(i) See *Lalam Chetty v. Krishnamurthy* (1915) 38 Mad. 412, 21 I. C. 564.
(j) *Fakhr-ud-Din v. Ghafur-ud-Din* (1900) 23 All. 99; *Ishura Mal v. Har Kishan* (190) 24 All. 5 3.
(k) *Somayya v. Subbamma* (1903) 26 Mad. 599.
(l) *Balgobind v. Sheo Kumar* (1924) 22 All. L. J. 791, 8 I. C. 184, (24) A. A. 81.
(m) *Kshirode v. Nabin Chandra* (1915) 19 C. W. N. 1231, 30 I. C. 84.
(n) *Shyam Lal v. Ram Narain Lal* (1929) 5 Pat. L. J. 420, 57 I. C. 300.
(o) *Vasu v. Dittu* (1907) 9 Bom. L. R. 1099.

O. 9, r

e t anl fs in vlat cases* Tl s a t f so e l fl lty f r wl el there was no prov n n a le in the ll secto The prese t r le expres ly prov les f r these cases The rule says that where a lefen lant a st wl m a l cree s passe l ex parte applies f r an order to set it as le a l sat f s the Co rt that the s mno s as n t l ly served upon l etc the C rt shall make a r ler sett g a l the decree as ag nst l s [that s the appl ant] (f) pro l l that r re tl l e s f su h a atu e tl t t e not l e t a d as aga nst s ch l f n l nt only t a j be s t l as ag nst all or j f the ther l f n lant The rule pr arly appl s t the case ly f the pa t c lar lef lant wl o has appl ed to have the decree set as le B t ler certa n c rc mstan es t nay l o necessary in the interests of j st ce to set a le the decree aga n t the otl er lefend ants also For th s prov on has be n n a le n the pro o to th s r le By v rt e of the pro o the C urt to wh h an appl cat on is made to set as le an ex parte decree ma set t a le not only as aga nst the lefen lant l o appl es to have t set as le l ut as aga t the other lef n lants al o wl ere the decree is f s l a n t re that it can not l e set as le s aga n t the appl ant o ly As a ge eral r le we ay say that a decree n ay be s t as le not o ly as a nst the appl ant l ut as aga n t the other lefendants al o f the ntere ts of just ce re rt (q) e g —

(1) l ere the decree s one an l l l le (r)

(2) wl ere the su t woul l result in inconsi t nt decree if the decree vere not s t a le as aga nst the otl er lefen lants also (s)

(3) where the rel ef to wl l the appl ca t is e t tled n the su t could not effec t vely l e g ven otl erw se than l y sett g a de the decree as a n t the otl er defen lants al o (t)

(4) l ere the decree proceeds on a gro n l com on to all the defen lants ( )

The cases now under co s lerat on may b d ded as po nted o t at the be nn n of th s paragraph nto two classes

Cla s I—Wh e the l c e s x p i t p s l ag t all tl l f la but the appl ca t o to s t a l l e l s a l b j so f l l j

Ill ra ns

(a) *B C* and *D* who on t tute a j nt H n lu f n y execute a n o t a e of the r jo nt p operty n favour of A A sues *B C* and *D* to enfor e the mort a e *D* is ser e l th the summon but not *B* and *C* None of the lefendants appears at the hearing and an ex pa te de ree s passed a a nst all the d fendants for a sale of the mo tgaged property *B* and *C* apply for an order to set as de the decree on the ground that the ummons was not ser ed upon them Here the de ree b ing *one a d nd s ble* the Court may set as

as ser ed

Ajodl ja P

(1911) 33 All 264 38 I A 37 9 I C 9 5

(S e a to the n on of he wo d a a n t h m the ju n nt of S an y J in *Ihu a J a H A han Das* 190 4 All 383 at p 387

(q)

( )

a a n R J 899 4 C N 4 6 4 8

( ) *Bhu a Ma Ha K han D* 190 4 A 383 388 400

u)

O. 13

(b) *A* sues *B* and his minor sons *C* and *D* members of a joint Hindu family to recover Rs 1,000 alleged to have been advanced to *B* as manager of the family. None of the defendants appears at the hearing and an ex parte decree is passed against all the three. All the three defendants apply to have the decree set aside. As to *C* and *D* it is proved that no summons was served upon them. As to *B* it is proved that the summons was duly served upon him. Here the decree being *one and indivisible* (r) the Court may set aside the decree not only as against *C* and *D* but also as against *B* though the summons was served upon him and there was no sufficient cause for his non appearance. Further this is a case where the relief to which the minors *C* and *D* are entitled could not effectively be granted unless the decree was set aside as against *B* also. For if the decree were allowed to stand as against *B*, *B's* share in the joint family property could be attached and sold though the sons might succeed in showing at the re-trial of the suit that the debt never was incurred or that it had been discharged, or that from its nature the joint family property was not liable. The sale of the father's share in the joint family property would be a manifest injury to the sons, and this could only be avoided by setting aside the decree against the father also, and re-opening the whole suit. *Bhura Mal* v *Har Kishan Das* (1902) 24 All. 383, at pp. 400 and 401.

(c) *X* alleging that *A* and *B* are in joint possession of certain immoveable property, sues *A* and *B* and asks for a declaration that he is in joint possession with them. *A* is served with the summons but *B* is not. Neither defendant appears at the hearing and a decree ex parte is passed against both the defendants. *B* applies to have the decree set aside and it is set aside as against him, *but not as against A*. At the hearing *B* establishes that *X* has no title whatever to the property. There would in such a case be *two absolutely inconsistent decrees* namely the ex parte decree held by *X* against *A declaring X to be jointly in possession* with *A* and *B*, and the decree against *X* passed at the rehearing *that X was not in joint possession* with *A* and *B*. This is therefore a case in which the decree must be set aside not only as against *B* but as against *A* also. see *Bhura Mal* v *Har Kishan Das* (1902) 24 All 383, at p. 388.

(d) *X* sues *A* and *B* on a promissory note executed by *A*. *B* is *A's* nephew, and he is joined as a defendant on the ground that *A* and *B* are members of a joint Hindu family, and that the note was for a debt binding on the family. Neither defendant appears at the hearing and an ex parte decree is passed against both the defendants. The decree against *A* proceeds on the ground that *the note* was passed by him and against *B* on the ground that *the debt was incurred for a family purpose*. *B* applies for an order to set aside the decree alleging that the summons was not served upon him and that the debt in respect of which the note was passed by *A* was not incurred for a family purpose. *It is not disputed that the amount was actually advanced to A*. Such being the case the decree may be set aside as against *B* but it must not be set aside as against *A*. Justice does not require it for the contention of *B* that the debt was one not binding on him is a defence peculiar to him alone and not one common to him and *A*. *Gopala Chetti* v *Subbier* (1903) 26 Mad 604.

(e) *A* sues *B*, *C* and *D* personally and as managers of a devasam to recover Rs. 27, being revenue paid by him on behalf of the defendants. None of the defendants appears

(r) See *Mahomed Hamidulla* v *Tehurennisa Bibi* (1 9.. 25 Cal. 155, 160 where it was said of a similar decree that it was *one and indivisible*.

at the hearing, and an ex parte decree is passed against them personally and against the devasam property If B alone applies under this rule, and shows sufficient cause for his non appearance at the hearing, the decree may be set aside so far as it ordered payment by B personally and from the devasam property, but it cannot be set aside so far as it directs C and D to pay the amount personally *Valia Koni v Marutha Veera* (1908) 31 Mad 454

Class II —Where against some of the defendants the decree is passed ex parte, but against others who have appeared and defended the suit it is passed after a hearing, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed ex parte —In this case the question arises, whether, if the decree is of such a nature that it cannot be set aside as against the applicant only, but must be set aside also as against the *defendants against whom the decree was passed after a hearing*, the Court has the power to set aside the decree as against *such defendants* also It is submitted that it has The words "the decree in the proviso mean the decree passed in the suit, not only against the defendants who did not appear but also against the defendants who did appear The words 'other defendants' in the proviso mean defendants other than the applicant against whom the decree is passed, whether as against them it was passed *ex parte* or after a hearing (w)

Illustrations

(a) X sues A and B, alleging that A and B are in joint possession of certain immoveable property, and asking for a declaration that he is in joint possession with them A appears and defends the suit B does not appear The Court finds that A and B are in joint possession, and that X is entitled to joint possession with them, and a decree is passed against A and B declaring that X is entitled to joint possession with them Here the decree, so far as regards A, is passed after a hearing, and as regards B, it is *ex parte* But there is *only one decree*, and the words the decree in the proviso could well be referred to that decree Therefore if B applies for an order to set aside the decree, and the decree is set aside as against him it must also be set aside as against A, otherwise, in the event of B succeeding in the suit this absurd position would arise that A and B being in joint possession of the property X would be in possession of a decree declaring him to be jointly in possession along with A and B, whilst B would be in possession of a decree in his favour declaring that X is not entitled to joint possession with him and A, see *Bhura Mal v Har Kishan Das* (1902) 24 All 383 at p 400

(b) *A and B, both Mahomedans pass a promissory note to X B dies leaving* three heirs, H1, H2 and H3 X sues A (surviving maker of the note) and H1, H2 and H3 as heirs of B A and H1 appear at the hearing and defend the suit H2 and H3 do not appear A decree is passed against all the defendants, the liability of H1, H2 and H3 under the decree being limited to the extent of the property of B inherited by them as B's heirs Here the decree, so far as regards A and H1 is passed after a hearing, and, as regards H2 and H3, it is *ex parte* H2 and H3 apply to have the decree set aside alleging that the summons was not served upon them The Court is satisfied that the summons was not served Upon these facts the High Court of Calcutta held under the

(w) *See* the judgment of Bannerjee J in *Mahomed Hamidulla v Tohurennissa Bibi* (1898) 15 Cal 155 159 160, and of Aikman J, in *Bhura Mal v Har Kishan Das* (1902) 24 All 383 400

13 old section that the decree should be set aside not only as against *H2* and *H3* but also as against *A* and *H1*, the ground of the decision being that the decree was *one and indivisible* *Mahomed Hamidulla* v *Tolurennessa Bibi* (1898) 25 Cal 155

(c) *A* sues *B* and *B*'s mother *C*, Native Christians, upon a promissory note jointly passed by them *B* appears at the hearing and defends the suit *C* does not appear A decree is passed against both defendants for the amount of the note Here the decree so far as regards *B* is passed after a hearing, and as regards *C*, it is *ex parte* *C* applies for an order to set aside the decree, alleging that the summons was not served upon him. The Court finds that the summons was not served upon *C* Upon these facts the High Court of Bombay held under the old section that if the decree were set aside as against *C* it should not be set aside as against *B* also *B* having appeared and defended the suit *Manaku* v *Sitaram* (1894) 18 Bom 142 If the Bombay decision means that the setting aside of a decree *ex parte* against a defendant does not necessarily revive the suit as against a defendant who has appeared and defended the suit the decision is still good law But if it means that where a decree is passed *ex parte* against *A* and after a hearing against *B* the Court can set aside the decree only against *A*, and cannot set it aside *in any case* against *B* the decision is no longer law see the proviso to the rule

(d) *A* sues *B* and *C* for a *declaration of title* to certain lands and *D* and *E* (tenants of *B* and *C*) for *possession* of the lands *B* and *C* appear and defend the suit *D* and *E* do not appear The Court passes a decree against all the four defendants as against *B* and *C*, declaring that the lands belong to *A*, and as against *D* and *E*, directing them to deliver possession of the lands to *A* Here the decree against *D* and *E* is *ex parte*, for they did not appear at the hearing *D* and *E* apply for an order to set aside the decree, alleging that the summons was not served upon them The Court is satisfied that the summons was not served Should the decree be set aside *as a whole*, that is, against all the defendants *B*, *C*, *D* and *E* or should it be set aside against *D* and *E* only The decree should not be set aside as a whole, for the decree is *not one and indivisible*. The relief granted to *A* as against *B* and *C* is a *declaration of A's title* to the lands The relief granted to *A* as against *D* and *E* is that they should *deliver up possession* of the lands to *A* In fact the decree though nominally one, really consists of two decrees each against one set of defendants the relief granted against each set being separately specified Hence the decree may be set aside as against *D* and *E*, but not against *B* and *C*, for the relief granted against *B* and *C* is distinct from that granted against *D* and *E*, who alone applied for an order to set aside the decree *Monomohini* v *Nara* (1899) 4 C W N 458.

Where ex parte decree has been executed —The fact that an ex parte decree has been satisfied does not preclude the defendant from applying to the Court for an

O 9, r

onler t sti ta l l rtl sr l l lt sa ex parte l rcea s t H a latta les *I* s goods ii exec t n f tle l re *I* j ys tl a t f tle le rec i ler prote t a lajjl sfra nlr to st al tle le ne i tl gr l that tle s o s i is i t served j i l Tl C rt r ay i ak a or l r sett g a lo the leere i t tl ts l o tl t tle le me las l en s t fel(x)

Ex parte decree against firm —In ex j rt lecr e a t a fr a ot be lt le ex j rt am ta j art ri tle fr leers le l as i ot appeare l at tle l ar A ex part l rec a t s fr an le set a lo o tle gr l that tle s r ons a r t l ly ser el on tle fr If tl i s s as l ly r l j o tle fr tl lerec e t be set a l l ex so o e of tle j art e s t s r e l In l r O 30 r 3 t si t n rs t ser e ry j rt r ls A) t *Co* a fr The firm c ts f t j t rs A l) Ile s o s s er el A al e as s j rt er) n t s r e l tl tle n A l r A r) a j j r t tle l r a l a ex p rte l rec j a l st tl *f* Tl s l l e l ly ser l on t e frm tl lecree a t t a frm e n b se as de because l w s ot r e l a l le l l ot aj pe r at tl l ar (*y*)

Appeal —Wh re an aj j l at n ler tl s r le s r j ect l an aj j eal l s agt t tle ord r r *j l ng* tle aj j l at n [O 43 r l cl (1)] B t l re tle aplicat o i is grante l ro aj j e l l s a a t tle or l r *j a l g* tle aj j l at ( ) Wl e an aj j l at o to set a l an ex j rte l erree l as l a l n l f r l f lt and a fre l aj j l at on s mal to s t a l l l al a l tl f l aj j l t o r j t l n appeall s fr tl o l rr j t t e f e l aj pl t ( )

Revision It l as l en l ll l y tl H l C rt f Al l a l that an r ler set a le an ex j rte l r e s i t l j t r l ll l r e be tl at tle al l tv f tl or l r l k l d 10 a j j l f tl f l l r (*b*)

Dismissal for default of application to set aside ex parte decree See not t r 9 D al f d f f j j f t n f ut o j 03 al e

Limitation l u *I* an l *C* f a d e a t tl em j u tly n re pect of a jo t mo t a e l lt A j a y d f l ja d a t *B* and *C* n 1900 a l t s a le l lute 19 l As a t *I* l r tl leer e was ex j arte a d it set a l a a n t l l j j l A l o tle j a c l o tle me s a a t *L* 1J *B* aj j al f o tl l re l ut tle j j eal i dis sed n 1901 a l as a n t l n tle l e s ade al solute 19 o l th n appl s 190o for exe t o l oth t *I* and *C* by al of tl n t d p operty *C* co te ds that as tle dec e as a a t l n as de l olut 1901 tl aj j at n for executio is l ar d l y l t ut o t l av b al n tl th o y a s fro n that date The apj li at on s i ot bar ed by l at o for the pe od of thr e yea s mu t be cal u

( ) *Z nloo I v F h al* (1899 3 Pon 716
( ) *d pp I* (19 6 B n L P 3 3 8 I C 773 4 A I 6
( ) *S a D v I hu* 9 16 C l 4 6 *I al I a* (19 1 L u 40 p 11 I C 914

(*a*) *S a f v I a d* (19 0 A L J 519 67 I C A A 3 7, *C nd S ha v I ga I a a* 9 46 Al 38
(*b*) *S h a v Aa I kh h* 19 1) 19 A l L J 907 64 I C 7 ( ) A A 441

lated from 1905 when the decree against *B* was made absolute The decree of 1905 for the first time justified *A* in applying for the joint execution of the decree against *B* and *C* (c) In a recent case it was held by a Full Bench of the Madras High Court that a rule framed by that Court applying s 5 of the Limitation Act, 1908, to applications under r 13, was *intra vires* (d) See notes above, "Remedies in case of ex parte decree"

Where no application to set aside an ex parte decree is made within the period of limitation, the Court has no inherent power under s 151 to set it aside after the expiry of the period (e)

Whether this rule applies to execution proceedings.—See notes under the same head to r 9, on p 502 above

Vakalatnama—No fresh vakalatnama is necessary for the purpose of an application to set aside an ex parte decree (f)

14. [S 109] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

No decree to be set aside without notice to opposite party

ORDER X.

Examination of Parties by the Court.

1. [S 117] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether allegations in pleadings are admitted or denied

2. [S 118] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions

Oral examination of party, or companion of party

(c) *Ashfaq Husain* v *Gauri Sahai* (1911) 33 All 264, 38 I A 37 9 I C 975

(d) *Krishnamachariar* v *Sriranganmal* (1921) 47 Mad 824 80 I C 877 ('25) A M 14

(e) *Ajodhya* v *Mussammat Phuller* (1927) 1 Pat 277 83 I C 311, ('22) A P 479 See also *Dhirchand* v *Pritam Das* (1925) 7 Lah 1 L 13, 86 I C 256 ('25) A L 321

(f) *Lachuldas* v *Ibrahim* (1922) 47 Bom 11, 6 I C 309 ('22) A B 207

O. 10, rr. 2-4.

relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Object of examination under this rule.—The object of examination under this rule is not to take *evidence* or ascertain what is to be the evidence in the case, but to determine the *matters in dispute* between the parties (*h*).

3. [S. 119.] Substance of examination to be written

The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (2)]

4 [S. 120] Consequence of refusal or inability of pleader to answer

(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Direct that such party shall appear in person.—Under this rule, an order directing a party to appear in person can only be made if the pleader who represents him has refused or is unable to answer material questions (*i*) See O 9, r 12

Appeal—An appeal lies from an order pronouncing judgment against a party under sub r (2) [O 43, r 1, cl (e)] Where in a suit by *A* against *B*, *C* and *D*, the Court struck off *B*s defence owing to his failure to appear in person, but ultimately decided the case on the merits and passed a decree against all three defendants, their defences being similar it was held that *B* was not entitled to appeal from the order striking off his defence, but that he was at liberty to appeal from the final decree and to call in question upon that appeal the order striking off his defence [s 105] (*j*)

(*h*) *Gunga* v *Tiluckram* (1888) 15 Cal 533 15 I A 119

(*i*) *Satu* v *Hanmantrao* (1899) [illegible]

(*j*) *Madhuri* v *Buhal* (1917) 39 All [illegible]

ORDER XI.

Discovery and Inspection.

11, r. 1.

Discovery by interrogatories

1. [R S C, O. 31, r. 1. Cf S 121.] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose · Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness

Discovery by interrogatories.—Every party to a suit is entitled to know the *nature of his opponent's case* (k), so that he may know beforehand what case he has to meet at the hearing (l) But he is not entitled to know the *facts which constitute exclusively the evidence of his opponent's case*, the reason being that it would enable an unscrupulous party to tamper with his opponent's witnesses, and to manufacture evidence in contradiction, and so shape his case as to defeat justice (m) The *nature* of a plaintiff's case is disclosed in his plaint The *nature* of a defendant's case is disclosed in his written statement But a plaint or a written statement may *not sufficiently* disclose the nature of a party's case In such a case, either party may administer interrogatories in writing to the other through the Court. Interrogatories may also be administered by a party to his opponent *to obtain admissions from him to facilitate the proof of his own case* The party to whom interrogatories are administered must answer them in writing and on oath (r 8) This is called *discovery* by interrogatories, the party to whom the interrogatories are administered *discovers* or discloses by his affidavit in answer to the interrogatories the *nature* of his case

Every suit contemplates two sets of facts, namely, (1) facts which constitute a party's case, and (2) facts by which a party's case is to be proved (see O. 6, r 2). The first set of facts discloses the *nature* of a party's case. The second set forms the evidence of his case Thus if *A* sues *B* for damages for breach of a contract, *A* must prove (1) the contract, and (2) breach of the contract These two facts *constitute* *A*'s case, and it is to these facts that one should turn to determine the *nature* of *A's* case. *Hence B may* administer interrogatories to *A* for information as to the particulars of (1) the contract and (2) the breach *thereof* *He may also interrogate A to* obtain admissions from him *to facilitate the proof of his own case.* But he is not entitled to administer interrogatories seeking information as to the *evidence by which A will prove these two facts.* Thus in the above case it is not permissible to *B* to ask who was present at the time when the alleged

(k) *Saunders* v *Jones* (1877) 7 C D 435
(l) *Marriott* v *Chamberlain* (1886) 17 Q B D 154
(m) *Benbow* v *Low* (1880) 16 C D 93, 95, *Re Strachan* [1895] 1 Ch 439, 445, 447, 448

contract was made. In other words it is not permissible to ask the names of the witnesses (n). But if the name and address of a person is itself a relevant fact, an interrogatory as to that name and address is not rendered inadmissible merely by the fact that the answer will disclose a witness's name (o). In a suit for the recovery of the amount of a hundi alleged to have been drawn by the defendant in consideration of Rs. [illegible] advanced to him by the plaintiff, and to have been dishonoured by non-payment, the defendant is entitled to discovery of the form in which the loan is alleged to have been made, and of the time and place the hundi was drawn and accepted and the time and place and the names and addresses of the persons by whom it was presented. All these are *material facts* which constitute the plaintiff's case (p). See notes to O. 6, r. 4, "Object of particulars," on p. 442 above and "Interrogatories relating to names of persons" on p. [illegible]16 below.

What Interrogatories may be allowed.—In England interrogatories are allowed for the following purposes:—

1. *To ascertain the nature of your opponent's case or the material facts constituting his case* (q).

   We have dealt with this proposition in the preceding paragraph.

2. *To support your own case either*

   (a) *directly by obtaining admissions, or*

   (b) *indirectly, by impeaching or destroying your adversary's case* (r).

Illustration of Case 2.—A sues *B* to recover Rs. 5,000 for making model machinery for exhibition. The defence is that the machinery was defective and unworkable. A may interrogate *B* whether the machinery did not obtain a prize at the exhibition. If it did, it is clear that the answer would tend to destroy *B*'s case and support A's case (s). Moreover the answer will serve as an admission from *B*, and the getting of admissions by interrogatories is always allowed, for it supports the party's case (t).

There is one *exception* to the rule in Case 2 (b). A sues to eject *B* from a piece of land alleging that the land belongs to him and that *B* is wrongfully in possession thereof. This is an action of ejectment. A is plaintiff in ejectment and *B* is defendant in ejectment. In an action of ejectment the plaintiff must prove his own title affirmatively. It is not enough for him to impeach or destroy the defendant's title. If he does not establish his own title to the land he will not be entitled to a decree though he may succeed in impeaching or even destroying the defendant's title. The reason is that the defendant being in *possession* he cannot be dispossessed of the land except by *proof of title* on the part of the claimant. Hence the plaintiff in ejectment should not be allowed to interrogate the defendant for the purpose *merely of destroying or impeaching* the defendant's title (u). And this is the *Exception* above referred to. But the plaintiff in ejectment is entitled to interrogate the defendant as to any matter relating to the defendant's title that may support his case *directly* (v). The same principles apply in the case of discovery by production of documents.

The High Court of Calcutta has expressed the opinion that interrogatories in India should not be allowed for the first of the above purposes, that is, to ascertain the nature

(n) *McColla* v. *Jones* (1887) 4 Times Rep. 12; *Eade* v. *Jacobs* (1877) 3 Ex. D. 335; *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154; *Nash* v. *Layton* [1911] 2 Ch. 71.

(o) *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154, 164, 166.

(p) *Baijnath* v. *Raghunath* (1914) 41 Cal. 6, 24 I. C. 765.

(q) *Eade* v. *Jacobs* (1877) 3 Ex. D. 335, 337; *Attorney General* v. *Gaskill* (188) 20 C. D. 519, 5[illegible]; *Marriott* v. *Chamberlain* (1886) 17 Q. B. D. 154.

(r) *Grumbrecht* v. *Parry* (1884) 32 W. R. (Eng.) 558 [illegible]

(s) [illegible] D. *[illegible]* 334

(t) [illegible] D. [illegible] 628

(u) *Eyre* v. *Rodgers* (1891) 40 W. R. [Eng.] 137; *Lyell* v. *Kennedy* (1883) 8 App. Cas. 217; *Morris* v. *Edwards* (1890) 15 App. Cas. 309.

(v) *Miller* v. *Kirwan* [1903] 2 I. R. 120.

of your opponent's case but that they may be allowed for the second, that is, to support your own case (w). The opinion is based on the ground that where a party has not sufficiently disclosed his case, it is the Court that has to determine the exact nature of his case by procedure under O 8, r 7, and O 14, rr 1 2, and that it is not therefore permissible to the opposite party to get that information by *discovery*. But the provisions of the said rules are, it is submitted, intended not to supersede, but to supplement the provisions for discovery to ascertain the *case* of a party to a suit, and there is no reason why any distinction should be drawn between the English and the Indian practice (x).

What interrogatories may not be allowed.—These may be divided into three classes —

1 *A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case or title* (y).

2. *A party is not entitled to interrogate as to any confidential communication between his opponent and his legal advisers.*

3 *A party is not entitled to exhibit interrogatories which would involve disclosures injurious to public interests.*

For fuller information on the above rules see notes to r 13 below, "Grounds of objection to production of documents" p 524 below.

Interrogatories relating to names of persons—Interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant (z). Such interrogatories are not allowable in any other case. Thus in a suit by the vendor against the purchaser for specific performance of a contract for sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal. The only object of such an interrogatory is to give the plaintiff the opportunity, if he is so minded, of releasing the defendant from all liability under the contract, and of securing for the plaintiff some other person liable under the contract in substitution for, and not jointly with, the defendant (a).

As to interrogatories as to names of witnesses, see notes "Discovery by interrogatories" on p 514 above, and notes to O 6, r 4 "Object of particulars," on p. 442 above. As to interrogatories as to names of informants in defamation cases, see the undermentioned cases (b).

Foreign law—An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law (c).

Time for delivery of interrogatories.—A plaintiff may, under this rule deliver interrogatories to a defendant even before the filing of the written statement. But there is this difference if the English practice is to be followed here, that in what are called *common law actions*, interrogatories, if delivered before filing the written statement, will as a rule be struck out under r 7 as unnecessary and vexatious unless

(w) *Ali Kader* v. *Gobind Dass* (1890) 17 Cal 840.
(x) *Baijnath* v. *Raghunath* (191[illegible]) 41 Cal. 6 at p 9, 24 I C [illegible].
(y) *Benbow* v. *Low* (18[illegible]) 16 C D 93 95; *Plummer* v. *May* (1750) 1 Ves 426; Bray on Discovery pp 444 465; Wigram on Discovery p 261.
(z) *Tetd* v. *Leask* (1855) 10 Ex 704; *Hancocks* v. *Lablache* (18[illegible]) 3 C P D 197, [illegible].
(a) *Sebright* v. *Hanbury* [1916] 2 Ch. 245.
(b) *Chapman* v. *Leach* [192[illegible]] 1 K B [illegible] (slander); *Lyle Samuel* v. *Odhams Ld* [1920] 1 K. B 135 (action for libel in a newspaper).
(c) *Perlak Petroleum Maatschappy* v. *Deen* [1924] 1 K B 111.

sufficient reasons are given by the plaintiff why the interrogatories are necessary at that stage of the suit (*d*), while in suits of the nature of *chancery actions* (*e*), they may, as a rule, be allowed though no written statement has been filed (*f*)

A defendant, as a rule, is not allowed to deliver interrogatories to the plaintiff before he has filed his written statement (*g*)

Leave of the Court —The application for leave to administer interrogatories is, as a rule, made *ex parte* In determining whether leave should be granted, the Court should consider whether it is a fit and proper case for administering interrogatories Leave should be *refused if the interrogatories are scandalous or are an abuse of the* process of the Court. But it is not the duty of the Court, when granting leave, to consider what particular questions the party interrogated should be compelled to answer. The proper time for considering that question is after the party interrogated has made his affidavit in answer [r 8] (*h*) See r 2 below

"Opposite party"—These words do not include solely the relation of plaintiff and defendant Hence one defendant may administer interrogatories to another defendant, provided there is *some right to be adjusted in the action between them* (*i*)

Where opposite party is a minor or a lunatic.—Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or guardian *ad litem*, as the case may be see r 23 below

Points of distinction between interrogatories and cross-examination:—

(1) Not every question which could be asked to a witness in the box may be put as an interrogatory Thus, questions which are put only to test the credibility of a person will not be allowed, although of course they may be asked in cross examination (*j*)

(2) Interrogatories can be administered only to a *party* to a suit and not to a witness (*k*)

Impleading party for discovery —A person cannot be made a party to a suit solely for the purpose of discovery (*l*)

Distinction between pleadings and interrogatories —Interrogatories are not like pleadings confined to the *material* facts on which the parties rely in support of their claim or defence Interrogatories may be administered not only to ascertain the nature of your opponent's case, but *to obtain admissions* from him of everything which is material on the pleadings, so as to facilitate the proof of your own case, and thus save yourself the expense of proving facts admitted by your opponent in answer to the interrogatories (*m*)

Probate proceedings —O 11 applies, by virtue of s 266 of the Indian Succession Act 39 of 1925, to proceedings in probate (*n*)

(*i*) *Molloy* v *Kirby* (1880) 15 C D 162 *Shaw* v *Smith* (1886) 18 Q B D 193 *Birchal*

(*j*) [illegible]

(*k*) *Attorney-General* v *Gaskill* (1882) 20 C D 519 530

(*l*) *Rahimbhoy* v *Turner* (1893) 17 Bom 341, *Burchard* v *Macfarlane* [1891] 2 Q B 241, 247

(*m*) *Attorney-General* v *Gaskill* (1882) 20 C D 519 528

(*n*) *Anilabala* v *Rajendranath* (1916) 43 Cal 300 34 I C 277

O. 11, rr. 2-5.

Particular interrogatories to be submitted

2 [*New.* R. S C., O 13, r. 2.] On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs

Power of Court under this rule—It is to be noted that the Court has no power under this rule to settle interrogatories but to state only what interrogatories should be administered (o) Further the allowance by the Court of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them but leaves him at liberty to take any objection to answering which he might otherwise have taken (p) See rr 6 7 below

Running down cases—In running down cases only such interrogatories should be allowed as may be necessary for disposing fairly of the suit or for saving costs within this rule (q)

Costs of interrogatories

3. [R S C, O. 31, r 3, *Cf* S 123] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the cost occasioned by the said interrogatories and the answer thereto shall be paid in any event by the party in fault.

Form of interrogatories

4. [*New* R S C, O 31, r 4] Interrogatories shall be in Form No 2 in Appendix C, with such variations as circumstances may require

Corporations

5. [R S C, O 31, r 5, *Cf* S 124] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person any opposite party may apply

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(o) *An labala* v *Rajendranath* (1916) 43 Cal 300 34 I C 907

(p) *Leek* v *Fay* (1894) 3 Ch 282

(q) *Griebart* v *Morris* [1920] 1 K B 659

for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly

Delivery of Interrogatories to an officer of a corporation—A corporate body cannot answer for itself, and if it is necessary that some officer should answer for it His answer is the answer of the Company, and can be read against the Company Such being the case, he is only bound to answer as to his knowledge *acquired in the course of his employment* by the Company, and as the result of inquiries made by him of the other officers and agents of the Company with regard to their knowledge *acquired in the same way* He is not bound to answer as to *his own knowledge*, or to make inquiries of the other officers or agents of the Company as to their knowledge *acquired accidentally or in some other capacity* (r)

Objections to interrogatories by answer

6. [R S C, O 31, r. 6, *Cf* S 125] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Scandalous Interrogatories—"Certainly nothing can be scandalous which is relevant" (s) Interrogatories which tend to incriminate a party are not scandalous if they are relevant (t)

Irrelevant Interrogatories—The discovery by interrogatories, as distinguished from cross examination, must be *directly relevant* to the matter in issue (u) Thus in an action for damages against the defendant for seducing the plaintiff s daughter, the defendant cannot be asked how rich he is, as it is perfectly irrelevant in such cases whether the defendant is rich or poor, the true measure of damages being the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter But interrogatories as to whether the defendant had had sexual intercourse with the daughter, and whether he had stated that he believed that she had not had such intercourse with any other man are allowable (v) Similarly interrogatories will not be allowed if the defence at which they aim would be no defence in law to the suit (w)

Where a party seeks discovery of *documents*, and the opposite party alleges that the documents are *not relevant* the procedure to be followed is that laid down in r 18, sub r (2) below A party should not be compelled to give discovery of documents *by means of interrogatories*, the relevancy of which is denied (x)

"Not exhibited bona fide for the purpose of the suit."—Though an interrogatory may be relevant, it may be objected to on the ground that it is put with a view to serve an ulterior object beyond that of helping the suit

(r) *Welsbach Incandescent Gas Lighting Co* v *New Sunlight Incandescent Co* [1900] 2 Ch 1
(s) *Fisher* v *Owen* (1878) 8 C D 645 653 per Cotton L J
(t) *Allhusen* v *Labouchere* (1878) 3 Q B D 654, (1878) 8 C D 645 *supra*
(u) *Re Howel Morgan* (1888) 39 C D 316 *Kennedy* v *Dodson* [1895] 1 Ch 334, 338 340
(v) *Hodsoll* v *Taylor* (1873) L R 9 Q B 79
(w) *Rogers & Co* v *Lambert & Co* (1890) 24 Q B D 573
(x) *Nilomoye* v *Soobul* (1896) 23 Cal 117

O. 11, rr. 6, 7.

"Not sufficiently material at that stage."—An interrogatory may be perfectly relevant to a suit, further it may be put *bona fide* for the purposes of the suit, but it may be premature, in which case it will not be allowed (*y*). This may be illustrated by the following cases :—

(1) *A* sues *B* for breach of an alleged trust and for profits made by *B* by such breach. *B* denies the alleged trust. *A* is not entitled to interrogate *B* so as to require from him an *account* of profits of the alleged trust fund unless the trust is proved (*z*); but it is otherwise if the breach of trust is admitted (*a*).

(2) In *Fennessy* v. *Clark* (*b*), the plaintiff's interrogatories to prove the *amount* of damages were held premature, as it was not yet decided whether the plaintiff was entitled to any damages at all Cotton, L.J., said "The Court is always unwilling before the right to relief is established, to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief"

"Or any other ground."—Besides the three specific grounds mentioned in the rule, a party interrogated may object to answer an interrogatory on the ground that it is prolix, oppressive, unnecessary or scandalous (r. 7), or on the grounds specified in the notes to r. 1, "What interrogatories may not be allowed," on p. 516 above.

"Fishing" interrogatories not allowed.—The questions asked must not be "fishing," that is to say, they must refer to some definite and existing state of circumstances, and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case (*c*) See Odgers on Pleading, 8th Ed, p 298 For instances of "fishing interrogatories," see *Ali Kadar* v *Gobind Das* (*d*)

Contracts by way of wager—In cases where the defence of wager is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit, the reason being that it is manifestly unfair to compel a person to disclose his general dealings on the chance they thereby his opponent may discover something that will support his case (*e*)

Defamation.—Where a statement of claim in an action for slander alleges publication to one named person, and publication also to various other persons unnamed, it is not generally permissible to ask the defendant whether he uttered the words complained of to any person or persons other than the person named, and the names of the other persons if any Such an interrogatory is a fishing interrogatory, the object being to find out some cause of action against the defendant other than the specific cause of action alleged in the plaint (*f*)

Setting aside and striking out interrogatories

7. [*New.* R. S C, O. 31, r. 7.] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary

(*y*) *Neelram* v *Bank of Bengal* (1887) 14 Cal 703
(*z*) *Parker* v *Wells* (1881) 18 C D 477
(*a*) *Whitham* v *Whitham* (1884) 28 Sol Jo 456
(*b*) (1888) 37 C D 184 [infringement of trade-mark]
(*c*) *Gourley* v *Plimsoll* (1873) L R 8 C P 362, *Hennessy* v *Wright* (No 2) (1890) 24 Q B D 445.
(*d*) (1890) 17 Cal 840, 842-843
(*e*) *Bhagwandas* v *Burjorji* (1913) 37 Bom 347, 17 I C 152
(*f*) *Barham* v *Huntingfield* [1913] 2 K B 193

or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

O. 11, rr. 7-10.

Setting aside and striking out interrogatories.— A, as trustee in the bankruptcy of *C*, sues *B* for a declaration that a piece of land purchased by *B* and *C* in 1883 was purchased by *B* and *C* in partnership *B* denies the partnership *A* exhibits interrogatories to *B* asking for particulars of purchases of land by *B* and *C* previous and subsequent to 1883 to prove that they had been co partners in various other purchases similar to that of 1883 The interrogatories are irrelevant and oppressive, and must be struck out "To ask the defendant to take the trouble to go through his books and papers for so many years is vexatious and oppressive (*g*)"

The present rule does not apply where the interrogatories are merely irrelevant An objection that an interrogatory is irrelevant must be taken in the affidavit in answer (r 6) and is no ground for setting aside the interrogatory under this rule (*h*)

"There is no foundation for the opinion that a person who has a ground for refusing to answer [an interrogatory] is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out" (*i*).

8. [R. S C, O. 31, r. 8, S. 126] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer filing

Answers as to matters done by agent or servant of party interrogated—A party to a suit is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's knowledge, but are only within the knowledge of his agents or servants, *if derived in the ordinary course of their employment* and he is bound to obtain the information from such agents or servants, unless he shows that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of delay or the like (*j*) A party's banker or solicitor is his agent within the meaning of the above rule (*k*) But a party is not bound to disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment (*l*)

9. [*New* R S C, O 31, r. 9] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require

Form of affidavit in answer

10. [*New* R S C., O 31, r 10.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court

No exception to be taken

(188?) opshire (1884)

24 C D 110 113
(*k*) *Alliot* v *Smith* [1895] 2 Ch 111
(*l*) *Welsbach Incandescent Gas Lighting Co* v *New Sunlight Incandescent Co* [1900] 2 Ch 1 10-11

O. 11, rr. 11, 12.

11. [R. S. C., O 32, r. 11, S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or answer further

Application for further answer to interrogatories.—An application for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required (m)

"Answers insufficiently."—"With regard to an answer to interrogatories, what the Court has to consider is this simply, whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is insufficient or not, and if it is insufficient, then only can it require a further answer" (n) "When an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having trust upon him irrelevant matters as part of it, the answer is insufficient, and the proper course to pursue is to ask that a further answer shall be made " (o)

Privilege.—Where in an answer to interrogatories the party interrogated declines to give further information on the ground of privilege, and the privilege is properly claimed in law the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated *The mere existence of reasonable suspicion* which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified (p) See notes to r 13, " Conclusiveness of affidavit of documents," on p 525 below

Consequence of failure to answer interrogatories.—See r. 21 below

12. [R. S. C., O 31, r. 12, S 129.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery

Application for discovery of documents

(m) *Anstey* v *North and South Woolwich Subway Co* (1879) 11 C D 439
(n) *Lyell* v *Kennedy* (1884) 27 C D 1, 21
(o) *Ib*, p 28
(p) *Lyell* v *Kennedy* (1884) 27 C D 1.

shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

O. 11, rr. 12, 13.

Affidavit of documents

13. [R. S. C., O. 31, r. 13, S. 129, 2nd para] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

Discovery and production of documents.—Having dealt with discovery by way of answer to interrogatories, we now proceed to consider another species of discovery called *discovery of documents* The parties to a suit may have in their possession or power *documents relating to the matters in question in the suit* These documents may be divided into two classes —

(i) those which the adversary is entitled to inspect, and

(ii) those which he is not entitled to inspect.

Documents which belong to class (ii) are described and classified below, under the head " Grounds of objection to production of documents " As to class (i) of documents we may say that the adversary is entitled to inspection of all documents which do not come within class (ii) Speaking generally, we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party's *evidence* of his case or title But how is inspection to be obtained ? If *A* wants to inspect documents in the possession of *B* which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by *B* *A* must therefore call upon *B* to produce the documents But how can *A* do this, unless he knows what documents are in the possession or power of *B* ? To enable him to obtain this information, *A* is entitled to *discovery* from *B* of the documents in his possession or power (*q*) For this purpose, *A* may apply to the Court for an order requiring *B* to make an affidavit, called *affidavit of documents*, stating what documents are in his possession or power relating to the matters in dispute in the suit On the order being made *B* is bound to make his affidavit of documents If he fails to do so, he will be subjected to the penalties specified in r 21 below After the affidavit of documents is made by *B* disclosing the documents, *A* may require *B* to *produce* for his inspection such of the documents as he is in law entitled to inspect

Contents of affidavit of documents.—A party who is ordered to make his affidavit of documents should *set forth* on the affidavit all documents which *are* or *have been* in his possession or power relating to all matters in question in the suit. As to documents which *are not, but have been*, in his possession or power he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them For the same reason, if there are any documents in which he has a *joint* property with other persons not before the Court, he must state the names of those persons Rule 13 provides that every affidavit of documents should also specify which of the documents therein *set forth* the declarant objects to *produce* for the inspection of the opposite party

(*q*) See *Municipal Board of Agra* v *Asharfi Lal* (1922) 44 All 202, 65 I C 984, (22) A.A 1

O. 11, r. 13. together with the grounds of such objection (see App C, Form No 5) These grounds are three in number and are given below The Court will go into these grounds when it is called upon to make an order for *production* of the documents in a party s possession for the inspection of the opposite party (r 14)

Grounds of objection to production of documents—There are three grounds on which production of documents can be resisted as of right, (1) as disclosing the party s evidence, (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests We proceed to consider these grounds in detail

1 *A party is not bound to produce for the inspection of his opponent documents which "of themselves evidence exclusively the party s own case or title* (r) —Documents constituting *evidence* of the party s case or title are not protected unless they are *solely or exclusively* evidence of it Where a document is or may be evidence *for the adversary as well as the party*, the party cannot withhold inspection of it from the adversary (s) although his own evidence may be thus disclosed (t) It is not enough for a man to say such and such documents are the title deeds of *his property* it is no ground for refusing their production, if they are necessary to *support* the adversary s case (u) But a document is protected from production and inspection if it *exclusively* evidences a party s own case, and does not support the adversary s case (b) To entitle the party to this protection, the privilege must be properly claimed that is he must state in his affidavit that the documents constitute evidence of his own case or title that they contain nothing supporting or tending to support the adversary s case or title and that they contain nothing impeaching his own case or title (w) As to discovery in actions of ejectment see notes to r 1, " What interrogatories may be allowed on p 515 above

2 *A party is not bound to produce any confidential communications between him and his legal adviser* (x) —The reason of the rule is to enable persons to obtain legal advice safely and effectually (y) The following are amongst the confidential communications between a client and his legal adviser that are protected from production and inspection (1) statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information to conduct his case (z), (2) advice given by the solicitor with reference thereto (a), (3) entries in the solicitor s diary of communications between himself and his client (b), (4) memoranda or minutes made by the client of the communications between himself and the solicitor (c) (5) communications between solicitor and counsel with reference to the client s case (d), (6) draft pleadings (e), (7) case laid before counsel for his opinion and other briefs for counsel (f) (8) solicitor s bill of costs it being virtually the solicitor s

(r) *Budden v Wilkinson* [1893] 2 Q B 432 *Frankenstein v Gavins Co* [1897] 2 Q B 62 *Attorney-General v Mayor of Newcastle-upon-Tyne* [1899] 2 Q B 478

(s) Bray on Discovery p 4[illegible] *Burrell v Nicholson* (1833) 1 M & K 680 *Smith v Beaufort* (1847) 1 Ph p 220 *Combe v Corp London* (1845) 15 L J Ch pp 8[illegible] 83

(t) *London Gas Light Co v Chelsea* (1859) 6 C B N S pp 425 426 *Stratton v Chadwick* (1851) 3 M. & G 573

(u) *Attorney-General v Thompson* (1849) 8 Ha p 113 *Sutherland v Singhee Churn* (1884) 10 Cal 808

(v) *Egremont Burial Board v Egremont Iron Ore Co* (1880) 14 C D 158 *Morris v Edwards* (1890) 15 App Cas 309

(w) *Attorney-General v Emerson* (1882) 10 Q B D 191 *Minet v Morgan* (1873) L R 8 Ch 361 *Attorney-General v Newcastle* [1899] 2 Q B 4[illegible] *Balamoney v Ramasami* (1907) 30 Mad 230 231

(x) *Pyrie v Shrishankar* (1891) 15 Bom 7 See Evidence Act ss 126 and 129

(y) *Wheeler v LeMarchant* (1881) 17 C D 675 pp 681 6[illegible] *Re Strachan* [1895] 1 Ch 4[illegible] 444 *Bullivant v Attorney-General* [1901] A C 196 200

(z) *Southwark Co v Quick* (1878) 3 Q B D 315 *Birmingham and Midland Motor Omnibus Co Ld v London and North Western Ry Co* [1913] 3 K B 850 *Feuerheerd v London General Omnibus Co* [1918] 2 K B 565

(a) *Pyrie v Shrishankar* (1891) 15 Bom [illegible]

(b) *Ward v Marshal* (1887) 3 Times Rep [illegible]

(c) *Woolley v N L P Co* (1869) L R 4 C P 602

(d) *Mostyn v West Mostyn Co* (1876) 34 L T 32[illegible]

(e) *Lamb v Orton* (1863) 22 L J Ch 713

(f) *Walsham v Stainton* (1863) 2 H & M 1 *Muncherishaw v New Dhurumsey Co* (1880) 4 Bom 576

history of the transaction in which he was concerned (*g*) But the communication to be privileged must be of a *confidential* nature (*h*) And further it must have been made to the *legal adviser with a view to obtain professional advice* (*i*) It is not necessary that it should have been made either during an actual or even an expected litigation A communication with a legal adviser is protected though it relates to a transaction *which is not the subject of litigation* provided it be a communication made to him for the purpose of obtaining professional advice (*j*) But no privilege attaches to communications between a solicitor and his client which are in themselves facts of a criminal or unlawful proceeding (*k*) Where one of the trustees of a will is a solicitor and acts as the solicitor for the trustees, communications passing between him and his co trustees which would be privileged if the solicitor were not a trustee are privileged notwithstanding that he is a trustee (*l*) But confidential communications between a principal and an agent who is not a legal agent, *e g*, a commercial agent are not privileged, whether they are made after litigation has become imminent and after legal advice has been taken or even after litigation has commenced (*m*) See Evidence Act 1872 ss 126 129

3 *A Party is not bound to produce any public official document if its production would be injurious to public interests* (*n*) —This head of privilege applies as a rule when a party to a suit is a public officer See Evidence Act 1872 ss 123 124

In all the three heads of privilege mentioned above, the privilege must be claimed

or
it

Conclusiveness of affidavit of documents: Further affidavit—If a party states in his affidavit of documents that he has no documents relating to the matters in question in the suit other than those set forth in the affidavit his oath is conclusive, and the other party cannot cross examine upon it nor adduce evidence to contradict it, nor administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit (*q*) The oath of the party being conclusive the Court will not order him to make a further affdavit of documents though the opponent may state on oath that the party has got other documents in his possession (*r*) the reason being that in all questions of discovery the oath of the party making the discovery is conclusive as against the oath of the party claiming the discovery (*s*) The only case in which the Court may require a party to make a further affidavit is where there is a reasonable probability or presumption *or even ground for suspicion* derived from certain sources that he has other relevant documents in his possession (*t*) The sources into which the Court may look for this purpose are (1) the

(*g*) *Turton* v *Barber* (1874) L R 17 Eq 3 9 *Chant*

Bom
Bom
(1903)

963

) 675

(*k*) *Bullivant* v *Attorney General* (1901) A C 196 200-201 *Whitworth In re* (1919) 1 Ch 320 335 338

(*l*) *Whitworth In re* [1919] 1 Ch 320

(*m*) *Wallace* v *Jefferson* (1878) 2 Bom 453 *B pro Doss* v *Secretary of State for India* (1885) 11 Cal 655 *Ryrie* v *Shivshankar* (1891) 15 Bom 7 *Umbica Churn* v *Bengal S & W Co* (1895) 22 Cal 105

(*n*) *Wadeer* v *E I Co* (1865) 8 De G M & G p 182 *Jehangir* v *Secretary of State* (1904) 6 Bom L R 131 160

(*o*) *Umbica Churn* v *Bengal S & W Co* (1895) 22 Cal 105

(*p*) Bray on Discovery 311 349 Steph Dig art 120

Nichol

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(*t*) *Hall* v *Truman* (1885) 29 C D p 319 *Lyell* v *Kennedy* (1884) 27 C D p 20 *Comp Financiere* v *Peruvian Guano Co* (188) 11 Q B D 55

O 11, r. 13. affidavit of documents itself, (2) the documents therein referred to and (3) the pleadings (u) Unless the affidavit is shewn from any of these sources to be insufficient, the general rule is that no further affidavit can be ordered But this rule is qualified where the basis on which the affidavit has been made turns out to be wrong Thus if the party making the affidavit has misconceived his case so that the Court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents, then the Court will refuse to recognise the affidavit as conclusive and order a further affidavit (v)

The affidavit of documents is also conclusive as to the *facts* constituting the grounds of objection to *production* Thus if a party sets forth five documents in his affidavit, and objects to produce two of them on the assertion that they relate *exclusively* to his own title, and that they contain nothing tending to support the adversary's title, the Court will not go behind the affidavit (u), and will not order production, unless the Court is *reasonably satisfied or reasonably certain* from the sources specified in the preceding paragraph that the nature of the documents as described by the party has been misconceived by the party, or that the documents are of such a character that the party cannot properly make such an assertion (x) *Mere suspicion* that the documents are not of the character described by the party, though it is sufficient to justify the Court in ordering the party to make a *further affidavit of documents* (see preceding paragraph), does not entitle the Court to order their *production* (y)

In a suit for the price of materials supplied to the defendant in which the defence was that the materials were defective, the defendant objected to produce his engineer's report on the ground that it formed *evidence* of his own case *exclusively*, but the Court ordered production on the ground that the defendant *had set forth the nature of the report in his written statement*, and the statement showed that the report was not of the character described by the defendant (z)

Inspection by Court of documents for which privilege is claimed —Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim of privilege See r 19, sub r (2)

Sufficient description of documents —It being one of the objects of the affidavit of documents to enable the Court to make an order for production of the documents mentioned therein, the affidavit ought to contain a sufficient description of the documents A description will be held sufficient, if it is of such a character that if an order for production is made, the Court can determine whether the very documents that were ordered to be produced have actually been produced (a) Where there are numerous documents the practice is to tie them up in bundles, to schedule the bundles, and number the documents, or otherwise ear mark them in such a way that the other party may ask for those which he wants to see (b)

When a party claims to withhold certain documents from production, although some description may be necessary, he need not give such a description as would enable the adversary to know their contents (c) Thus where privilege is claimed for letters, it is not necessary to state the dates or the names of the writers, nor such other particulars as might enable the opponent to discover indirectly the contents (d)

(u) *Jones* v *Monte Video Co* (1880) 5 Q B D 556 *Kent Coal Concessions* v *Duguid* [1910] 1 K B 904 and cases cited in last note

(v) *British Association of Glass Bottle Manufacturers* v *Nettleford* [1912] A C 709

(w) *Vinayakrao* v *Narotam* (1893) 17 Bom 581

(x) *Attorney-General* v *Emerson* (1882) 10 Q B D 191 *Frankenstein* v *Gavins Co* [1897] 2 Q B 62 *Roberts* v *Oppenheim* (1884) 26 C D 724

(y) Bray on Discovery 503

(z) *Umbica Churn* v *Bengal S & W Co* (1895) 2 Cal 105

(a) *Taylor* v *Batten* (1878) 4 Q B D 85

(b) *Hill* v *Hart-Davis* (1884) 26 C D 470 472 *Cooke* v *Smith* [1891] 1 Ch 509, *Price* v *Price* (1879) 48 L J Ch 215

(c) *Kain* v *Farrer* (1877) 37 L T 470

(d) *Gardner* v *Irvin* (1878) 4 Ex D 50

"Not necessary at that stage of the suit."—See notes to r. 6, "Not sufficiently material at that stage," on p 520 above

Relating to any matter in question in the suit.—Every document which will *throw any light* on the case is a document relating to a *matter in dispute*, in the suit (e), though it may not be *admissible in evidence* (f) A document may not be admissible in evidence, and yet it may contain information which may either directly or indirectly enable the party seeking discovery either (1) to advance his own case or (2) to damage his adversary's case, or which may fairly lead him to a train of inquiry which may have either of these two consequences (g) Every such document must be included in the affidavit of documents, and the opposite party is entitled to inspection of such documents Thus a plaintiff may be required to *produce* for inspection of the defendant correspondence containing mere matter of opinion by a non legal agent as to the prospect of the plaintiff's success in the case, though the correspondence *may not be admissible in evidence* (h)

Non disclosure of documents—Presumption—"It is open to a litigant to refrain from producing any document that he considers irrelevant, if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way, if he fails to do so, no inference in his favour can be drawn as to the contents thereof (i) But where an *order for discovery is made* upon a party, and it is alleged by him as to some of the documents that they may have been destroyed or may have perished, it is incumbent on him to give evidence of diligent search and of failure to find them, if no such evidence is given, the presumption arises that the contents of the documents not accounted for are, as regards the issue in dispute unfavourable to that party (j)

Several plaintiffs or several defendants.—Where there are several plaintiffs or several defendants, *all* must join in making the affidavit of documents unless some specific reasons to the contrary are shown The fact that some of the parties reside in England is no reason why they should be excused from making such affidavit (k)

Minors and lunatics—The next friend or guardian *ad litem* as the case may be of a minor or a lunatic may be required to make an affidavit of documents (r 23)

Affidavit of documents from a co-defendant—An affidavit of documents may be required by a defendant from a co defendant, if there is an issue joined between them, but not otherwise (l) See notes to r 1, Opposite party," on p 517 above

Advocate-General—No order can be made against the Advocate General whether he be plaintiff or defendant, requiring him to give discovery on *oath* Hence no affidavit of documents can be required from the Advocate General But an affidavit of documents may be required from the relators (m) See s 92

(e) *Hutchinson* v *Glover* (1875) 1 Q B D 138
(f) *Bustros* v *White* (1876) 1 Q B D 423 *Hutchinson* v *Glover* (1875) 1 Q B D 141
(g) *Compagnie Financiere* v *Peruvian Guano Co* (188..) 11 Q B D 63
(h) *Bustros* v *White* (1876) 1 Q B D 423
(i) *Bilas Kunwar* v *Desraj* (1915) 37 All 557, 566, 42 I A 202, 206 30 I C 299 Distinguish

O. 11 r. 13, 14.

Official Liquidator.—The Official Liquidator, being an officer of the Court, should not in the absence of special circumstances be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the documents which the latter requires to see (n)

Marine Insurance—The affidavit of ship's papers which underwriters are entitled to require from the plaintiff in an action on a policy of marine insurance on cargo is not limited to documents in the possession of the plaintiff or other persons interested in the insurance, but extends to all material documents in whomsoever's possession they may be (o)

Sealing up parts of documents.—Where one part of a document relates to matters in dispute in the suit and another part does not, the latter may be sealed up and so concealed from inspection Similarly where protection from discovery can be claimed for one part of a document and not for another part, the part which can be protected may be sealed up (p) In some cases the Judge has ordered the sealed parts to be unfastened in order that he might inspect them himself (q) See r 19, sub r (2)

Duty of solicitor.—Where after a party has made his affidavit of documents, his solicitor finds that there are other documents which have not been disclosed, it is the duty of the solicitor to bring those documents to the notice of his opponent at the earliest possible opportunity (r)

Inspection of property being subject-matter of suit.—See O 39, r 7 (1) (a)

14. [R. S. C., O. 31, r. 14, S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production of documents

Production of documents—Discovery of documents must be distinguished from production of documents "The rule as to discovery is the exact contrary of that as to production. You must *set out* every document in your possession whether you are bound to *produce* it or not" (s) If the document is privileged from production, it must be disclosed and privilege claimed for it This rule provides for production of documents *upon* oath In actual practice production is now obtained by notice under r. 15 or by order under r 18 The Court has no discretion under this rule to refuse an order for production unless the documents are privileged (t) At the same time no order should be made under this rule against a party unless he has directly or indirectly admitted the document to be in his possession or power (u) As to the three heads of privilege, see notes to r 13, Grounds of objection to production of documents," on

(n) *Mutual Society in re* (1883) 22 Ch D 714

(o) *Teneria Modenna Franco Esponola v New Zealand Insurance Co* [1924] 1 K B 79

(p) Bray on Discovery p 233 *Jadub v Kanai* (1893) 20 Cal 587, *Heeralal v Ram Surun* (1879) 4 Cal 835

(q) *Lafone v Falkland Islands Co* (1858) 27 L J Ch 25 *Caton v Lewis* (1853) 1 W R (Eng) 119 *Gurmuk Roy v Tularam* (1901) 28 Cal 421

(r) *Attorney in the matter of an* (1920) 25 Cal W N 99

(s) *Swanston v Lishman* (1881) 45 L T 360, 361

(t) *Wallace v Jefferson* (1878) 2 Bom 453, *Balamoney v Ramasami* (1907) 30 Mad 230

(u) *Kumar Rameshwar v Rani Ekinat* (1920) 5 Pat L J 550, 58 I C 28

p. 524 above, "Conclusiveness of affidavit of documents," on p 525 above, and 'Sealing up parts of document," on p 528 above

Indian Evidence Act, ss. 163-164—Under s 163 if *A* calls for a document which he has given *B* notice to produce, and the document is produced in Court and inspected by *A*, *B* can compel *A* to put the document in evidence Under s 164 a party refusing to produce a document cannot use it in evidence without the consent of the other side or the order of the Court

Waiver of privilege—Where a document is privileged, the fact that a portion of it has been read out by the plaintiff s solicitor to the defendant's solicitor does not amount to a waiver of privilege on the part of the plaintiff as regards the part *not read* (*v*)

Partner.—One partner of a firm represents the other partners for the purpose of production of documents (*w*)

Revision.—The High Court will not in revision interfere where a lower Court, in the exercise of its discretion, refuses inspection of documents produced before it under this rule (*x*)

Right to take copies—The inspecting party is entitled to take copies of documents, produced for inspection (*y*) In a proper case, as where a document is alleged to be forged, the Court may allow a party to a suit to take a photograph of the document in the possession of the other party (*z*)

Inspection of documents referred to in pleadings or affidavits

15. [R. S. C., O 31, r. 15, S. 131.] Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof, and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Inspection of documents referred to in pleadings and affidavits.—Rules 15 to 18 are confined to documents *referred to in the pleadings or affidavits* They are intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings (*a*)

The machinery for the production of documents is of two kinds We have first rule 12 of this Order which enables a party without filing any affidavit to apply for an

(*v*) *Kay* v *Poorunchand* (1880) 4 Bom 631
(*w*) *Haji Jakaria* v *Casim* (1876) 1 Bom 496
(*x*) *Balamoney* v *Ramasami* (1907) 30 Mad 230
(*y*) *Ormerod Grierson & Co* v *St George s Iron Works Ltd* [1905] 1 Ch 505
(*z*) *Lewis* v *The Earl of Londesborough* [1893] 2 Q B 191
(*a*) *Quilter* v *Heatly* (1883) 23 C D 42 50

O. 11, r. 15, 16.

order directing any other party to the suit to make discovery on oath of the documents in his possession or power relating to any matter in question in the suit Under that rule, a defendant is not, as a rule, entitled to discovery before he has filed his written statement (*b*). Rule 15 provides for *immediate* inspection of any documents which a party has *referred to in his pleadings or affidavits* Under this rule, a defendant is entitled to inspection of documents referred to in the plaint although he has not filed his written statement (*c*) But he is not entitled, as a rule, to inspection of documents not referred to in the plaint unless he has filed his written statement (*d*) It has been held in Bombay, following *Quilter* v. *Heatly* (*e*), that r 15 applies also to documents *relied on* by the plaintiff (*f*) But *Quilter* v *Heatly* was a case of documents *referred to* in the statement of claim In a later case (*g*), the same Court held that r. 15 does not apply to documents other than (1) those referred to in the pleadings, and (2) those relied upon by the plaintiff The High Court of Calcutta has held that r 15 does not apply to documents *relied upon* by the plaintiff (*h*) Where a document not at all material to the suit is casually referred to in the plaint, the defendant is not entitled to inspection thereof (*i*)

A party who is required under this rule to produce a document referred to in his pleadings for the inspection of the opposite party may claim privilege for the document It is not to be supposed that where a document is referred to in the pleadings, all privilege with regard to it is gone The rule only says that "if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence That is the penalty He may prefer to lose part of his claim rather than produce the document [This] rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced" (*j*)

Where a plaintiff by his plaint refers to letters written by himself, he is not bound to produce *copies* of those letters for the inspection of the defendant, there being no reference to *copies* in the plaint (*k*) As regards exhibits to an affidavit, it has been held that "any one who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit" (*l*). A party is entitled under this rule to inspection of letters referred to in an affidavit of the opposite party, though the affidavit has not been filed, provided it is sworn and a copy thereof is furnished to him (*m*)

Inspection by party or his pleader.—No one is entitled under this rule to inspection except a party or his pleader The term "party" includes the authorized agent of the party (*n*) But if such agent was formerly in the employ of the opposite party and in charge of his books, the Court ought not to permit inspection to be taken by him (*o*).

16. [R S. C, O. 31, r 16.] Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

Notice to produce

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(*o*) *Enamul* v *Ekramul* (1898) 25 Cal 294

O 11, rr 17 18

17 [R S C, O 31, r 17, S 132] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground Such notice shall be in Form No 8 in Appendix C, with such variations as circumstances may require

Time for inspection when notice given

"Documents"—This rule applies to all documents mentioned in r 15 it is not confined to cases where there has been an affidavit of documents under rr 12 and 13 (p)

Bankers' books—See notes to O 7, r 17, Bankers Books Evidence Act 1891, on p 479 above

Business books—See r 19 below

Usual place of custody—*A* who owns a ginning factory at Broach agrees with *B* in Bombay to gin *B*'s cotton in his factory at Broach *B* sues *A* in Bombay for damages for breach of the contract and requires inspection of *A*'s books in Bombay *A* offers to give inspection at Broach where the books are kept *B* is not entitled to inspection in Bombay for Broach is the place where the books are kept (q)

18. [R. S C, O 31, r. 18, Ss 133, 134] (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Order for inspection

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavits of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party The Court

(p) Re *Fenner and Lord* [1897] 1 Q B 667 669 670

(q) See *Keraldas* v *Pestonji* (1881) 5 Bom 467

O. 11, rr. 18, 19. shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

'Served with notice '—No order for inspection can be made under this rule unless notice has been served under r 15 (r)

Sub-rule (2)—This sub rule provides for the inspection amongst others of documents not disclosed in the affidavit of documents and the Court may under this

tinguished from inspection (s)

App'al—No appeal lies under the Code from an order for inspection Nor does an appeal lie under cl 15 of the Letters Patent for an order directing inspection to be given is not a judgment within the meaning of that clause (t)

Bankers' Books Evidence Act—In ordering inspection under the Bankers Books Evidence Act the Court is guided by the general rules regulating the inspect on of documents before trial (u)

19. [*New* R S C, O 31, r 19A] (1) Where inspection of any business books is applied for, the Court may, if it thinks fit instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made

Verified copies

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may, on the application of any party to a suit at any time and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his

( ) *Mohend o v Ishun Chunder* (1884) 10 Cal 56 *Dhapi v Ram Pe shad* (1887) 14 Cal 768
(r¹) *S c Nitto Moye v Soobul* (1896) 23 Cal 117 1°7
(s) *Basanta Coomar v Kum id ni* (1911) 38 Cal 428 1° I C 1°
(t) *Sonbai v Ahmedbha* (1°7) 9 Bon H C 398 409 *Ahmed v Ayeshaba* (1909) 11 Bom L R °48 2 I C 167
(u) *Waterhouse v Ba ke* [19 4] ° K B 7 9

O. 11, rr. 19-21.

possession or power, and, if not then in this possession, when he parted with the same and what has become thereof Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

Specific documents—To justify an application under sub r (3) the party making the application must in his affidavit *name and specify* so that they can be identified, the particular documents of which he desires discovery It is not sufficient to make a general affidavit based on *a priori* reasoning that certain classes of documents must be in his opponent's possession or power (v)

20. [R S C, O. 31, r. 20, S. 135] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection

Premature discovery

Issue to decide upon right to inspection—The object of the rule is to enable the Court to decide an *issue* in a suit as distinguished from the suit itself for the purposes of discovery (w) See notes to r 6 Not sufficiently material at that stage on p 520 above

21. [R S. C, O. 31, r 21, S 136] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly

Non compliance with order for discovery

Dismissal of Suit.—This rule cannot be applied unless there has been an order for discovery under r 12 or for inspection under r 18 (x) And even where such

(v) *White* v *Spafford & Co* [1901] 2 K B 241
(w) *Ahmedbhoy* v *Vulleebhoy* (1882) 6 Bom 57
(x) *Kishan Lal* v *Sultan Singh* (1916) 38 All 5 30 I C 525 *Deokaran* v *Sangidas* (1925) 27 Bom L R 694 89 I C 215 (25) A B 386

O. 11, r. 21-23. an order has been made, it is only when the default is wilful, and as a last resort, that the Court should dismiss the suit or strike out the defence (y) If the parties concerned are *purdanashin* ladies, this should be taken into account before making the order (z) The word " production," which occurred after ' discovery " in the corresponding s 136 of the Code of 1882 has been omitted in the present rule It has hence been held by the High Courts of Allahabad (a), and Madras (b), that this rule does not apply to cases where there has been non compliance with an order for production of documents made under r 14 According to a Lahore decision (c), this rule applies also to orders made under r 14

Contempt —Besides the penalty prescribed by this rule, a party before a High Court who has failed to answer or give inspection is liable to be committed for contempt by that Court This power has been conferred on Chartered High Courts by their Letters Patent (d) An order of *committal for contempt* is appealable according to the Bombay decisions (e), but not according to the Allahabad decisions (f)

Appeal —An appeal lies from an order under this rule under O. 43, r 1 (f) below (g)

22. [*New.* R. S C, O. 31, r. 24.] Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer or the opposite party to interrogatories without putting in the others or the whole of such answer. Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in

Using answers to interrogatories at trial

23. [*New.* R. S.C., O. 31, r. 29.] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order to apply to minors

Minors and lunatics —Prior to this rule the practice of the different High Courts as to discovery from minors and persons of unsound mind was not uniform It is useless to note the decisions under the old Code

(b) *Sithamalli* v *Ramanathan* (1924) 46 Mad

ORDER XII.

Admissions.

O. 12, rr. 1-4.

1. [R. S. C., O. 32, r. 1.] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party

Notice of admission of case

Different kinds of admissions—The object of obtaining admissions is to do away with the necessity of proving facts that are admitted [see Evidence Act 1872 s 58] Admissions are of three kinds namely,—

I Admissions in pleading—

(1) *actual* that is those contained in the pleadings (O 7, r 5), or in answer to interrogatories (O 11, r 22)

(2) *constructive*, that is those which are merely the consequence of the form of pleading adopted (O 8, rr 3 4 5)

II Admissions by agreement

III Admissions by notice

Admissions by notice are dealt with in this Order

The importance of admission consists in the fact that either party may, *at any stage of the suit* move for judgment on the admissions made by the other side (r 6)

2. [R. S. C., O. 32, r. 2, S. 128] Either party may call upon the other party to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense

Notice to admit documents

Admissions between co-defendants—Admissions between co-defendants to which the plaintiff is not a party cannot be entered as evidence against the plaintiff (*h*)

3. [*New* R S C., O 32, r 3] A notice to admit documents shall be in Form No 9 in Appendix C, with such variations as circumstances may require

Form of Notice

4. [*New* R. S C., O 32, r. 4] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the

Notice to admit facts

(*h*) *Dodds* v *Tuke* (1884) 25 C D 617

O. 12, rr. 4-6.

purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Form of admissions

5. [*New.* R. S. C., O 32, r. 5.] A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

Judgment on admissions

6. [*New.* R. S. C., O. 32, r. 6.]. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Scope of the rule.—This rule is new. It is a reproduction of O 32, r 6, of the English Rules It enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side Either party may, by availing himself of this rule, get rid of so much of the suit as to which there is no controversy (i) The rule, however, is permissive, it does not preclude a party, who does not avail himself of it and proceeds to trial in the ordinary way, from relying at the trial on the admissions made by the opposite party (j)

"The Court may make such order or give such judgment as the Court may think just."—A judgment on admissions is not a matter of right, but is in the discretion of the Court If a case involves questions which cannot be conveniently disposed of on a motion under this rule, the Court may, in the exercise of its discretion, refuse the motion (k)

(i) *Thorp* v *Holdsworth* (1876) 3 C D 637, 640

(j) *Tildesley* v *Harper* (1877) 7 C D 403

(k) *Mellor* v *Sidebottom* (1877) 5 C D 342, *Pe Wright, Kirke* v *North* [1895] 2 Ch 747 750, *Galstaun* v *E D Sassoon & Co, Ld* (1923) 27 Cal W. N 783, 82 I C 348, (24) A C 100

There is no hard and fast rule that where the defendant admits part of the plaintiff's claim and denies the rest of the claim, the Court should, if it gives judgment under this rule for the plaintiff as to the portion of the claim admitted by the defendant, refuse to allow the plaintiff to proceed with the suit as to the remainder of his claim. If there is a clear and unambiguous admission by the defendant as to part of the plaintiff's claim, the Court has jurisdiction to enter judgment as to that part of the plaintiff's claim, and it is in its discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admissions made in Court, whether it should allow the plaintiff to proceed to prove the remainder of his claim (*l*). *A* sues *B* for Rs 6,800. *B* admits that only Rs 4,500 are due, and alleges as to the rest of *A*'s claim that it was in respect of goods as to which there was a separate arrangement between the parties. The issue as to the balance of *A*'s claim being an issue independent of the other part of the claim, the Court may pass judgment for *A* for Rs 4,500, and give leave to *A* to prove his claim to the balance. It is clear that even if the issue as to the balance of *A*'s claim were decided in *B*'s favour, it would not, having regard to *B*'s admission, reduce *A*'s claim below Rs 4,500 (*m*).

In the *United Telephone Co* v *Donohoe* (*n*), the plaintiffs sued the defendant for infringement of a patent, claiming injunction and damages. The defendant admitted ten instances of infringement, but denied he had committed any others. The plaintiffs thereupon moved for judgment upon the admissions in the pleadings. In the Court of first instance the Vice Chancellor granted an injunction against infringement by the defendant of the plaintiff's patent, but he refused an enquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damages, but that it must be limited to the instances of infringement admitted, and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein. Referring to this case, Sanderson, C J, said in the Calcutta case cited above (*o*) that the question whether the Judge, who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court.

Admissions on pleadings.—Under this rule either party may move for judgment upon admissions of fact made on the pleadings or otherwise. Admissions in pleadings are either actual or constructive. Acutal admissions consist of facts *expressly* admitted either in pleadings or in answer to interrogatories [O 11, r 22]. The patent case cited in the preceding paragraph is an instance of actual admissions. Constructive admissions, on the other hand, are admissions which are *inferred or implied* from pleadings as a consequence of the form of pleading adopted [O 8, rr 3, 4, 5]. Constructive admissions usually arise where a defendant has not specifically dealt with some allegation of fact in the plaint of which he does not admit the truth [O 8, r 3]; for as we have seen, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the written statement, will be taken to be admitted except as against persons under disability [O 8, r 5]. Constructive admissions also arise where a defendant denies an allegation of fact in the plaint evasively and does not answer the point of substance [O 8, r 4].

(*l*) *Premsuk Das* v *Udairam* (1918) 45 Cal 138, 144, 44 I C 233; *Andrews* v *The Patriotic Assurance Co of Ireland* (1886) L R 18 Ir 115.

(*m*) *Premsuk Das* v *Udairam* (1918) 45 Cal 138, 44 I C 233.

(*n*) (1886) 31 C D 399.

(*o*) *Premsuk Das* v *Udairam* (1918) 45 Cal 138, 44 I C 233.

Illustrations

O. 12, r. 6.

1 *A* alleging that he and *B* having agreed to carry on certain business in partnership, draft articles of partnership were prepared and approved by *B*, and that they both thereupon proceeded with the partnership undertaking sues *B* for a declaration that he and *B* were partners and claims that the partnership may be dissolved *B* in his written statement admits that he agreed to enter into partnership as alleged, but adds that "terms of the arrangement between himself and the plaintiff were *not definitely agreed upon* as alleged" This is an evasive denial of the fact of partnership (O 8, r 4), and it will therefore be *construed* as an admission by *B* of the partnership *A* is therefore entitled under this rule to a decree for dissolution of partnership, without adducing any evidence to prove the partnership But though the written statement will be construed as an admission of the *fact* of partnership it will not be construed as an admission of the *terms* of the partnership *B* may therefore claim an inquiry by the decree as to the terms of the arrangement of partnership, and if such inquiry is claimed, the Court will direct it by its decree (*p*)

2 A defendant by his written statement, simply "puts the plaintiff to proof of the several allegations in the plaint' The denial not being specific (O 8, r 3), the defendant will be deemed to have admitted the facts alleged in the plaint (O 8, r 5), so as to entitle the plaintiff to a decree under this rule without adducing any evidence in support of his case (*q*)

In applying the present rule in India, it is to be noted that, where a plaintiff applies for a decree upon *constructive admissions* in a written statement, the Court may in its discretion refuse to pass the decree, if it thinks, in the special circumstances of the case that the defendant must not be held to have admitted facts not specifically denied in his written statement (*r*) See the proviso to r 5 of O 8, and notes thereto p 482

An order on admissions on the pleadings will not be made, unless the admissions are *clear and unequivocal* (*s*) Further, a plaintiff moving for judgment on admissions in the defendant's written statement must have a clear case, and the mere admission by the defendant of a right asserted by the plaintiff, but which has in fact *no existence in law*, is not sufficient to entitle the plaintiff to a judgment establishing his right (*t*)

Judgment upon admissions made otherwise than on pleadings—A judgment may be given under this rule not only upon admissions made on the pleadings, but upon admissions *otherwise* made The words ' or otherwise in this rule are not confined to admissions made under r 1 or r 4 of this Order, but are of general application, and justify the giving of an immediate judgment when an admission is made by letter of facts which show that the defendant has no defence to the action (*u*) A judgment may be given under this rule even upon a verbal admission where the same is clearly proved (*v*)

Orders which may be made under this rule—This rule "was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion It must, however, be such an admission of facts as would show that the plaintiff is clearly

Rutter also udhar ha v Eng) and

Glasgow Assurance Co (1891) 8 Times Rep 81 *Gilbert* v *Smith* (1876) 2 C D 686, *Galstaun* v *F D Sassoon & Co Ld* (1923) 27 Cal W N 783 82 I C 348 (24) A C 190

(*t*) *Chilton* v *Corporation of London* (1878) 7 C D 735

(*u*) *Ellis* v *Allen* [1914] 1 Ch 904

(*v*) *Re Beeny* [1894] 1 Ch 499 [order directing payment into Court]

O. 12, rr. 6, 7.

entitled to the order asked for whether it be in the nature of a decree, or a judgment, or anything else The rule was not meant to apply when there is any serious question of law to be argued But if there is an admission on the pleadings which clearly entitled the plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action ' (w) An order amounting to what is called a preliminary decree in this Code may appropriately be made under this rule upon a simple motion Where such an order was applied for under the corresponding English rule by a plaintiff in a suit for partition, and the defendant contended that that would be giving a *decree* to the plaintiff, and that the plaintiff should wait until the action was set down for trial, the Court held that the plaintiff was entitled to an order directing the usual inquiries upon the admissions of the defendant, and that he was not bound to wait (x) [O 20 r 18] Such orders have also been made in administration actions (y) [O 20, r 13] in actions for dissolution of partnership (z) [O 20, r 15], in actions for partnership accounts (a) [O 20, r 15], in actions for accounts between principal and agent (b) [O 20 r 16] and in actions for the execution of the trusts of a settlement (c)

Practice —Motions in England under the corresponding English rule are brought on upon an ordinary motion day after notice to the other side As to form of application, see Daniell s Ch Forms, 270 The practice in England is, when an order is made amounting to what is called a preliminary decree in this Code, to adjourn the further hearing of the case without requiring any further prior hearing, the words generally used in the order being " and without requiring any further prior hearing than this motion of the said cause, the further hearing of the said cause is adjourned (d) See Seton on Decrees Vol I, p 399 Form No 5

" At any stage '—A plaintiff may move for judgment upon admissions in the written statement *at any stage of the suit* and notwithstanding that he has joined issue on the defence (e)

Co-plaintiffs.—An application under this rule for an order against a defendant on admissions of fact must be made by all the plaintiffs and not merely by some of them If the application is made by some of the plaintiffs only it must be refused (f)

Withdrawal of admission —Where it is shown that an admission was made by mistake, the party may be allowed to amend his pleading under O 6 r 17 for the purpose of withdrawing it upon such terms as to the Court may appear just (g)

Appeal —An order rejecting an application for judgment on admission is a ' judgment within the meaning of cl 15 of the Letters Patent and is appealable (h)

Affidavit of signature

7. [*New.* R S C, O 32, r 7.] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required

(w) *Gilbert* v *Smith* (1876) 2 C D 686 688-689 per Mellh L J
(x) *Gilbert* v *Smith* (1876) 2 C D 686 *Burnell* v *Burnell* (1879) 11 C D 213
(y) *Re Barker Hetherington* v *Longrigg* (1878) 10 C D 162
(z) *Thorp* v *Holdsworth* (1876) 3 C D 637
(a) *Turquand* v *Wilson* (1875) 1 C D 85
(b) *Rumsey* v *Reade* (1876) 1 C D 643
[illegible]

O. 12, r. 8, 9.

8. [*New* R S C, O 32, r 8] Notice to produce documents shall be in Form No 12 in Appendix C, with such variations as circumstances may require An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served

Notice to produce documents

Notice to produce documents—It is always desirable when a document is in the possession or power of the opposite party to give him notice to produce the same for unless such notice is given secondary evidence of the document cannot be given see Indian Evidence Act 1872 s 65 cl (a) and s 66

9. [*New* R S C, O. 32, r 9] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice

Costs

See rr 2 and 8 above

ORDER XIII

Production, Impounding and Return of Documents

O 13, r. 1

1. [Ss 138, 140] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced

Documentary evidence to be produced at first hearing

(2) The Court shall receive the documents so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs

"Shall produce at the first hearing"—This rule does not exclude the discretion of the Court to receive documentary evidence at a subsequent stage of the proceedings (i) See r 2 below

Form of list of documents produced by Parties—See App H Form no 5

(i) *Imambandi* v *Mutsaddi* (1918) 45 I A 73 80-81 45 Cal 878 885-889 47 I C 513

O. 13, rr. 2-4.

2. [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

Effect of non production of documents

"Unless good cause is shown."—This rule has been enacted to prevent fraud by the late production of suspicious documents But no suspicion can attach to certified copies of public documents, such as records of Government or records of judicial proceedings Such copies therefore may be received in evidence though they have not been produced at the first hearing (j) The rule, however, is not confined to public documents only. The Court may, in its discretion, admit other documents also at a subsequent stage of the proceedings (k) See notes to r 1 above

Appeal.—The fact that further documentary evidence is admitted *after* the first hearing is not a good ground of appeal (l) Nor can an appellate Court reject evidence admitted by the Court of first instance simply on that ground (m)

3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents

Rejection of inadmissible documents.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given (n)

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is better to admit than to exclude the document (o)

4. [S. 141.] (1) Subject to the provisions of the next following sub rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely —

Endorsements on documents admitted in evidence

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(*c*) the date on which it was produced, and

(*d*) a statement of its having been so admitted ;

and the endorsement shall be signed or initialled by the Judge.

(j) *Ranchhod* v *Secretary of State* (1898) 22 Bom 173 *Talewar Singh* v *Bhagwan Das* (1908) 12 C W N 312
(k) See *Imambandi* v *Mutsaddi* (1918) 45 I A 73 81 45 Cal 878 899 47 I C 513
(l) *Goshain* v *Rickmunee* (1869) 12 W R P

C 32

O. 13, rr. 4, 5.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge

"Or initialled"—These words which occur after the word signed in sub rr (1) and (2), are new

"Shall be endorsed—The rule as to endorsement of documents admitted in evidence must be strictly followed In *Sadik Husain Khan* v *Hashim Ali Khan* (p) where some of the documents were not so endorsed the Judicial Committee said The r Lordships with a view of insi ting on the observance of the wholesome provisions of this rule will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not indorsed in the manner requ red Documents admitted on the record without making the endorsement prescribed by this rule cannot be regarded as being legally before the Court (q)

Endorsements on copies of admitted entries in books accounts and records

5. [S 141 A] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the persons producing it

Bankers' Books Evidence Act—See notes to O 7 r 17, p 479 above

(p) (1916) 43 I A [illegible] 237 38 All 6?7 664 36 I C 104

(q) *Secretary of State* v *Shrimati* (19?4) 5 Lah 227, 79 I C 74 (?4) A L 549

Stamp — A copy or extract from an entry in an account book filed under the provisions of this rule and rule 7, does not require any stamp (r)

Endorsements on documents rejected as inadmissible in evidence

6. [S 142] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge

"Or initialled"—These words are new

Recording of admitted and return of rejected documents

7. [S 142 A] (1) Every document which has been admitted in evidence, or a copy thereof *where a copy* has been substituted for the original under rule 5, shall form part of the record of the suit

(2) *Documents not admitted* in evidence shall not form part of the record and shall be returned to the persons respectively producing them

Court may order any document to be impounded

8. [S 143] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit

Return of admitted documents

9. [S 144] (1) Any person whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall unless the document is impounded under rule 8 be entitled to receive back the same,

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of

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(r) *Kastur v. Fakira* (1902) 26 Bom 5

O. 13, r. 9 11.

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

"Shall be entitled "—On an application being made by a party under this rule the documents are necessarily returned if the application is in the proper from the act of returning the documents is purely ministerial (s)

And undertakes to produce the original if required to do so "—These words are new

Court may send for papers from its own records or from other Courts

10. [S 137] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

Provisions as to documents applied to material objects

11. [S 145] The provisions herein contained as to documents shall, as far as may be, apply to all other material objects producible as evidence

(s) *Girjananda v The Emperor* (19 1) 26 Cal W N 660 66? 71 I C 666

ORDER XIV

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

O. 14, r. 1.

1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other

Framing of issues

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue

(4) Issues are of two kinds (*a*) issues of fact, (*b*) issues of law

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence

Of the framing of issues—The plaint and written statement in a suit are called *pleadings* [O 6 r 1] Section 58 of the Evidence Act enacts that no fact need be proved at the hearing which a party has *admitted* by his pleadings unless the Court requires proof thereof Admissions on pleadings may be either actual or constructive (*t*) [O 8 rr 3 4 5] *Issues* are to be framed in respect only of those facts which have been alleged by one party and either denied or not admitted by the other party (*u*) They must however be confined to *material* facts that is to points on which the right decision of the case depends The practice of raising issues which do not state the main questions in the suit but only various *subsidiary* matters of fact upon which there is not agreement between the parties is embarrassing and must be avoided (*v*) Where an issue though in terms covering the main question in the case does not sufficiently direct the attention of the parties to the main questions of fact necessary to be decided and a party may have been prevented from adducing evidence a fresh issue may be directed to try the principal question of fact (*w*)

(*t*) See *Apaji v Apa* (1902) 26 Bom 735 737
(*u*) See *Fateh Muhammad v Imam ud Din* (1920) 2 Lah L J 183 63 I C 108
(*v*) *West End Watch Co v Berna Watch Co* (1911) 35 Bom 425 10 I C 805
(*w*) *Oolagappa v Arbuthnot* (1875) 14 B L R 115 142 1 I A 268 316

O. 14, r. 1. "The duty of raising issues rests under the Code of Civil Procedure on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove (x) See also notes to O 8, r 5

Omission to frame issues—Where a material fact stated in the plaint is denied or is not admitted in the written statement, the Court must frame an issue on the fact denied What is the consequence if no issue is framed on the fact? The answer depends on the following considerations If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court, and the Court decides the point, *as if there was an issue framed on it*, the decision will not be set aside in appeal on the ground merely that no issue was framed on the fact The reason is that mere omission to frame an issue is not fatal to the trial of a suit (y) But if the point denied in the written statement is not tried at all, or where it is tried, it is tried imperfectly so as to cause failure of justice, the case will in appeal be remanded for a re trial after framing the necessary issue (z) In other words, omission to frame an issue is an *irregularity* which *may* or *may not* affect the disposal of a suit on the merits If it does the appellate Court should remand the case for a new trial to the lower Court after framing the necessary issue If it does not, the appellate Court should not remand the case (s 99) In *Mitna* v *Syud Fuzl* (a) their Lordships of the Privy Council said —

In this case the omission to raise the issues was brought before the notice of the appellate Court, the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret, that the Principal Sudder Ameen had omitted to settle the issues The [appellate] Court, however, nevertheless conceived that it was not under any positive obligation to remand the case but seeing that *the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence*, they thought it within their competence to affirm that decision without sending the case back for a re trial Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section [now O 41, r 25] of the Civil Procedure Code *Their Lordships think that, under all the circumstances of the case, substantial justice having been done*, there has not been that fatal mis trial of the cause which vitiates all the proceedings and renders a new trial necessary '

Delay in raising an issue.—In *Sayad Muhammad* v *Fatteh Muhammad* (b), their Lordships of the Privy Council said ' It does not quite appear at what period of the suit the question of the sound disposing mind of the Diwan was raised, nor is it very material except in one respect Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issue, and it may perhaps be not altogether immaterial to observe that the question of the capacity of the Diwan does not appear to have been prominently raised, at all events in the first instance Their Lordships are, however, of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter '

Wrong issue.—If the first Court frames and tries wrong issues, the appellate Court should lay down the proper issues, and remand the case for a new trial (c) It is,

(x) *Ganoo* v *Shri Dev Sidheswar* (1902) 26 Bom 360
(y) *Mitna* v *Syed Fuzl* (1870) 13 M I A 573 *Kalehekaleyana* v *Kachinjaya* (1869) 12 M I A 495 *Balmakund* v *Dalu* (1903) 25 All 498
(z) *Rewan* v *Jankee* (1866) 11 M I A 2.. See *Chandra Kunwar* v *Narpal Singh* (1907) 29 All 184 195, 34 I A 27 36
(a) (1870) 13 M I A 573 583
(b) (1894) 22 I A 4 44 Cal 325
(c) *Peer Chunder* v *Tarinee* (1869) 11 W. R 20

however, different where the first Court frames a wrong issue for decision but it appears from the judgment that there is a finding on the point which would have been raised if the correct issue had been framed In such a case the appellate Court may not remand the case (*d*)

Relief not founded on pleadings.—As a rule relief not founded on the pleading should not be granted But where the substantial matters which constitute the title of all the parties are touched though obscurely, in the issues and they have been fully put in evidence, and have formed the main subject of discussion in the Court, the Court may grant a relief though it may not be founded on the pleadings Thus in a case where the plaintiff and the defendant each claims to be exclusively entitled to certain lands, the Court may if the above conditions are satisfied declare each to be entitled to a moiety (*e*) Similarly the Court may in a suit for ejectment pass a decree for redemption (*f*) But if a case not alleged by the plaintiff in his pleading is disclosed in the evidence, the Court should not deal with it unless a specific issue is raised on it and the defendant is given an opportunity of meeting it (*g*)

Variance between pleading and proof— It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case which the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove (*h*) The above principal applies only to *cardinal* facts and *cardinal* issues, and not to subordinate facts and issues based thereon In applying that principle the whole of the circumstances must be taken into account and carefully scrutinized (*i*)

Issues of law and of fact

2 [**S. 146, 6th para**] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issue of fact until after the issues of law have been determined

"**Or any part thereof** —These words are new

Materials from which issues may be framed

3 [**S 147**] The Court may frame the issues from all or any of the following materials —

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties,

569
66) 11 M
ned (188')
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O. 14, rr. 3-5.

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit,

(c) the contents of documents produced by either party

Issues not to be inconsistent with pleadings—Issues whether raised from the allegations in the pleadings or from other materials should not be inconsistent with the pleadings (j) Thus if *A* sues *B* to set aside a document on the ground that it was *not executed* by him and that it is a forgery the Court should not raise an issue as to whether the document was *executed under coercion or undue influence* The latter issue pre supposes that the document was executed while the plaintiff s case as set up in the plaint is that it was *not executed* by him at all (k) But the plea that the document in suit was obtained by the defendant by fraud is not inconsistent with the plea that it was obtained by undue influence Therefore where fraud is pleaded in the plaint, and the plaintiff s counsel alleges at the hearing that the plaintiff was subjected to undue influence the Court may allow issues both as to fraud and undue influence (l)

Appeal—No appeal lies from an order refusing to frame an issue asked for by a party to a suit (m)

It was held by the High Court of Madras in one case that an appeal lies under cl 15 of the Letters Patent from an order made at the settlement of issues fixing a distant date for the hearing of the suit (n) But this decision has been disapproved in later cases (o)

4 [S 148] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process

Court may examine witnesses or documents before framing issues

5 [S 149] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed

Power to amend and strike out issues

(2) The Court may also, at any time before passing a decree, strike out any issue that appear to it to be wrongly framed or introduced

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pleas both of fraud and undue influence—a highly objectionable procedure indeed

(m) *Ebrahim* v *Fuckhrunnissa* (1879) 4 Cal 531 *Tuljaram* v *Alagappa* (1912) 35 Mad 1 8 I C 340

Sub-rule (1) —The first part of sub rule (1) leaves it to the discretion of the Court to amend the issues or frame additional issues as appears from the word "may," while the latter part makes it imperative on the Judge to amend the issues and frame additional issues as appears from the word "shall" (*p*)

May amend the issues or frame additional issues —A Judge *may*, under the first part of sub rule (1), amend an issue or frame an additional issue, even if the issue proposed to be added or amended relates to a matter not disclosed by the pleadings This, however, can only be done under special circumstances, when no injustice would be done to either party (*q*) It follows from this that a Judge should not frame any additional issue so as to make for either party a case which he had no intention of making for himself (*r*) Nor should he frame an additional issue so as to convert a suit or defence of one character into a suit or defence of a different and inconsistent character Thus if *A* sues *B* for *damages for wrongful occupation of his land*, treating *B* as a *trespasser*, he should not be allowed to raise an additional issue claiming *rent* of the land from *B*, treating him as his *tenant* (*s*) But if a suit is brought on a mortgage, and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution, but had put their names on the document on the acknowledgment by the executant of his signature, it is perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s 59 of the Transfer of Property Act though the invalidity of the deed is not set up as a defence in the written statement Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties (*t*) See notes to r 3 above, 'Issues not to be inconsistent with the pleadings"

At any time before passing the decree —An additional issue may be raised even after the close of the arguments on the case (*u*)

6 [S 150] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law may by agreement be stated in form of issues

(*a*) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,

(*b*) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or

O. 14, rr. 6, 7.

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

Compare O 36 r 1

Form —As to form of agreement for issues to be tried see App H, form No 1

Court if satisfied that agreement was executed in good faith may pronounce judgment

7 [S 151] Where the Court is satisfied, after making such inquiry as it deems proper,—

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement, and, upon the judgment so pronounced, a decree shall follow

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ORDER XV

Disposal of the Suit at the first hearing

1 [S 152] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment

Parties not at issue

2 [S 153] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants

One of several defendants not at issue

Admission of claim by one of several defendants —*A* sues *B* and *C* upon a promissory note jointly passed by them *B* appears and admits the claim and a decree is passed against him The decree against *B* is no bar to the further prosecution of the suit against *C* (r) See notes to O 1 r 6 Joint liability on a contract' p 379 above

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(r) *Dick v Dhanji* (1901) 25 Bom 378

O 15, rr 3, 4.

3. [S 154] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Parties at issue

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires

4. [S 155] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues

Failure to produce evidence

ORDER XVI

Summoning and Attendance of Witnesses

O. 1[illegible]

1. [S 159] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents

Summons to attend to give evidence or produce documents

Difference between the old section and the present [illegible] corresponds with s 159 C P C 1882 except as to the time [illegible] witness summons for which see next paragraph

O. 16, rr. 1, 2.

Time for application for witness-summons—Under s 159 of the Code of 1882, the application for summonses to witnesses was to be made *after* the writ of summons was delivered or sent for service on the defendant *and before* the day fixed in the summons for the appearance of the defendant Under the present rule, the application may be made *at any time after the institution of the suit*

Whether witness-summons can be refused—A party is entitled as of right to summonses to witnesses (w) So long as the application is made after the institution of the suit, the Court is bound to issue the summons It does not matter that the party had himself originally undertaken to bring his witnesses and has failed to do so (x) Nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal on the suit (y) The Court may in either of these cases refuse to *adjourn the hearing* for the attendance of the witnesses, but it has no power to refuse *to issue summonses* (z) The only case in which the Court has power to refuse to issue summonses is where the application is not made *bona fide*, as where a decree holder attaches property belonging to a *muth*, and, on the head of the *muth* objecting to the attachment, applies to summon him as his own witness with the sole object of putting pressure upon him, by requiring his personal attendance in Court, to relinquish his claim In such a case the Court may, in the exercise of its inherent power to prevent the abuse of its own process [s 151] refuse to issue the summons (a)

Remedy of party when witness-summons refused—Where a party applies for summonses to witnesses, but the application is refused, he cannot appeal from the *order of refusal* He must wait until the suit is disposed of, and if the decree in the suit goes against him, he may appeal from the *decree*, and set forth the refusal of the lower Court to issue summonses as a ground of objection in the memorandum of appeal (s 105) If the appellate Court finds that the refusal *has* injuriously affected the decision of the case, it may set aside the decree, and direct the lower Court to issue the summonses, but if it finds that the refusal has not injuriously affected the decision, it should not interfere with the decree (b) [see s 99]

Form of summons to witnesses.—See Schedule I, App B, No 13

Expenses of witness to be paid into Court on applying for summons

2. [S 160] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

Experts

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert,

(w) *Bai Kali* v *Alarakh* (1891) 15 Bom 86, *Saibai* v *Balkrishna* (1925) 27 Bom L R 471 87 I C 702 (25) A B 363

(x) *Pandurang* v *Keshavji* (1892) 6 Bom 742

(y) *Krishna* v *Protab Chunder* (1881) 7 Cal 560

(z) *Bhagwat* v *Debi* (1894) 16 All 218, *Kazi Ahmad* v *Kazi Mahamad* (1885) 9 Bom 308

(a) *Veerabadran* v *Nataraja* (1905) 28 Mad 28

(b) *Bhagwat* v *Debi* (1894) 16 All 218

allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Scale of expenses

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Sub rule (2) is new

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (3)]

Travelling and other expenses—A witness is entitled under this rule only to travelling expenses and other expenses of a similar nature, but he is not entitled to compensation for loss of time (c) The right to claim travelling expenses is not lost merely because the witness did not apply for them before giving his evidence The reason is that a witness is entitled to demand his travelling expenses at any time even after he has given his evidence (d) If a witness is summoned by the plaintiff, he is entitled to claim his travelling expenses from the plaintiff, though he may not be examined by the plaintiff, and is examined by the defendant as his witness (e) See also the undermentioned case (f)

Remedy of witness if travelling expenses not paid—The only remedy is by an application to the Court that heard the case, no separate suit will lie to recover such expenses (g)

Default on part of process server—Where a plaintiff pays into Court the process fee and the expenses of his witnesses, but the summons is not served owing to default on the part of the process server it is illegal to dismiss his suit for want of proof in the absence of the witnesses (h)

Tender of expenses to witness

3 [S 161] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

Procedure where insufficient sum paid in

4 [S 162.] (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable

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149 76 I C 3ɔ3

(g) *Dubois* v *Hurrish Chunder* (1866) 5 W R Ref 6

(h) *Moti Ram* v *Kishori Lal* (19?4) 6 Lah L J 418 8ɔ I C 3?1 (25) A L 296

O. 16, rr. 4-6.

property of the party obtaining the summons, or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid

Expenses of witnesses detained more than one day

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party, or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid

Sale of moveable property—Under this rule if the expenses are not deposited *only the moveable property of the defaulting party may be attached and sold but not* his immoveable property (i)

Time place and purpose of attendance to be specified in summons

5 [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes, and any particular document which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy

Where hearing postponed—When a witness attends Court in pursuance of a summons on the day specified in the summons but the case is not reached on that day *it is not necessary to issue a fresh summons He need only be warned that his attendance* will be required on the day to which the hearing may be postponed (j)

Summons to produce document

6 [S. 164] Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same

(i) *Md Warish* v *Lakaman* (1921) 26 Cal W N 877 70 I C 1-3

(j) *Subbarayalu* v *Chenchuramayya* (1901) 24 Mad 200

O 16, rr. 7-10

7 [S 165] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Power to require persons present in Court to give evidence or produce document

8 [S 166] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

Summons how served

9 [S. 167] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving summons

10 [S 168] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons

Procedure where witness fails to comply with summons

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein, and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding

O 16, rr. 10-12

the amount of the costs of attachment and of any fine which may be imposed under rule 12

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

Appeal—An appeal lies from an order under this rule for the attachment of property [O 43, r 1, cl (g)]

If witness appears attachment may be withdrawn

11 [S 169] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(*a*) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(*b*) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit

Procedure if witness fails to appear

12 [S 170] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment

Scope of the rule—R 11 applies to the case where the person served appears and satisfies the Court. The present rule applies to the case where the person does not appear or appears but fails to satisfy the Court (*k*)

Order releasing property from attachment—In a case under the Code of 1882 the Court accepted the fine and costs even after sale of the property attached and refused to confirm the sale the price realised at the sale being absurdly low The auction purchaser appealed from the order, but it was held that no appeal lay from the order (*l*)

(*k*) See *S b Kumari* v *Secretary of State* (1920) 31 Cal L J 363 55 I C 425

(*l*) *Bal i Prasad* v *Tej Singh* (1910) 33 All 68, 7 I C 100

If a similar case arises under the new Code, it will have to be considered in the light of rule 13 of this Order and of O 21, r 89 [which cannot apply unless the Crown is regarded as a decree holder] r 90 and r 92

13 [*New*] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment debtor

Mode of attachment

14 [S 171] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witness strangers to suit

15 [S 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place

Duty of persons summoned to give evidence or produce document

16 [S 173] (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison

Sub-rule (2) —This sub rule is new

O. 16, r. 17-20

Application of rules 10 to 13

17 [Ss 174 175] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16

Procedure where witness apprehended cannot give evidence or produce document

18 [S 174, 5th para] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison

No witness to be ordered to attend in person unless resident within certain limits

19 [S. 176] No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court house

See O 26 r 4

Consequence of refusal of party to give evidence when called on by Court

20 [S 177] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit

Appeal —An appeal lies from an order under this rule pronouncing judgment against a party [O 43 r 1 cl (h)]

21. [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable. **O. 16, r. 21.**

Rules as to witnesses to apply to parties summoned

Duty of suitors to give evidence on their own behalf.—In *Lal Kunwar v. Chiranji Lal* (m), their Lordships of the Privy Council severely condemned the practice followed in some parts of India of advocates omitting to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross examining their own client when called by the other side Referring to this practice, their Lordships said "It is a vicious practice, unworthy of a high toned or respectable system of advocacy It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud, falsehood, or chicane to baffle justice"

ORDER XVII.

Adjournments.

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit. **O. 17, r. 1.**

Court may grant time and adjourn hearing

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

May adjourn—This rule gives a discretion to the Court to grant time to the parties and to adjourn the hearing of a suit On the one hand, no adjournment should be granted if no sufficient cause is shown (n) On the other hand, the Court should not refuse an adjournment if sufficient cause is shown (o) What is sufficient cause is a question of fact in each case.

Payment of costs as a condition precedent—*A* sues *B* for damages At the hearing of the suit *B* applies for an adjournment The hearing is adjourned on the

(m) (1909) 32 All 104, 108 109, 37 I A 1, 4 5, 5 I C 549

(n) *Bindubashini v Secretary of State* (1924) 51 Cal 70 79 I C 745, (24) A C 774

(o) *Maharaja v Harihar* (1920) 5 Pat L J 300 57 I C 250

O. 17, r. 1, 2.

terms that *B* should pay Rs 50 to *A* for costs before the next hearing, and that if he fails to do so, his defence would be struck off and the suit would be proceeded with *ex parte*. *B* fails to pay the costs. The Court may proceed with the suit *ex parte* (*p*). But the Court cannot do so if payment of costs is not made a condition predecent to the hearing of *B*'s case (*q*)

Procedure if parties fail to appear on day fixed

2. [S. 157.] Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

"One of the modes directed by Order IX."—The effect of this rule is to assimilate the procedure in cases where there is default of appearance at an *adjourned* hearing with that in cases where there is such default at the *first* hearing. The result is that though a party may have appeared at the first hearing, but fails to appear at an adjourned hearing, the procedure laid down in Order 9 will apply, that is to say, where a *plaintiff* fails to appear at an adjourned hearing, the Court may make an order dismissing the suit under this rule and O 9, r 8, and the plaintiff may, if so advised, then apply under this rule and O 9, r 9, for an order to set the dismissal aside (*r*), and where a *defendant* fails to appear at an adjourned hearing the Court may pass a decree *ex parte* under this rule and O 9, r 6, and the defendant may, if so advised, then apply under this rule and O 9, r 13, for an order to set it aside (*s*). If both parties fail to appear at the hearing, the Court may make an order dismissing the suit under this rule and O 9, r 3, and the plaintiff may then, if so advised, either bring a fresh suit, or apply for an order to set the dismissal aside under this rule and O 9, r 4 (*t*)

After a decree has been passed, the Court has no jurisdiction to dismiss the suit under this rule and O 9, r 8, for plaintiff's default. The reason is that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal (*u*)

Or make such other order as it thinks fit.—It has been held by the High Court of Bombay that the words "*may* proceed" show that it is *not obligatory* on the Court to proceed in the manner directed by Order 9; rather, the Court should in each case exercise its *discretion* as to whether it should proceed under that Order or make some other order. It has thus been held that it is a bad exercise of discretion if an order is made dismissing the suit under this rule and O 9, r 8, when the plaintiff has at the first hearing made a case which, if uncontradicted, would entitle him to a decree, but neither he nor his pleader appears at an adjourned hearing. The Court should in such a case proceed to decide the case *on its merits*, and not dismiss it for *default of appearance* (*v*). On the other hand, it has been held by the High Court of Allahabad that the words "or make such other order as it thinks fit" do not empower the Court to dispose of the suit *on the merits*, but enable the Court merely to grant a *further adjournment*,

(*p*) *East Indian Railway Co* v *Jit Mal* (1925) 47 All 534 86 I C 862, (25) A A 280
(*q*) *Virabhadrappa* v *Chinnamma* (1898) 21 Mad 403
(*r*) [illegible]

and if the Court is not inclined to grant a further adjournment, the only course left open to the Court is, where the plaintiff does not appear, to dismiss the suit under this rule and O 9, r 8, and, where the defendant fails to appear, to pass an *ex parte* decree against him under this rule and O 9, r 6 (*w*) Where the Court refuses a further adjournment, and passes an order, but omits to state whether the order was made under this rule or r 3, it must be taken that the order was made under this rule (*x*)

" Adjourned " hearing.—It has been held by the High Court of Calcutta that the word "adjourned" in this rule refers to an adjournment *upon the application of parties* granted under r 1, and not an adjournment necessitated by the rules of the Court relating to the regulation of its own business (*y*)

" Fail to appear " —See notes to O 9, r 9, "Appearance," on p 498 above It cannot be said that a decree passed against a defendant is an *ex parte* decree within the meaning of O 9, r 6, where at an adjourned hearing of a part heard suit the plaintiff's case being closed, and the defendant's case being partially entered, the defendant's pleader applies for an adjournment, and on the application being refused he withdraws from the case, and a decree is passed against the defendant *on the merits* It is not open to the defendant in such a case to apply to have the decree set aside under this rule and O 9, r 13 (*z*)

Remedy —See notes to the next rule under the head " Remedy "

Court may proceed not withstanding either party fails to produce evidence etc

3 [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith

Scope of the rule.—The provisions of this rule do not apply unless—

(1) the hearing is adjourned *on the application of a party* to the suit, as distinguished from an adjournment by the Court *of its own motion* (*a*)

(2) the adjournment is granted to enable the party to produce his evidence, or to cause the attendance of his witnesses or to perform any *other act necessary to the further progress of the suit* and

(3) the party *fails* to perform any of the acts for which the adjournment was granted within the time allowed by the Court

Where *before* the hearing of a suit has commenced, the plaintiff fails to appear on an adjourned date, the Court should proceed under r 2, and not under this rule, that is, it should dismiss the suit under O 9, r 8, so as to give the plaintiff an opportunity of having the dismissal set aside under O 9, r 9 (*b*).

"Any other act."—*A* sues *B* to recover possession of certain lands. *B* contend that the suit is not properly valued The Court thereupon appoints a commissioner, on the application of *A*, to value the land and directs *A* to pay into Court Rs 100, being the commissioner s fee within a specified time If *A* fails to make the payment within

(*z*)
(*a*)
(*b*)

O. 17, r. 3. the prescribed time, the Court may proceed under this rule The payment of the commissioner's fee is an act necessary to the further progress of the suit within the meaning of this rule (c)

Procedure to be followed under this rule.—Rule 2 applies to cases where the hearing is adjourned, *no matter for what purpose*, and the parties or any of them *fail to appear* at the adjourned hearing The present rule contemplates cases where the hearing is adjourned at the instance of a party *for some one or other of the purposes specified in the rule*, and the party *fails to perform the specified act or acts* for which the adjournment was granted within the time allowed by the Court In such a case, the rule says, the Court *may* notwithstanding such default, proceed to *decide* the suit forthwith These words do not mean that the Court may dismiss the suit if the plaintiff is in default, or pass a decree against the defendant if the defendant is in default (d) What the words mean is that the Court may *further adjourn* the hearing, or, it may, without granting any further adjournment, *proceed to try the suit* and take such evidence as may be tendered by the parties and decide the suit on the merits (e) Thus where an adjournment is granted to the plaintiff to amend the plaint, but the plaintiff fails to amend the plaint, the Court should not dismiss the suit, but *decide* it on the merits (f) The word forthwith means without granting any further adjournment Contrast the words at once pronounce *judgment*" in O 15, r 4

Remedy.—Where a suit is disposed of under the first part of r 2 above, it is open to the party *aggrieved by the order to proceed under O 9, r 9 or O 9, r 13*, as the case may be [see notes to r 2 One of the modes directed by Order 9] But where a case is decided under the present rule, the decision amounts to a decree, and the remedy of the party aggrieved is by way of appeal (g) or by way of review (h) As to what points may be taken in appeal and what on the application for review, see the under mentioned case (i)

Case where default under this rule is coupled with default of appearance under rule 2.—If the hearing of a suit is adjourned on the application of the plaintiff to enable him to *produce his evidence*, and if on the date to which the hearing is adjourned the plaintiff *does not appear*, should the Court proceed under this rule or under rule 2? It has been held by the High Court of Allahabad that the Court should in such a case proceed under this rule (j) [In the Allahabad case there were sufficient materials to enable the Court to proceed to judgment] The High Court of Madras has held that the Court should in such a case proceed under rule 2 and dismiss the suit *for default of appearance* so that the plaintiff may have an opportunity to apply under O 9, r 9, to set aside the dismissal (k) This view is in accordance with the earlier decisions of the Calcutta and Bombay High Courts (l) In recent cases, however, the latter Courts have held that where an adjournment is granted at the instance of a party for any of the purposes stated in r 3, and either party fails to appear

(c) *Sdara* v *Tulshi* (1901) 23 All 462 *Ram* [illegible]

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(l) *Mariannissa* v *Ramkalpa* (1907) 34 Cal 235 *Shrimant Sagajirao* v *Smith* (1899) 20 Bom 736

at the adjourned hearing the Court should if there are materials enabling it to decide the suit act under this rule and not rule (2) (m) In a recent Bombay case the Court took a view similar to that taken by the Madras Court (n) If the Court does not do so and dismisses the suit for default in appearance then according to the Patna High Court the dismissal must be treated as one under r 2 of this Order (o) The High Court of Lahore has held that if there be no sufficient materials on the record to enable the Court to proceed to judgment as required by this rule the Court should proceed under r 2 above (p) but if there are sufficient materials it should proceed under this rule (q) And this seems to be the correct view **O. 17, r. 3.**

"To whom time has been granted —Where a party has paid the process fee for summoning witnesses but the witnesses are not served and the Court adjourns the hearing *to enable its officer to serve the summonses* the adjournment does not amount to granting of time within the meaning of this rule and the rule does not apply (r)

Execution proceedings —The provisions of this Order do not apply to execution proceedings (s)

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

O 18, r. 1.

Right to begin

1 [**S 179, Expln.**] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks in which case the defendant has the right to begin

Right to begin —The right to begin is to be determined by the rules of evidence As a general rule the party on whom the burden of proof rests should begin Sections 101 114 of the Indian Evidence Act I of 1872 deal with burden of proof Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side Thus if *A* sues *B* for the recovery of a piece of land of which *B* is in possession the burden of proof lies on *A* for if no evidence were given on either side *B* would be entitled to retain his possession

"Unless the defendant admits the facts alleged by the plaintiff '— Facts mean *all* material facts Thus where a defendant admits only *some* of the facts alleged by the plaintiff it does not give him the right to begin (t)

(m) *Enatulla* v *Jiban* (1914) 41 Cal 956 96 | (1919) Punj Rec no 150 p 395 5? I C ?9

O. 18, rr. 1-3.

"Preliminary issue raised by defendant that suit does not lie."—Where the defendant raises a preliminary issue that the suit is barred as *res judicata*, the defendant has the right to begin (u)

"Preliminary issue raised by respondent that appeal does not lie"—In such a case, according to the Bombay High Court, the appellant has the right to begin The decision was put on the ground of established practice in the Bombay High Court (v)

2 **[S. 179, 1st para., S. 180, 1st and 2nd paras]** (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove

Statement and production of evidence

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case

(3) The party beginning may then reply generally on the whole case

'The other party shall then state his case.'—Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff has closed his case, both the defendants should state their case before any evidence is given by either defendant (w)

Some of the defendants supporting plaintiff's case—Where there are several defendants and some of them support the plaintiff's case, the rule is that the plaintiff and such of the defendants as support his case, wholly or in part, must address the Court and call their evidence in the first place and then 'the other party', that is, the other defendants, should address the Court and call their evidence (x)

Hearing of arguments—If in a case where a party, having an opportunity of addressing the Court, does not do so the judgment cannot be set aside because it was delivered without hearing arguments (y)

3 **[S. 180, 3rd para]** Where there are several issues the burden of proving some of which lies on the other party, the party beginning, may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence,

Evidence where several issues

(u) *Fatmabai* v *Aishabai* (1888) 12 Bom 454
(v) *Rustomji* v *Kessowji* (1884) 8 Bom 287 289
(w) Re *Dukshina* (190) 29 Cal 32
(x) *Haji Bibi* v *Sultan Mahomed Khan* (1908) 32 Bom 599
(y) *Harji* v *Devi Ditta* (1923) 4 Lah 364 71 I C 398 (24) A L 107

and the other party may then reply specially on the evidence so produced by the party beginning, but the party beginning will then be entitled to reply generally on the whole case

O. 18, rr. 3 5.

4 [S 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge

Witness to be examined in open Court

Evidence of witnesses—It is the duty of the Judge to examine every witness tendered unless it appears clearly that the object of summoning a large number of witnesses is to obstruct or delay justice (z) It is not right for the Judge to select a certain number of witnesses and send away the rest because he thinks that they would only prove the same facts as those already deposed to (a) or because he is satisfied on the evidence already recorded (b) If he does so the appellate Court may remand the case with a direction to him to take the evidence of the witnesses tendered by the party but not examined by the Judge (c)

Evidence shall be taken "in open Court"—As to the examination of witnesses on commission see Order 26 below

5 [S 182] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it

How evidence shall be taken in appealable cases

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (O 49 r 3, cl (4))

Presence of parties—Where evidence is taken in the absence of the opposite party it will be rejected by the Court of appeal if the objection to the reception of the evidence was taken before the Court trying the suit If no such objection was taken the appellate Court would not remand the case especially if the other evidence in the case is sufficient to support the decision of the lower Court (d) See Indian Evidence Act, 1872 s 167

"Shall be read over"—There is a difference of opinion whether if the deposition is not read over to the witness as required by this rule or interpreted to him as required by r 6 below it is admissible in evidence in trials for perjury and forgery it being held in some cases that the deposition is not admissible in evidence (e) while in others

O. 18, rr. 5-8.

that it is (f) The former view proceeds on the ground that the deposition not being read over or interpreted to the witness, it does not prove itself under s 80 of the Evidence Act, 1872, and that it cannot be proved in any other way having regard to the provisions of s 91 of that Act The latter view proceeds on the ground that though the deposition does not in such a case prove itself under s 80 of the Evidence Act, it may be proved in any other way, e g, by the Judge who took it down, and that s 91 of the Act is no bar to such proof

Where a witness understands English and the deposition is read over by him instead of being read over to him, it is a substantial compliance with the rule (g)

Signature of witness—The rule does not require a witness to sign his evidence (h)

Signature of Judge.—A prosecution for perjury cannot be sustained if the deposition is not signed by the Judge The signing of the deposition by the Judge is made essential to the application of s 80 of the Evidence Act, 1872, by the section itself (i)

When deposition to be interpreted

6 [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

"Shall be interpreted."—See notes to r 5 above "Shall be read over"

Evidence under section 138

7. [*New*]. Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Memorandum when evidence not taken down by Judge

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

(f) *Elahi Baksh* v *Emperor* (1918) 45 Cal 825, 45 I C 258 *Bogra* v *Emperor* (1911) 34 Mad 141 7 I C 414, *Meango* v *Bariah* (1918) Mad W N 237

(g) *Ramesh Chandra* v *Emperor* (1919) 46 Cal 895, 901, 50 I C 660

(h) 46 Cal 895, 900, 50 I C 660, *supra*

(i) *Empress* v *Mayadeb* (1881) 6 Cal 762

O. 18, rr. 9-13.

When evidence may be taken in English

9 [S. 185] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Any particular question and answer may be taken down

10 [S. 186] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Questions objected to and allowed by Court

11 [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3, cl (4)]

Where no objection is taken—If evidence has been admitted *without objection* in the Court of first instance it must not be rejected by the appellate Court (j)

Remarks on demeanour of witnesses

12 [S 188] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination

Remarks on demeanour of witnesses—See the undermentioned case (k)

Memorandum of evidence in unappealable cases

13 [S 189] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length, but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he

(j) *Ch n naj v D nkur* (1897) 11 Bom 3 0 *Bothna ain v Onrao* (18 0) 13 M I A 519 5 9

(k) *Emperor v C Dunn* (19) 44 All 401 66 I C 1005 ( ) A A 107 [a criminal case]

O. 18, rr. 13-16.

deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3, cl (4)]

Judge unable to make such memorandum to record reasons of his inability

14 [S 190] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from his dictation in open Court

(2) Every memorandum so made shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Power to deal with evidence taken before another Judge

15 [S 191] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it

(2) The provisions of sub rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Power to examine witness immediately

16 [S 192] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3 cl (4)]

Notice.—For form of notice see App H form No 6

17. [S 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit

Court may recall and examine witness

18. [*New*] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise

Power of Court to inspect

View by Judge—This rule does not entitle a Judge to put a view *in the place* of evidence Thus in an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff s the conclusion of the Judge on a view by him of the two articles—such as to rival omnibuses that the defendant s article is calculated *to deceive* is *not sufficient by itself to support an injunction* The Judge must be satisfied by *independent evidence* that there is at least a reasonable probability of deception (*l*)

ORDER XIX

Affidavits

1. [S 194] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable

Power to order any point to be proved by affidavit

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

(*l*) *London General Omnibus Co Ld* v *Lovell* [1901] 1 Ch 135

O. 19, rr. 2, 3.

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent

Power to order attendance of deponent for cross examination

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs

3. [S 196] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated

Matters to which affidavits shall be confined

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same

Grounds of belief —The grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief (*m*)

ORDER XX

Judgment and Decree

O 20, r. 1.

1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders

Judgment when pronounced

See s 33 above

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3 cl (5)]

Evidence taken before another Judge —As a general rule judgment must be given upon evidence taken by the Judge before himself and not upon evidence taken before another person (*n*) In the three following cases the Judge may give judgment

(*m*) *Padmabati* v *Pasuk Lal* (1910) 37 Cal 259 6 I C 666

(*n*) *Naranbhai* v *Naroshankar* (1867) 4 B H C A C 95

upon evidence recorded by some other Judge or person :—

(1) Under O 18, r 15, when the Judge who has heard the evidence is prevented by death, transfer or other cause from concluding the trial of the suit

(2) Under O 26, r 1, where the evidence has been taken by a *commissioner* of a witness residing *within* the jurisdiction who is exempted under the Code from attending the Court or is unable to attend from sickness or infirmity

(3) Under O 26, r 4, where the evidence has been taken by a *commissioner* of a witness residing *beyond* the jurisdiction and of other persons specified in the rule

Notice to parties —Notice should be given in the manner prescribed by s 140 A judgment delivered without notice to parties is not a judgment pronounced within the meaning of this rule (*o*)

Judgment not pronounced —A judgment not pronounced in Court does not operate as a judgment it operates only as minutes or memoranda made by the Judge who wrote it (*p*) The posting of a notice on the notice board of the Court announcing the result of a case is not a sufficient compliance with this rule (*q*)

Non-compliance with rules 1, 2 and 3 —Where a judgment is not pronounced, dated, or signed in conformity with the requirements of the Code it constitutes a mere irregularity within the meaning of s 99, it affords no ground for reversal in appeal of the decree based on it (*r*)

Power to pronounce judgment written by judge's predecessor

2 [S 199.] A Judge may pronounce a judgment written but not pronounced by his predecessor

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3 cl (5)]

Written by his predecessor —It does not matter that the judgment was written by the Judge's predecessor after he had taken leave or left the judicial post which he occupied when he heard the case or after he had been transferred (*s*) The fact that the transferred officer himself pronounces the judgment does not make any difference (*t*)

May pronounce —The word may leaves a Judge the option to pronounce a judgment according to this own view of the case though it may be different from the judgment written by his predecessor who heard the case (*u*)

Non-compliance with rules 1, 2 and 3 —See notes to r 1 above under the same head

Judgment to be signed

3 [S 202.] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed,

(*o*) *Kharak* v *Lachman* (1925) 47 All 33? 86 I C 869 (25) A A ?93

(*p*) *Mahomed Ali* v *Asadunissa* (1867) 9 W R 1 [F B]

O. 20, rr. 3, 4.

shall not afterwards be altered or added to, save as provided by section 152 or on review.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r. 3, cl (5)]

Shall not afterwards be altered.—A decree cannot be altered by a Court even with the consent of parties except in the modes prescribed by this rule (r) Where a District Judge delivered a judgment in open Court, but suspended the issue of the decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (w) Where it is held by one Judge that the Court fee paid on a plaint is sufficient, his successor has no power to alter that judgment and hold that it is insufficient (x)

Amendment.—S 152 enables the Court to correct clerical or arithmetical mistakes or errors arising from accidental slips in judgments, decrees or orders See p 359 above

Review.—See s 114 and O 47, r 1

Non-Compliance with rules 1, 2 and 3—See notes to r 1 above under the same head.

Judgments of Small Cause Courts

4 [S 203] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of other Courts

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Judgments of *Small Cause* Court.—Where the judgment of a Small Cause Court, after setting out a number of issues, merely stated, "I find all the issues for the plaintiff," it was held that it was not a sufficient compliance with the provisions of sub rule (1) and the judgment was set aide and the case remanded to the lower Court for being disposed of according to law (y).

Court invested with *Small Cause* Court powers.—A Court invested with Small Cause Court powers is governed by sub r (1) and not sub r (2) (z)

Unintelligible Judgment.—Where a judgment is unintelligible, the appellate Court may set it aside and remand the case to the lower Court for the recording of judgment according to law after hearing afresh the arguments of pleaders (a).

[illegible]

(22) A L 122

O. 20, rr. 5-7.

5 [S 204] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit

Court to state its decision on each issue

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Object of Judgment —The proper object of a judgment is to support by the most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived That object is defeated by the Judge elaborately recording the fluctuations of his mind from day to day in reference to the witnesses the evidence, and the arguments It is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties *e g*, when it finds a particular signature to be a forgery which both sides admit to be genuine (*b*)

6 [**S 206, 1st and 2nd paras., S. 221**] (1) The decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3, cl (5)]

How decrees should be drawn up —Decrees should be drawn up in such a way as to make them self contained and capable of execution without referring to any other document (c)

Sub-rule (3)—This sub rule corresponds to s 221 of the Code of 1882

Power to amend decree —See s 152 and notes thereto

7 [S 205] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree

Date of decree

(*b*) *Sri Raghunadha* v *Sri Brozo Kishore* (1876) 3 I A 154

(*c*) *Joylard* v *Mahomed* (1882) 8 Cal 975

O. 20, rr. 7-11.

Chartered High Court.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r. 3, cl (5)]

Date of decree—The period of limitation for an appeal from a judgment runs from the date on which it is pronounced, and not from the date on which it is written and signed (*d*)

Procedure where Judge has vacated office before signing decree

8 [*New.*] Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor, or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Decree for recovery of immoveable property

9. [S. 207.] Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries by numbers in a record of settlement of survey, the decree shall specify such boundaries or numbers.

Decree for possession of land.—A decree for possession of land carries with it possession of account books and other papers relating to the management of the land (*e*).

Decree for delivery of moveable property

10. [S. 208] Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property—This rule contemplates suits for the recovery of *specific* moveable property, referred in arts 48 and 49 of the Limitation Act (*f*)

Decree may direct payment by instalments

11. [S 210.] (1) Where, and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest,

(*d*) *Sitaramal* v *Lachmanram* (1922) 1 Pat 771, 75 I C 879 (23) A P 129

(*e*) *Sri Pharani* v *Detrao* (1887) 11 Bom 485

(*f*) *Murugesa* v *Jotharam* (1899) 22 Mad 478

notwithstanding anything contained in the contract under which the money is payable. **O. 20, r. 11.**

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Order, after decree, for payment by instalments

Old section.—This rule corresponds with s 210 of the Code of 1882 except in the following particulars.—

(1) The words "shall be postponed" in sub rules (1) and (2) are new

(2) The words "notwithstanding anything contained in the contract under which the money is payable" in sub rule (1) are also new; see notes below under those words

"In so far as the decree is for the payment of money."—This rule applies to money decrees only and not to mortgage decrees (*g*)

"Notwithstanding anything contained in the contract under which the money is payable."—These words are new. They have been added to override the ruling of the Bombay High Court in *Ragho* v *Dipchand* (*h*) In that case it was held that if *A* executed a bond to *B* payable by instalments, with a proviso that if default was made in payment of any one of the instalments, the whole amount should become due and payable forthwith, and if on default being made by *A* in payment of any one instalment *B* sued *A* to recover the whole of the balance due, the Court could not, at the time of passing the decree, order the amount decreed to be paid by instalments, for to do so it was said, would be inconsistent with the terms of the bond Under the present rule the Court has the power to order payment of the amount decreed by instalments, notwithstanding the terms of the bond

Interest.—Where a decree is made payable by instalments under sub rule (1), the *rate of interest is in the discretion of the Court* (*i*)

Sub-rule (2).—Sub rule (1) applies where an application is made by the judgment debtor *at the time of passing* the decree Sub rule (2) applies where an application is made *after* the passing of the decree In the latter case, no order can be made for payment by instalments, nor can payment be postponed except with the consent of the decree holder

Taking of security.—Immoveable property given by the judgment debtor as security under sub rule (2) may be realized by the decree holder in execution and he is not obliged to have recourse to a regular suit for the purpose O 34, r. 14, does not apply to a charge created by the decree itself or one created by the act of parties subsequent to the decree It applies only to a charge existing prior to the decree (*j*)

(*g*) *Shankarapa* v *Danapa* (1881) 5 Bom 604
(*h*) (1880) 4 Bom 96
(*i*) *Carvalho* v *Nurbibi* (1879) 3 Bom 202
(*j*) *Official Receiver* v *Nagaratna* (1925) 49 Mad L J 643 92 I C 497, (26) A M 194

O. 20, rr. 11, 12.

Limitation —An application by a judgment debtor under this rule for payment of the amount of a decree by instalments should be made within 6 months from the date of the decree [Limitation Act, 1908, Sch I, art 175]

Execution of decree payable by instalments —In the case of an *ordinary* instalment decree, that is, a decree payable by instalments on certain specified dates, the period of limitation as regards each instalment (which is 3 years) runs from the date on which the instalment becomes due (*k*) In the case of a decree payable by instalments, *with a proviso* that if default be made in payment of any one of the instalments the whole of the decretal amount should become due and recoverable in execution, limitation runs from the date of the *first* default (*l*) But if the judgment debtor pays the over due instalment and the decree holder accepts it without protest, limitation will run from the date of the *next* default Strictly speaking the *first* default being waived it ceases to be a default *in law* and the *next* default then becomes the *first* default (*m*)

Decree for possession and mesne profits

12 [Ss 211, 212] (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree—

(*a*) for the possession of the property,

(*b*) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,

(*c*) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(*i*) the delivery of possession to the decree holder,

(*ii*) the relinquishment of possession by the judgment-debtor with notice to the decree holder through the Court, or

(*iii*) the expiration of three years from the date of the decree,

whichever event first occurs

(2) Where an inquiry is directed under clause (*b*) or clause (*c*) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

Inquiry as to mesne profits no longer a proceeding in execution —The provisions relating to mesne profits in the Code of 1882 were contained in ss. 211, 212 and 244 Those provisions have now been re cast The definition of mesne profits is relegated to s 2, cl 12 At the same time an important alteration has been made as regards procedure in determining the amount of mesne profits Under the Code of

(*k*) Limitation Act 1908 Sch 1 art 182 (7)
(*l*) *Sitab Chand* v *Hyder* (1897) 24 Cal 281
(*m*) *Kashiram* v *Pandu* (1903) 27 Bom 1 *Mon Mohun* v *Durga* (1888) 15 Cal 502 *Budhu Lal* v *Tekkhab* (1889) 11 All 49 *Karalaralasa* v *Karanam* (1881) 3 Mad 256

1882, the amount of mesne profits was to be determined in execution proceedings (*n*) [see C P C, 1882, s 244, cls. (a) and (b] Under the present rule the amount must be determined by the decree and not in execution And inquiry as to mesne profits under this rule is not a proceeding in execution, but a proceeding in continuation of the original suit (*o*)

Decree for possession and mesne profits—In a suit for the recovery of possession of immovable property, the plaintiff may claim mense profits which have accrued due during a period *prior to the institution of the suit* He may also claim mesne profits which have accrued due *subsequent to the institution of the suit* [see s 11, p 60, para (2)] The decree to be passed in such a case will now be as follows —

1 That the defendant do put the plaintiff in *possession* of the property specified in the schedule annexed to the decree [To this extent the decree is *final*]

2 That the defendant do pay to the plaintiff the sum of Rs with interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due *prior to the institution of the suit* [To this extent the decree is *final*.]

Or [where accounts have to be taken of the mesne profits]—

That an inquiry be made as to the amount of mesne profits which have accrued due *prior to the institution of the suit* [To this extent the decree is *preliminary* see s 2, Expln]

3 That an inquiry be made as to the amount of mesne profits *from the institution of the suit* until the point of time specified in cl (c) of the section [To this extent the decree is *preliminary*] See Sch I, App D, Form No 23

The inquiry referred to above may be held before an officer of the Court appointed in that behalf, who must report to the Court the result of the inquiry After that is done, and the parties have been heard on the report, a *final* decree will be passed in respect of the mesne profits It has been held that where a preliminary decree under this rule has either intentionally or inadvertently omitted to direct an enquiry into future mesne profits the Court has no power to direct such enquiry by its final decree (*p*)

Joint Hindu family—This rule applies not only where the plaintiff sues for possession of the *whole* of an immovable property, but also where he sues for possession of a *portion* thereof But the portion must be a *specified* portion, that is, a portion to the profits whereof the plaintiff is *exclusively* entitled Hence the provisions of this rule do not apply to a suit for partition by a member of a joint Hindu family, for until partition no member is entitled to a *specific* share of the property (*q*) This does not mean that a member of a joint Hindu family is not entitled in a suit for partition to claim his share of the rents and profits of the joint property from which he may have been wrongfully excluded He is entitled to such share (*r*) but the Court in deciding upon his claim is to be guided, not by the provisions of this rule, but by the rules of Hindu law relating to partition (*s*) See notes to r 18 below

Procedure—Where an appellate Court disagreeing with the lower Court finds that the plaintiff is entitled to possession, it should pass a preliminary decree for possession and direct an inquiry as to mesne profits it is not proper merely to remand the case to the lower Court for disposal (*t*)

(*n*) *Kedarnath* v *Anant Prasad* (1925) 52 I A 189 4 Pat 507 88 I C 492 ('25) A I C 117

(*o*) *Rudra Pratap* v *Sarda* (1925) 47 All 543 87 I C 322 ('25) A A 593

(*p*) *Ghulsaam* v *Ahamadsa* (1919) 42 Mad 296 297 51 I C 140

(*q*) *Pirthi Pal* v *Jowahir* (1887) 14 Cal 493 503 14 I A 37 *Shankar* v *Hardeo* (1889) 16 Cal 397 405 16 I A 71

(*r*) *Bhirrao* v *Sitaram* (1895) 19 Bom 532

(*s*) *Ramasamy* v *Subramania* (1923) 46 Mad 47 74 I C 804 ('23) A M 147

(*t*) *Subba* v *Krishnamachari* (1922) 45 Mad 449 68 I C 869 ('22) A M 112

O. 20, r. 12.

Mesne profits—The expression "mesne profits" is defined in s 2, cl (12), as meaning those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession

The claim for mesne profits is virtually a claim for damages Hence there is no rigid rule for determining the amount of mesne profits, and the amount must be assessed in every case by a proper exercise of judicial discretion (*u*) "Mesne profits are in the nature of damages which the Court may mould according to the justice of the case" Hence in calculating mesne profits, payments of revenue and cesses made by the defendant should be deducted (*v*) But the costs of collecting the rents or profits should not be allowed to the defendant, unless he entered on the property in the exercise of a *bona fide* claim of right (*w*)

Wrongful possession by the defendant is the very essence of a claim for mesne profits and the very foundation of a decree therefor Hence a defendant cannot be rendered liable for mesne profits during the period the property was under attachment by virtue of an order made under s 146 of the Criminal Procedure Code (*x*) Where a defendant has been in wrongful possession for a certain period, and is subsequently *dispossessed* by a third party, the defendant can only be charged with mesne profits for the period for which he was in wrongful possession He cannot be charged with mesne profits that have accrued due subsequently to his dispossession, though the person who dispossessed him may not have done anything to recover the rents or profits (*y*) The reason is that if a defendant is dispossessed by a third party, he cannot be said to have even impliedly received the profits, nor could he with ordinary or extraordinary diligence have received them But where a defendant who has been in wrongful possession *abandons* the land without giving notice to the plaintiff, he will be held liable for mesne profits (*z*)

Where a person buys immoveable property from a defendant pending a suit against him for recovery of the property and for mesne profits, and a decree is eventually passed against the defendant, the plaintiff is entitled to recover mesne profits not only from the defendant, but from the purchaser *pendente lite* (*a*) The purchaser, however, is liable only from the date on which he enters into possession (*b*)

Interest forming part of mesne profits—It will be seen from the definition of mesne profits, that mesne profits consist of *two* items, namely, (1) profits of the property and (2) *interest* on such profits Hence if a decree awards mesne profits, but says nothing about interest, that is, interest on the profits, it must be construed as *including not only the profits, but the interest on such profits It has been so held* by their Lordships of the Privy Council in *Grish Chunder* v *Shoshi Shikareswar* (*c*) If the profits were payable from month to month, the interest thereon would be calculated month by month, and if they were payable from year to year, the interest would

(*u*) *Grish Chunder* v *Shoshi* (1900) 27 Cal 951, 27 I A 110 *Surja* v *Reid* (1902) 29 Cal 622, *Shambhu Nath* v *Satish Chandra* (1920) 23 Cal W N 369 66 I C 49

(*v*) *Dakhina* v *Saroda* (1894) 21 Cal 142 20 I A. 160 *Kachar* v *Oghadbhai* (1893) 17 Bom 35

(*w*) *Dungar* v *Jai Ram* (1902) 24 All 376 *Lakshina* v *Saroda* (1893) 20 I A 160 21 Cal 142, *Raja Sashikanta* v *Raja Sarat Chandra* (1921) 34 Cal L J 415 430 70 I C 6, *Altaf Ali* v *Lalji Mal* (1877) 1 All 518

(*x*) *Chhagmull* v *Amanat Ali* (1924) 51 Cal 853 858-860 83 I C 520, (24) A C 1010 *Indurjeet Singh* v *Radhey Singh* (1874) 21 W R 269 [Receiver in possession] *Kali Charan* v *Ashutosh* (1917) 25 Cal L J 140 38 I C 660

(*y*) *Abbas* v *Fasih ud-din* (1897) 24 Cal 413 [illegible] 10 Cal [illegible] *Noresh* [illegible] I 166, [illegible]

(*c*) (1900) 27 Cal 951 967, 27 I A 110 *Narpat Singh* v *Har Gayan* (1903) 25 All 275 *Lalta Prasad* v *Sri Ganeshji* (1922) 44 All 570 67 I C 219 (22) A A 117

be calculated year by year Calculating in this manner, the interest on the profits must be allowed up to the date of ascertainment of the aggregate amount of mesne profits (*d*), but in no case should it be allowed for a period longer than three years from the date of the decree (*e*) The reason is that the item of interest we are now considering forms an integral part of "mesne profits," and since mesne profits cannot be allowed for a period longer than three years from the date of the decree, the interest forming part thereof cannot also be allowed *for a longer period It must not, however, be supposed* that because 'mesne profits' are defined as meaning "profits" *plus* "interest on such profits," therefore the Court must always allow interest on such profits Mesne profits, as stated above, are in the nature of damages which the Court *may* award according to the justice of the case And since the item of interest now under consideration forms part of mesne profits, it is equally in the discretion of the Court whether to allow such interest or not (*f*) For the same reason, the Court may, while allowing the claim for interest, direct the interest to be calculated not month by month or year by year, but in a manner less advantageous to the plaintiff The mode of calculation indicated in the beginning of this paragraph applies only to those cases where the decree is silent as to the mode in which interest is to be calculated.

After the aggregate amount of mesne profits is ascertained, the plaintiff may apply to the Court for a final decree for the amount so ascertained, and for interest on that amount, and the Court may award interest at such rate as it thinks fit (*g*) The date from which interest may be allowed is the date of the preliminary decree, and not the date on which the amount is ascertained (*h*) The rate of interest allowed is usually 6 per cent (*i*) See s 34

Application for ascertaining future mesne profits—The right to apply for ascertainment of *future* mesne profits arises not on the date of the decree directing an inquiry as to such profits, but on the happening of any one of the three events specified in sub rule (1) (c) (*j*)

Notice through Court—The notice of relinquishment of possession should be given through the Court But where a judgment debtor gives such notice *directly* to the decree holder, and the latter does not say that he will not accept the notice unless it was sent to him through the Court, he is not entitled to mesne profits after the date of the notice (*k*)

"Three years from the date of the decree"—Decree means a decree capable of execution Thus if an appeal is preferred from a decree for mesne profits, and the decree is confirmed in appeal, the period of three years is to be computed from the date of the appellate decree (*l*) Similarly, if a decree for mesne profits is taken to the Privy Council and is confirmed, the period of three years is to be counted from the date of the King's order in Council (*m*) See notes to s 36, "What decree may be executed."

When a decree awards possession with mesne profits to be ascertained in an inquiry, but specifies no time down to which mesne profits are to be computed, the decree cannot be construed as giving mesne profits for a period longer than three years from the date

(*d*) Narpat v Har Gayan (1903) 25 All 275, [illegible]

(*k*) Ijatulla Bhuyan v Chandra Mohun (1908) 12 [illegible]

O. 20, r. 12, 13.

of the decree (n) The plaintiff therefore is not entitled to mesne profits for more than three years from the date of the decree, though possession was not delivered to him until after the expiration of the three years note the words "whichever event first occurs" in sub r (1), cl (c) But in no case can mesne profits be awarded to the plaintiff for any period subsequent to an offer by the defendant to restore him possession (o)

Limitation—As regards mesne profits accrued due *prior* to the institution of the suit, the defendant is only liable for the mesne profits accrued due during the *three years before the date of the suit* A claim for mesne profits during a period preceding the three years next before the date of the suit is barred under the Limitation Act, 1908 sch I, art 109 (p)

Burden of proof—The burden of proving the amount of mesne profits *actually received* is on the person who has received them, while that of proving the amount of profit that *might with ordinary diligence have been received* is on the person claiming them (q)

Order supplementing preliminary decree—Where after the passing of a preliminary decree for accounts, an order is made determining the period and the mode of accounting the order itself is a preliminary decree and appealable as such (r) See notes to s. 97, Two preliminary decrees, on p 266 above

Appeal.—Under the Code of 1882 [s 244] the amount of mesne profits was determined in execution proceedings and the decision determining mesne profits, being an order in execution proceedings was appealable as a decree Under the present rule the amount of mesne profits is to be determined by the decree itself and a party aggrieved by the determination as to mesne profits may now prefer an appeal from the decree (s)

Mesne profits and jurisdiction.—See notes to s 6 on p 15 above, and notes to s 38, 'Rule IV,' on p 120 above

Res judicata—Where after the passing of a preliminary decree under this rule, the plaintiff applies in execution for ascertaining the mesne profits, wrongly believing that such profits are to be ascertained in execution proceedings, and the application is dismissed, the dismissal does not operate as *res judicata* so as to bar a subsequent application *in the suit* for ascertaining the mesne profits (t)

Decree in administration suit.

13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(n) *Uttamram* v *Kishordas* (1900) 24 Bom 149 *Narayan* v *Sono* (1900) 24 Bom 345, *Trailokya Nath* v *Jogendra Nath* (1908) 35 Cal 1017

(o) *Raja Sashi kanta* v *Raja Sarat Chandra* (1911) 31 Cal L J 415 [illegible]

(p) *Krishnanand* v *Partab Narain* (1884) 10 Cal 785, 11 I A 88 *Abbas* v *Fasih ud din* (1897) 24 Cal 413

(q) *Ramakka* v *Nagasam* (1924) 47 Mad 800 [illegible] *Mohammad Abdul* [illegible] *Gaffur* v *Muhammad Samsuddin* (1924) 47 Mad L J 730 [illegible] 139 [illegible] A M 297

(r) *Raja Peary Mohan* v *Manohar* (1923) 27 Cal [illegible]

O. 20, r. 13.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Courts in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent, and all persons, who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code

Judicature Act, 1875, s 10 —The words of the present rule are almost the same as s 10 of the Judicature Act of 1875

Administration-suit —Where a person dies leaving a will it is his executor that administers his estate and where he dies intestate it is his administrator that administers his estate The administration of the estate of a deceased person consists, first in paying his funeral expenses, next his debts, and then the legacies under his will (if any) The residue of his estate is then to be divided among the *residuary legatees* under his will, or amongst his heirs if he has left no will In an administration suit, it is the Court that takes upon itself to a large extent the functions of an executor or administrator, and administers the estate of the deceased

The following persons may maintain an administration-suit :—

(1) A *creditor* of the deceased when his claim is not paid off by the legal representatives of the deceased But though a creditor may bring an administration suit, he must bring the suit on behalf of *himself and the other creditors* (*u*)

(2) A *legatee* whether specific or pecuniary where the legacy is not paid to him by the legal representatives of the deceased

(3) Next-of kin of the deceased for their share in the estate of the deceased

(4) An *executor or administrator* when there are disputes amongst the legatees or next of kin as to the amount of the property left by the deceased and the amount to which the legatees or next of kin are entitled (*Walker and Elgood on Administration Actions*, pp 24 31)

Forms of plaint in an administration-suit.—See Sch I App A, forms Nos 41 to 43

Preliminary decree —This rule provides that in an administration suit, the Court shall pass a *preliminary decree* before passing the final decree, directing accounts to be taken and enquiries to be made For forms of preliminary decree see Sch I, App D, forms Nos 17 and 19 and for forms of final decree see forms Nos 18 and 20

Insolvent estate —Sub rule (2) provides that *when it appears in an administration suit* that the estate of the deceased is insolvent the rules laid down in the

(u) *Worraker v Pryer* (1876) 2 C D 109

O. 20, rr. 13, 14.

Presidency Towns Insolvency Act, 1909, as to Presidency Towns, and in the Provincial Insolvency Act, 1920, as to the rest of British India, shall apply so far as regards (1) the respective rights of secured and unsecured creditors, (2) debts and liabilities proveable, and (3) the valuation of annuities and future and contingent liabilities Note that this sub rule does not apply *all* the rules and principles of bankruptcy to insolvent estates, but only the rules in respect of the three heads enumerated above (t)

Rights of secured creditors under the Presidency-Towns Insolvency Act—See s 48 of the Act, and cls 9 to 17 of Sch II to the Act

Rights of secured creditors under the Provincial Insolvency Act—See S 47 of the Act

Debts and liabilities proveable under the Presidency-Towns Insolvency Act—See sections 46 and 48 and Schedule II of the Presidency Towns Insolvency Act, 1909

Debts and liabilities proveable under the Provincial Insolvency Act—See ss 45 and 46 of the Act

Suit to recover assets improperly paid by Administrator-General—This section does not apply to a suit brought by a creditor of the deceased against the Administrator General (to whom letters of administration have been granted) and against other creditors of the deceased to recover assets alleged to have been improperly paid by the Administrator General to such creditors in priority to the plaintiff (v)

Decree in pre emption suit

14. [S. 214.] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(*a*) specify a day on or before which the purchase-money shall be so paid and

(*b*) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (*a*), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(*a*) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall

(t) *Re D Epineuil* (1882) 20 C D 217, *Narajee v Adm Gen of Madras* (1915) 38 Mad 500, 503, 22 I C 566

(v) *Narajee v Adm-Gen of Madras* (1915) 38 Mad 500, 22 I C 566

O. 20, r. 14.

take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre emptor failing to comply with the said provisions would, but for such default, have taken effect, and,

(*b*) if and so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Difference between the old section and the present rule.—This rule corresponds with s 214, C P C, 1882, except in the following particulars —

1 The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new See notes below under those words

2 Sub rule (2) is also new See notes below "Sub rule (2) Rival pre emptors"

Pre-emption —*The right of pre emption can only be exercised in respect of immorable* property *A* and *B*, both Mahomedans, are co sharers of a house If *B* sells his share to *X* for Rs 500, *A* is entitled to pre empt *B* s share on payment of Rs 500, that is to say, *A* as co sharer may require *B* to sell his share to him *in preference* to *X*. The same rule applies if *A* and *B* are owners of *adjoining* houses If *B* refuses to sell his share to *A*, *A* may institute a suit for pre emption against *B* and *X* It has been held by the High Court of Allahabad, that if the sale by *B* to *X* has been completed before the date of the suit, *B* having no longer any interest in the property, he is not a necessary party to the suit (*x*) If a decree is passed for *A*, and if he has not paid the amount of purchase money into Court, the decree should specify a day on or before which the pur chase money should be paid into Court If the amount is paid within the time fixed by the Court, *A* will be entitled to enter into possession of *B*'s share But if he fails to pay the amount within that time, he will lose the benefit of the decree (*y*) If a decree is passed for *A* with costs, *A* may pay into Court the purchase money *less* the costs (*z*) As to extension of time for payment see notes below

It is important to note that the right of pre emption is a *personal* right This gives rise to the following consequences —

1 If the pre emptor, that is the person entitled to pre emption, transfers the right to a third party, the right is lost and the transferee cannot maintain a suit for pre emption (*a*)

2 It is not settled whether if the pre emptor dies during the pendency of the suit for pre emption, the right, according to Sunni Mahomedan Law, is extinguished (*b*), or whether it survives to his heirs or to his legal repre sentatives (*c*)

3 If the pre emptor transfers the right of pre emption *during the pendency* of the suit for pre emption, the right of pre emption is lost, and the suit will be dismissed And even if he obtains a decree, and transfers the *decree*, the right of pre emption will be lost, and the Court will not allow execution of the decree But if he obtains a decree, and transfers not the *decree*,

(*x*) [illegible]
( ) [illegible]
(*z*) [illegible]

250 (22) A L 142
(*a*) *Rajjo* v *Lalman* (1883) 5 All 180 183
(*b*) *Muhammad* v *Nia nat un Nissa* (1898) 20 All 88
(*c*) *Sayyad Jiad* v *Sitaram* (1912) 36 Bom 144 12 I C 720 *Sitaram* v *Syed Sirajul* (1917) 42 Bom 630 653 42 I C 32

O 20, r. 14.

but the *property* which is the subject of pre emption the right of pre emption is not lost and *he* may execute the decree, though execution will not be allowed to the *transferee* (*d*)

"Whose title thereto shall be deemed to have accrued from the date of such payment."—These words have been added to make it clear that the title to the property vests in the plaintiff on payment of the purchase money, and that it is not necessary to complete the title that there should be any document in writing and registered as required by the Transfer of Property Act in the case of a sale of immovable property The object of adding these words into the rule is to supersede the opinion expressed by the High Court of Madras that, since the passing of the Transfer of Property Act, the title to a pre empted property could not vest in the plaintiff without an instrument of transfer (*e*)

The plaintiff's title is complete from the date of payment, though he has not obtained possession by reason of the defendant being himself in possession in another capacity (*f*) or by reason of a holder of a usufructuary mortgage being in possession (*g*)

The title accrues on payment of the purchase money and not from the date of the sale (*h*)

Mesne profits—Upon a pre emption decree the property and the right to mesne profits therefrom vest in the pre emptor only from the date when he pays the amount of the purchase price *finally* decreed until that time the original purchaser retains possession and is entitled to the rents and profits (*i*)

Extension of time for payment into Court—It has been held by the High Court of Allahabad that a plaintiff who has obtained a decree can appeal within the period of limitation, whether or not he has made the payment on or before the day fixed (*j*) But the mere filing of an appeal does not operate as an extension of the time for payment (*k*) The appellate Court, however, may if it thinks fit extend the time for payment (*l*) When the appellate Court has in the exercise of its judicial discretion extended the time for payment the High Court will not interfere in second appeal (*m*) See notes to s 148, Act directed or allowed by a decree of Court, on p 351 above

Sub-rule (2): Rival pre-emptors.—Sub-r (2) prescribes the form of decree to be passed when there are rival pre emptors It is based upon the undermentioned rulings of the Allahabad High Court (*n*)

Pre-emption under the Mahomedan law—The Mahomedan law is the only system prevalent in British India which provides substantive rules relating to the right of pre emption in a systematic form (*o*) The Mahomedan law of pre emption is applied by the Courts of British India to Mahomedans except in the Madras Presidency, the Punjab and Oudh In the Madras Presidency, the right of pre emption is not recognised by the Courts even as between Mahomedans, on the ground that it places a restriction upon liberty of transfer of property and is therefore opposed to equity and good conscience (*p*) Pre emption in the Punjab is regulated by the Punjab Laws Act, 1872, and in Oudh by the Oudh Laws Act 1876 See Mulla's ' Principles of Mahomedan Law, 8th Ed pp 1[illegible]2 154

(*d*) *Ram Sahai* v *Gaya* (188[illegible]) 7 All 107

(*e*) *[illegible]masami* v *Chinnan* (1901) 24 Mad 449 463

(*f*) *Sita Ram* v *Madho* (1914) 1[illegible] All L J 521 [illegible]3 I C 876

(*g*) *[illegible] Singh* v *Jodha Singh* (1923) 45 All 4[illegible]2 73 I C 646 ([illegible]23) A A [illegible]07

(*h*) *Nad[illegible]* v *[illegible]* (19[illegible]) 5 Lah 4[illegible]6 85 I C 18[illegible] [illegible]

(*i*) *Deokinandan* v *Sri Ram* (1890) 12 All 234 *Deonandan* v *Ramdhari* (1917) 44 I A 80 44 Cal 67[illegible] 39 I C 9[illegible]

(*j*) *Kodai Singh* v *Jaisri Singh* (1891) 13 All 376 *Wazir Khan* v *Fazle Khan* (1894) 16 All 1[illegible]6 *Jaggar Nath* v *Jokhu* (1896) 19 All 223 2[illegible]6

[illegible]

Pre-emption by custom—The Sunni Mahomedan law of pre emption applies by custom to Hindus in Behar (*q*) and Gujarat (*r*)

Pre-emption by contract—A right of pre emption is occasionally given in mortgage deeds to the mortgagee, so that in case of a sale of the equity of redemption by the mortgagor, the mortgagee shall have the refusal of the property, and in such a case the price may or may not be fixed beforehand (*s*)

Vendor's title in pre-emption suit—A pre emptor is not entitled in a pre emption suit to put the vendor on proof of his title to the property which he purports to sell The reason is that the principle of pre emption is substitution A pre emptor is therefore bound to take the title which the vendee was ready to take (*t*).

15. [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership

Preliminary decree directing accounts to be taken.—The preliminary decree directing accounts to be taken should always contain a declaration of the rights of the parties, and it should be in form No 21, Sch I, App D (*u*) After the accounts are taken, a final decree is passed directing that the partnership assets be applied, first, in payment of the partnership debts, next, in payment of the costs of the suit, and lastly, in payment to each partner of the amount found due to him on taking the accounts. If it turns out on taking the accounts that there is a balance due to the defendant, a decree may be passed in favour of the defendant (*v*) See Sch I, App D, form No 22

Appeal—A preliminary decree in a suit for the dissolution of a partnership or the taking of partnership accounts is appealable under s 96 But the appeal must be filed within the period prescribed by the law of limitation If no appeal is preferred within the period of limitation, the party aggrieved by such decree is precluded by virtue of the provisions of s 97 from disputing its correctness in an appeal from the final decree See s 97 and notes thereto

Letters Patent appeal—Where a commissioner appointed to take accounts applies to the Court for directions, and an order is made giving the directions, the order being merely one regulating procedure, and not being one giving a final adjudication of the rights of the parties, is not a "judgment" within the meaning of cl 13 of the Letters Patent for the High Court of Rangoon, and is not appealable as such (*w*)

(*q*) *Fakir* v *Emambuksh* (1863) B L R Sup Vol 35, *Jadu Lal* v *Janki Koer* (1903) 35 Cal 575

(*r*) *Gordhandas* v *Prankor* (1869) 6 B H C A C 263

(*s*) *Orby* v *Trigg* (1721) 9 Modern 2

(*t*) *Sabolra* v. *Bajeshwari* (1915) 37 All 509, I C 1000

(*u*) *Thirukumaresa* v *Subbaraya* (1897) 20 Mad 313

O 20, rr. 16-18.

16 [S 215A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not herein before provided for, where it is necessary in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such account to be taken as it thinks fit

Decree in suit for account between principal and agent

Shall pass a preliminary decree directing accounts —The provisions of this rule must be strictly followed If the fact of agency is established it is the duty of the Court to direct an account to be taken of the dealing between the parties before passing the final decree It is not proper to pass a final decree at the hearing (x) But the Court must be satisfied before directing an inquiry into accounts that the taking of accounts is necessary (y)

Whether decree can be passed in favour of defendant —In a suit for account between principal and agent a decree can, if necessary be passed in favour of the defendant on payment of the necessary Court fee (z) See notes to r 19 below

Appeal —See notes to r 15 above Appeal '

Stay of proceedings.—Where an appeal is pending against a preliminary decree the Appellate Court may make an order under O 41 r 5 staying the inquiry into accounts pending the hearing of the appeal (a) See notes to O 41, r 5 Stay of proceedings under a decree

17 [New] The Court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

Special directions as to accounts

18 [New] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

Decree in suit for partition of property or separate possession of a share therein

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to

(x) *Raghunath* v *Ganpat* (19[illegible]) [illegible] All 374
(y) *Bharat Chandra* v *Kailas Chandra* (19[illegible]) 5[illegible] Cal 766 [illegible] (25) A [illegible]
(z) *Ramanand* v *Jagat* (1910) 3[illegible] All 5[illegible] [illegible] 163
(a) See *Balakishen* v *Kaugnu* (1904) 31 Cal 7[illegible]

O. 20, rr. 18, 19.

be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required

Sub-rule (1)—The passing of a decree under sub rule (1) does not render the Court *functus officio* the Court may therefore grant an interim injunction restraining a party from interfering with the receiver s possession (*b*) See s 54 and notes thereto

"Giving such further directions"—These words are wide enough to include a direction for an inquiry into future mesne profits But under the rule the direction should be in the preliminary decree If no such direction is included in the preliminary decree, the Court has no power to direct an inquiry into future mesne profits by its final decree (*c*)

Joint Hindu family—In a suit for partition of joint Hindu family property, the property not being of the kind referred to in sub rule (1) a preliminary decree may be passed as provided by sub rule (2) (*d*) See notes to r 12 above, "Joint Hindu family"

19. [S. 216.] (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party

Decree when set off is allowed

(2) Any decree passed in a suit in which a set off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set off had been claimed

Appeal from decree relating to set off

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise

Appeal from decree relating to set-off—This rule corresponds with s 216 of the Code of 1882 except as regards the provision as to the Court to which an appeal should lie from a decree passed in a suit in which a set off is claimed The second paragraph of s 216 ran as follows —

'The decree of the Court with respect to any sum awarded to the defendant shall have the same effect and be subject to the same rules in respect of appeal or other

(*b*) *Shankar Das* v *Behari Lal* (1925) 6 Lah 447 89 I C 93 (1925) A L 445 reversing (1925) 7 Lah L J 4 86 I C 244 (1925) A L 357
(*c*) *Ghulusam* v *Ahamadsa* (1919) 42 Mad 296 51 I C 140
(*d*) See *Mussammat Lorandi* v *Md Nihal* (1925) 6 Lah 1 4 (1925) A L 403

O 20, rr. 19, 20.

wise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff

The present rule provides that appeals from decrees relating to set off shall lie to the Courts to which appeals in respect of the original claim would lie

Decree for defendant where set-off is claimed —It has been held by the Allahabad High Court that in a suit by a principal against his agent for accounts the Court can grant a decree to the agent for the amount found due to him on the taking of the accounts between the parties (e) The ground on which the decision is based is that a suit for accounts against an agent necessarily involves an undertaking by the principal to pay to the agent any sum that may be found due to him Commenting upon this case Phillips J in a Madras case (f) said This I think is taking a somewhat large view of the intention of a plaintiff in such a suit for it could rarely be his intention to bring a suit in order that a decree might be given against him See notes to O 8 r 6 The amount claimed to be set off must be legally recoverable on p 487 above

20. [S. 217] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense

Certified copies of judgment and decree to be furnished

ORDER XXI

Execution of Decrees and Orders

O. 21.

Of execution of decrees in general —The present order is the longest Order in the whole Schedule It consists of 103 rules It is proposed here to give a summary of these rules and at the same time an idea of the different kinds of execution and the procedure in respect thereof The references to the rules given in this summary are to the rules of the present Order

A obtains a decree against *B* for Rs 5 000 Here *A* is the decree holder, *B* is the judgment debtor and Rs 5 000 is the judgment debt If *B* fails to satisfy the decree *A* may apply for execution of the decree against *B*'s person or against his property, or both (r 30) But the Court may, in its discretion refuse execution *at the same time* against the person and property of the judgment debtor (r 21) Execution against the person of the judgment-debtor consists in arresting him and detaining him in jail Execution against the property of a judgment debtor consists in attaching and selling his property and paying the decree holder the amount of the judgment debt out of the sale proceeds

Application for execution —All proceedings in execution are to be commenced by an application for execution (r 10) The application for execution must be in writing [r 11 (2)] and should contain the particulars set forth in rr 11 (2) to 14 The only exception is where the decree is for the payment of money and the judgment debtor

(e) *Parmanand* v *Jagat Narain* (1910) 32 All 525 I C 163 See also *Ram Charan* v *Bulaqi* (1924) 22 All L J 733, 83 I C 800 (24) A A 854

(f) *Narasimha* v *Zamindar of Tiruvur* (1919) 42 Mad 873 879-88) 53 I C 234 [the defendant's claim for excess was in this case time barred]

is in the precincts of the Court when the decree is passed in which case the Court may order immediate execution on the *oral* application of the decree holder at the time of passing the decree [r 11 (1)] If the application complies with the requirements of rr 11 (2) to 14, the Court will direct execution to issue (r 24) If it does not the Court may reject it, or may require it to be amended (r 17) If the application is rejected the decree holder may present another application properly framed

Who may apply for execution —The application for execution is to be made by the decree holder If the decree is transferred by the decree holder, the transferee may apply for execution (r 16) If the decree has been passed jointly in favour of more persons than one any one of such persons may apply for execution (r 15) If the decree holder is dead his legal representative may apply for execution (s 146)

Against whom execution may be applied for —If the judgment debtor is living execution is to be applied for against him If he is dead execution may be applied for against his legal representative In the latter case the decree may not be executed against the person of the legal representative but only against the property of the judgment debtor which has come to the hands of the legal representative and has not been duly disposed of by him (s 50) As to notice to the legal representative see the next paragraph

Notice before ordering execution —The law does not require any notice to be issued to the party against whom execution is applied for except in the following two cases —

1 Where the application for execution is made more than one year after the date of the decree or more than one year after the date of the last order made on any previous application for execution
2 Where execution is applied for against the legal representative of the judgment debtor

In the two cases mentioned above the Code provides that the Court executing the decree *shall* issue a notice (r 22) There is one case in which it is *discretionary* with the Court to issue a notice before making an order for execution and that is where the decree is for *money* and execution is sought against the *person* of the judgment debtor (r 37)

Execution against person of judgment-debtor —

(i) *Decrees for the payment of money* —*A* obtains a decree against *B* for Rs 5 000 and costs [This is a money decree] *B* fails to pay the amount of the judgment debt *A* applies for execution of the decree against *B*'s *person* [r 11 (2) cl (j)] The decree being a money decree the Court *may* instead of issuing a warrant for *B*'s arrest, issue a notice calling upon him to appear and show cause why he should not be committed to the civil prison in execution of the decree (r 37) If *B* appears and satisfies the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause, and if there are no circumstances which disentitle *B* to the indulgence of the Court, the Court may make an order disallowing *A*'s application for *B*'s arrest and detention [r 40 (1)] If *B* does not appear the Court should issue a warrant for his arrest if the decree holder so desires (r 37) If *B* appears but fails to show cause to the satisfaction of the Court the Court should cause him to be arrested [r 40 (5)]

Where a warrant of arrest is issued it should be executed by an officer of the Court appointed in that behalf (rr 24 25) If when the officer goes to execute the warrant *B* offers payment of the amount of the judgment debt (which must always be specified in the warrant) the officer should receive the payment and the warrant should not then be executed (r 38) But if no payment is made, *B* should be arrested and brought before the Court as soon as practicable (s 55) If no notice was issued prior to his arrest under r 37, it is open to *B* to show that he is unable to pay the amount of the decree from poverty or any other sufficient cause [r 40 (1)] If the Court is satisfied that *B* is

21. unable to pay the amount of the decree from poverty or any other sufficient cause, and if there are no other circumstances which would disentitle *B* to the indulgence of the Court, the Court will make an order directing *B* s release [r 40 (1)] Otherwise the Court will make an order committing *B* to prison [r 40 (5)] The prison is to be a civil prison (s 55), and the term of detention in prison is six months if the amount of the decree exceeds Rs 50, and six weeks if the amount of the decree does not exceed Rs 50 (s 58) If while in prison, *B* pays the amount mentioned in the warrant to the officer in charge of the prison, or the decree is otherwise fully satisfied, as by attachment and sale of his property, he will be released from detention (s 58) Otherwise, he will be detained in prison until expiration of the term of his detention unless the decree holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment debtor A judgment debtor released from detention in any one of the above cases cannot be re arrested in execution of the same decree [s 58 (2)] though the judgment debt has remained unpaid This does not mean that his liability to pay the debt ceases, for the decree still subsists, and *A* may yet execute the decree against *B* s *property* [s 58 (2)] though not against his *person*

No woman can be arrested in execution of a money decree [s 56]

(ii) *Decrees other than those for the payment of money* —A judgment debtor may be arrested and imprisoned not only in execution of a decree for the payment of money, but also in execution of other decrees (rr 31, 32, 33) The procedure to be followed in these cases is as follows If the application is in proper form, the Court will issue a warrant for arrest of the judgment debtor (r 24) If the judgment debtor is arrested in execution of the warrant, he must be brought before the Court ' as soon as practicable' (s 55) The Court will then make an order committing him to the civil prison If, while in jail the decree is fully satisfied, he will be released from detention [s 58 (1)] Otherwise he will be detained in prison until expiration of the term of his detention, unless the decree holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment debtor as provided by r 39

Execution against property of judgment-debtor.—This subject may be considered under two heads, namely, (1) attachment, and (2) sale We shall first state the rules relating to attachment, and then the rules governing sale, for attachment precedes sale Attachment is levied and the sale of the property attached is effected by an officer of the Court under a warrant issued from the Court

Before considering the rules relating to attachment and sale, it is to be observed that there are certain kinds of property which are not liable to attachment or sale in execution of a decree These are described in s 60 Subject thereto all saleable property which belongs to the judgment debtor, or over which he has a disposing power which he may exercise for his own benefit, is liable to attachment and sale in execution of a decree against him (s 60)

I Attachment —Attachable property belonging to a judgment debtor may be divided into two classes (1) movable, and (2) immovable

As to attachment of movable property —See rr 43 to 53

Attachment of immovable property —If the property be immovable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such transfer or charge The order is to be proclaimed at some place on or adjacent to the property, and a copy of the order is to be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house (r 54)

Where an attachment has been made, any private transfer of the property attached whether it be movable or immovable, is void as against all claims enforceable under the attachment (r 64)

If any claim be preferred to any property attached in execution of a decree by any *person other than a party to the suit*, the procedure prescribed by rr 58 to 63 is to be followed If any questions arise in the course of execution proceedings between *the parties to the suit*, or their representatives, they are to be dealt with under s 47

If during the pendency of the attachment the judgment debtor satisfies the decree through the Court, the attachment will be deemed to be withdrawn (r 55) Otherwise the Court will order the property to be sold (r 64) If the property attached is current coin or currency notes, the Court may direct the same to be paid to the decree holder in satisfaction of his decree (r 56), for coin or currency notes do not require to be sold

II Sale of attached property—If the property attached be movable property which is subject to speedy and natural decay, the same may be sold at once (r 43) Every sale in execution of a decree should be conducted by an officer of the Court except where the property to be sold is a negotiable instrument or a share in a corporation, which the Court may order to be sold through a broker (r 76)

After the property is attached, the first step to be taken by the Court towards the sale thereof, whether the property be movable or immovable, is to cause a proclamation of the intended sale to be made, stating the time and place of sale, and specifying the property to be sold, the revenue (if any) assessed upon the property, the encumbrances (if any) to which it is liable, the amount for the recovery of which the sale is ordered and such other particulars as the Court considers material for a purchaser to know in order to judge of the nature and value of the property (r 66) No sale should take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which a copy of the proclamation has been affixed on the Court house of the Judge ordering the sale, unless the judgment debtor consents in writing to the sale being held at an earlier date (r 68) The Court may, in its discretion, adjourn the sale from time to time, but if the sale is adjourned for longer period than seven days, a fresh proclamation should be made, unless the judgment debtor consents to waive it (r 69)

It is important to note that no holder of a decree, in execution of which property is sold can bid for or purchase the property without the express permission of the Court (r 72)

Irregularity in the conduct of sale of attached property—No sale of *immovable* property can be set aside on the ground of irregularity in publishing or conducting the sale, unless upon the facts proved the Court is satisfied that the party seeking to set aside the sale has sustained substantial injury by reason of such irregularity (r 90) As regards *movable* property, the rule is that a sale of movable property is not liable to be set aside in any case on the ground of irregularity in publishing or conducting the sale The only remedy open to the party who has sustained any injury by reason of such irregularity is to institute a suit for compensation against the person responsible for the irregularity But if such person be the purchaser himself, the party sustaining the injury may sue for the recovery of the specific property and for compensation in default of such recovery (r 78)

Disposal of sale proceeds—The sale proceeds of property sold in execution of a decree are to be applied in the manner prescribed by s 73

Resistance to delivery of possession to purchaser—Where immovable property is sold in execution of a decree, and the purchaser is resisted or obstructed in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction The Court will thereupon fix a day for investigating the matter, and summon the party against whom the application is made to appear and answer the same (rr 97 103)

Payment under decree.

O. 21, r. 1.

Modes of paying money under decree

1. [S 257.] (1) All money payable under a decree shall be paid as follows, namely :—

(*a*) into the Court whose duty it is to execute the decree ; or

(*b*) out of Court to the decree-holder ; or

(*c*) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (*a*) of sub-rule (1), notice of such payments shall be given to the decree-holder.

Retrospective effect of rules contained in this Order —On comparing this Order with the corresponding Chapter of the Code of 1882, it will be found that several changes have been introduced in matters of procedure so far as they relate to the execution of decrees In this connection it is important to note that changes in matters of procedure are retrospective in effect and apply to pending proceedings (*g*)

" Money payable under a decree."—It is money payable under a *decree* that may be paid into Court under this rule Costs of an application awarded by an *order* under s 35 cannot be said to be money payable under a *decree* Hence such costs ought to be paid to the party direct, and not into Court (*h*)

Where an order has been made for the payment of money into Court on a certain date, and the Court is closed on that day, a payment made on the following day is good payment for the purposes of the order (*i*)

Decree directing payment to decree-holder —Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree holder (*j*)

Notice of payment into Court —Sub r (2), which requires notice to be given to the decree holder where payment is made into Court, is new Payment of the decretal amount into Court operates as a satisfaction of the decree to that extent, though no notice of payment is given to the decree holder as provided by sub r (2) Similarly where a decree is assigned by the decree holder, and the judgment debtor pays the decretal amount into Court without notice of the assignment, the payment operates as a satisfaction of the decree to that extent, though no notice of payment is given to the decree holder, and the assignee is not entitled to execute the decree (*k*) But where interest is awarded by the decree on the decretal amount, the decree holder is entitled to interest until he receives notice of the payment into Court (*l*)

(*g*) *Hazrat Akramnissa* v *Valiulnissa* (1894) 18 Bom 4[illegible] *Balkrishna* v *Bapu* (1895) 19 Bom [illegible]

(*h*) *Shanks* v *Secretary of State* (1889) 12 Mad 120

(*i*) *Aravamud* v *Samiyappa* (1898) [illegible] Mad 38[illegible]

(*j*) *Wana* v *Vitu* (1911) 3[illegible] Bom 3[illegible] 7 I C 90[illegible], *Sankaran* v *Raman* (19[illegible]5) 48 Mad L J 536

87 I C 560, ('2[illegible]) A M 743 [payment into [illegible]

O. 21, r. 2.

2. [S. 258.] (1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

Payment out of Court to decree holder

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.

S 257A, C. P. C., 1882, omitted in this Code—Before proceeding with the subject matter of the present rule, it is important to note that s 257A of the Code of 1882 has been omitted in this Code That section ran as follows —

"Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable

Agreement to give time to judgment debtor

"Every agreement for the satisfaction of a judgment debt, which provides for the payment, directly or indirectly, of any sum in excess of *the sum due or to accrue due under the decree, shall* be void unless it is made with the like sanction.

Agreement for satisfaction of judgment debt

"Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment debt, and the surplus, if any, shall be recoverable by the judgment debtor"

This section was first enacted by Act XII of 1879 with a view to protect the interest of judgment debtors against the exercise of undue pressure by decree-holders It gave rise to conflicting decisions, and as interpreted by the majority of the High Courts was found in practice *to be of little service* to judgment debtors *It* has been therefore omitted in this Code with the result that—

(1) agreements *to give time* to the judgment debtor, and

(2) agreements for the satisfaction of a judgment debt which provide *for the payment of any sum in excess of the decretal amount*, may now be entered into between the decree holder and the judgment debtor *without the sanction* of the Court, and effect may be given to them, if otherwise valid, as to any other agreement

O. 21, r. 2.

Points of difference between old section 258 and the present rule—The present rule corresponds with s 258 of the Code of 1882 except in the following particulars —

(1) The words "of any kind" have been added into sub r (1) to make it clear that this rule applies not only to money decrees, but to decrees for the enforcement of a mortgage (m), and other decrees, e g, a partition decree (n)

(2) In para 3 of s 258 there occurred the words "as a payment or adjustment of the decree" after the word "recognized" These words have been omitted [see sub r (3)] to make it clear that the Court cannot recognise an uncertified payment or adjustment *for any purpose whatever* See notes below, "Uncertified payment and limitation"

Scope and application of the rule—This rule provides that—

(1) where any money payable under a decree of any kind is *paid out of Court*, or

(2) where a decree is otherwise *adjusted* in whole or in part to the satisfaction of the decree holder,

the decree holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree, so that the same may be recorded by that Court

If the decree holder fails to inform the Court of the payment or adjustment *it is open* to the judgment debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (o) to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified If the payment or adjustment is not certified by either party, it shall not be recognised by any Court executing the decree This may be explained by the following

Illustration

A obtains a decree against *B* for Rs 2,000 It is subsequently agreed between *A* and *B* that *A* should accept Rs 1,000 in full satisfaction of the decree *B* pays *A* Rs 1,000 out of Court, but *neither the payment nor adjustment is certified to the Court* *A* applies for execution of the full amount of the decree *notwithstanding* receipt by him of Rs 1,000 *B* objects to execution on the ground that the decree has been adjusted and payment has been made The payment, not being certified, cannot be recognized by the Court *executing the decree*, and the Court must direct execution to issue It will not avail *B* to contend that *A* had agreed to certify the payment to the Court, but has omitted to do so See notes below under the head "Fraud"

History of sub-rule 3—The Codes of 1859 (s 206) and 1877 (s 258) provided that a payment or adjustment made out of Court should not be recognized by any Court *executing the decree* unless it had been certified to that Court The Code of 1877 was amended in the year 1879, and the amendment provided that an uncertified payment or adjustment should not be recognized by *any* Court, and the same provision occurred in the Code of 1882 In the year 1888, the section was again altered, by providing that an uncertified payment or adjustment should not be recognized by any Court *executing the decree*, and this is the form in which the rule now stands

Sub-rule (3)—Sub rule (3) provides that an uncertified payment or adjustment shall not be recognized by any *Court executing the decree* The words "by any

(m) See *Vaidhinathaswamy* v *Somasundram* (1903) 26 Mad 473
(n) *Charry* v *Cowrya* (1922) 46 Bom 2-6 64 I C, 490 (22) A B 390 *Ramakrishna* v *Balakrishna* (1920) 43 Mad 476 56 I C 283
(o) Limitation Act, 1908 Sch I, art 174

O. 21, r. 2.

Court executing the decree" indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court

[illegible]

ings other than execution proceedings An uncertified payment or adjustment may therefore be recognized by a Court *trying a suit* for a relief based upon such payment or adjustment (p) This gives rise to the following questions :—

1. Whether, on the Court directing execution to issue in the case put in the above illustration, B can maintain a *suit* against A for a declaration that the decree has been adjusted and for an *injunction* restraining A from executing the decree ?

2 Whether, if A causes the decree to be executed notwithstanding the adjustment, and B's property is sold in execution, B can maintain a *suit* against A *to set aside the sale*, on the ground that the decree having been adjusted, A ought not to have caused the same to be executed ?

3 Whether, if A causes the decree to be executed notwithstanding the adjustment, B can maintain a *suit* against A to recover *damages* for breach of the contract represented by the adjustment ? In other words, whether, if B is compelled to pay in execution of the decree the full amount of the decree, namely, Rs 2,000, he is entitled to recover back that sum from A as damages for breach of the contract on A's part not to execute the decree ?

The three kinds of suits referred to above would each involve recognition of an *uncertified* adjustment, and B's success in each would depend *inter alia* upon the recognition of such adjustment by the Court trying *the suit* Now, it has been made sufficiently clear that the prohibition against the recognition of an uncertified adjustment is confined to Courts *executing decrees*, and does not extend to Courts *trying suits.* Hence a Court trying any of the above suits would not be precluded from recognizing the adjustment though the adjustment has not been certified It is not, however, to be supposed that this circumstance by itself is sufficient to entitle B to a decree in each of the three kinds of suits, for in the first two cases there is an initial difficulty in B's way That difficulty is presented by the provisions of s 47 by which it is enacted that all questions relating to the " execution, discharge or satisfaction " of a decree should be determined by the Court executing the decree, and *not by a separate suit.* Noting these provisions, we proceed to answer the above questions in order

As regards the first question, it is quite true that if B brought a suit for an injunction restraining A from executing the decree, the Court trying the suit *would recognize* the adjustment though it might not have been certified But the Court cannot try *the suit at all,* for such a suit is barred under s 47, the principal question in the suit being whether A should be restrained from *executing* the decree This being a question relating to " execution," it cannot be tried in a separate suit (q) Hence the answer to the first question is in the negative

The answer to the second question is also in the negative, and for the same reasons. The suit being one to set aside the sale in execution, the principal question would be whether the *proceedings in execution* should be set aside and this question is also one

(p) [illegible]

required by s 47, *Voru* v *Hasan* (1919) 43 Bom 240, 48 I C 135

O. 21, r. 2. relating to "execution" within the meaning of s 47, and the suit would therefore be barred under that section (r) It is therefore immaterial whether the purchaser at the sale in execution is a stranger or the decree holder himself There are two cases (s) both prior in date to the Allahabad decision cited above, in which the property was purchased by a *stranger*, and the suit was to set aside the sale on the ground that the decree had already been satisfied out of Court at the time the sale was held In both these cases it was held that the person who bought the property having purchased it *bona fide* at an auction sale, the sale to him could not be set aside But the question whether the suit was *barred* was not raised in either of those cases According to the Allahabad decision cited above the suit would be barred under s 47

The third question stands upon a different footing The suit therein referred to is one for the recovery of *damages* for breach of the contract represented by the adjustment The contract represented by the adjustment was to accept Rs 1,000 in full satisfaction of the decree, and not to execute the decree for its full amount If notwithstanding the payment to *A* of Rs 1,000 in pursuance of the adjustment, *A* causes the decree to be executed, and *B* is compelled to pay the amount of the decree (that is, Rs 2 000) in execution, *B* may sue *A* to recover back that amount as *damages* for breach of the contract not to execute the decree Such a suit is not barred under s 47, for the principal question in the suit is not one relating to *execution*, but to the contract, its breach and the amount of damages suffered by *B* in consequence of the breach The answer to the third question is therefore in the affirmative (t) The Court trying the suit will take cognizance of the adjustment, and will direct *A* by its decree to repay Rs 2,000 as and by way of damages to *B*, though the adjustment has not been certified It may here be noted that if after the decree is satisfied out of Court, *A* assigns the decree to *X*, and *X* then proceeds to realize the decree by execution against *B*, *B* has no cause of action against *X*, and he is not entitled to recover from *X* as damages the amount paid by him in execution to *X*, even though *X* took the assignment with the knowledge that the decree had been satisfied (u)

Summarizing the above, we may say that if a decree is adjusted to the satisfaction of the decree holder, but the adjustment is not certified, it will not be recognized by any Court executing the decree The result is that if the decree holder applies for execution notwithstanding the adjustment, the Court will direct execution to issue and the judgment debtor will not be heard to say that the decree has been adjusted Nor can he, even by instituting a regular suit for injunction, obtain a stay of execution, for such a suit is barred under s 47 Nor is it open to him, if his property be sold in execution, to bring a suit to set aside the sale, for such a suit also is barred under s 47 His only remedy is to sue the decree holder for damages sustained by him by reason of the breach of the contract represented by the adjustment He need not, however, wait until the decree against him *is executed* His cause of action arises on the *presentation of an application* by the decree holder to execute the decree Therefore where he has paid any money under the adjustment, he may sue the decree holder to recover the same if the decree holder *applies* to the Court for execution notwithstanding the adjustment (v)

(r) *Jaikaran* v *Raghunath* (1898) 20 All 254

(s) *Yellappa* v *Ramchandra* (1897) 21 Bom 463 *Mothura Mohun* v *Akhoy Kumar* (1888) 15 Cal 557

(t) *Hanmant* v *Subbabhat* (1899) 23 Bom 394, *Viraraghava* v *Subbakka* (1882) 5 Mad 397 (F B), *Periatambi* v *Vellaya* (1898) 21 Mad 409 *Krishnasami* v *Ranga* (1897) 20 Mad 369 *Poromanand* v *Khepoo* [illegible]

(u) [illegible]

(v) *Medai Kalianі*, In the matter of (1907) 30 Mad 645

Suit by judgment-debtor based upon uncertified adjustment.—We have already considered three kinds of suits that may be brought by a judgment debtor against the decree holder upon an uncertified adjustment, namely, (1) a suit for an injunction (2) a suit for setting aside sales in execution, and (3) a suit for damages for breach of the contract represented by the adjustment All these suits are of a typical character, and they demand a careful study The following case is of a different kind altogether *A* obtains a decree against *B* for possession of certain immovable property *A* then executes an *ekrarnama*, whereby in consideration of Rs 156 paid to him by *B*, he relinquishes an eight annas share of the property in favour of *B* Subsequently he sells the remaining eight annas share to *B* by a *kabala* Both the *ekrarnama* and *kabala* are duly registered, but neither of them is certified to the Court *A* then applies for execution of the decree, and obtains possession of the property *B* sues *A* upon the two documents for a declaration of his right to the property, and for recovery of possession thereof Is the suit barred under s 47 ? It has been held that it is not barred, and that *B* is entitled to a decree The suit is not one for an injunction, and it cannot therefore be said to be directed to *interfere with the execution* of the decree In fact the decree has *already been executed* Nor is the suit one for setting aside a sale in execution, for there has been no sale The suit is one for the recovery of property conveyed to *B* by two documents, both of which are duly registered The documents no doubt constitute an adjustment of the decree, but as stated above there is nothing in sub r (3) which bars a *suit* upon an uncertified adjustment (*w*)

The reader is now in a position to understand the following proposition which summarizes in one sentence all that has gone before —

An uncertified payment or adjustment may be recognized by any Court *except a Court executing the decree* and a *suit* based upon such payment or adjustment is maintainable *unless it is barred by the provisions of s* 47

Suit by decree-holder upon an uncertified adjustment—Hitherto we have considered the case of the *judgment debtor* so far as it is affected by an uncertified adjustment We now turn to the case of the *decree holder* *A* obtains a decree against *B* for Rs 315 and costs *B* pays *A* Rs 200, and induces *A* to give up the costs and accept a bond for the balance to be paid at the end of eight months Neither the payment nor adjustment is certified to the Court This does not preclude *A* from *suing* on the bond, for, as stated above sub r (3) only prohibits a Court *executing a decree* from recognizing an uncertified payment or adjustment (*x*) Since the repeal of s 257A of the Code of 1882, the result would be the same even if the bond provided for payment of a sum *in excess of* the balance (*y*)

"Money payable under a decree"—Where under the terms of a decree in a mortgage suit the decree holder (mortgagee) was to be in possession of the mortgaged property and to render accounts every year of receipts of the income of the property and give credit for the surplus income accruing from the property, it was held that the income of the property received by the mortgagee decree holder under the terms of the decree did not constitute it ' money payable under a decree within the meaning of this rule (*z*)

"Decree of any kind"—See notes above, ' Points of difference between old section 258 and the present rule '

(*w*) *Iswar Chandra* v *Haris Chandra* (1898) 25 Cal 718

419 na 39 52

(*x*) ... *Annai* (1894) 17 Mad 382 as explained in *Venkata* v *Koran* (1903) 26 Mad 19 26

(*y*) See *Heera* v *Pestonji* (1898) 22 Bom 693 *Dhanram* v *Ganpat* (1903) 27 Bom 96

(*z*) *Yella Reddi* v *Syed Muhamad Ali* (1916) 39 Mad 106 33 I C 675

21, r. 2. **"Adjustment."**—A composition scheme between a judgment debtor and his creditors including the decree holder is an adjustment within the meaning of this rule and may be certified as such (a)

"Where the decree is adjusted in part"—*A* obtains a decree against *B* and *C* *A* then enters into an agreement with *B* by which *B* is discharged from liability under the decree The agreement constitutes an adjustment of a "part' of the decree within the meaning of this rule (b)

Application for final decree—An application for a final decree in a suit on a mortgage is not an application for execution Therefore, the Court to which an application is made for a final decree is not a "Court executing the decree" Hence such Court may recognize payments made by the mortgagor out of Court, though the payments have not been certified (c)

Mode of certifying—See notes below, "Uncertified payment and limitation"

This rule applies only to parties who stand in the relation of decree-holder and judgment-debtor at the date of payment or adjustment.—*A* obtains a decree against *B* for Rs 5,000 *B*, being unable to pay the amount of the decree in cash, transfers certain immovable property to *C* in consideration of *C* undertaking to pay the amount of the decree to *A* *C* pays the amount of the decree to *A* *out of Court* Subsequently, *C* gets the decree transferred to himself from *A*, and applies for execution against *B* The payment of the decretal amount by *C* to *A*, *though not certified*, is a bar to execution, for the payment was made not by *B*, the judgment debtor, but by *C*, a third party, and this rule applies only where a payment is made out of Court by a *judgment debtor* to the decree holder (d) But it has been held by the High Court of Allahabad that where by a consent decree in a suit by *A* against *B*, *B* agrees to pay a certain sum of money to *C*, and he makes the payment, such payment, if not certified, cannot be recognized by the Court executing the decree (e)

Fraud—There is an earlier decision of the Madras High Court which lends colour to the view that where a decree is adjusted to the satisfaction of the decree holder, and he agrees to certify the adjustment to the Court, but omits to do so, and subsequently applies to the Court for execution of the decree, the judgment debtor may object to the execution and prove the adjustment *in execution proceedngs*, and the Court *executing the decree* may take cognizance of the payment notwithstanding the provisions of this rule, the reason given being that the suppression of the adjustment from the Court is not only a fraud upon the judgment debtor, but a fraud upon the Court (f) But in later cases it has been held by the same High Court that if that be the effect of that decision, it is not good law (g) In a Bombay case (h), a decree for Rs 2,500 was *adjusted by the judgment debtor paying and the decree holder accepting* Rs 2,000 *in* full satisfaction of the decree, but the adjustment was not certified to the Court The decree holder thereafter applied for execution of the decree He omitted to state in his application, as required by O 21, r 11 (e), that the decree was adjusted It was held, following an earlier decision of the same Court (i), that it was a case of fraud upon the Court, and the application for execution was dismissed But these cases have been overruled by a Full Bench of the same High Court, and it has been held that a Court

(a) *Venkataswami* v *Kolilingam* (19..) 40 Mad L J 730 91 I C 1051 (..6) A M 184
(b) *Mahomed Khan Bahadur* v *Mahomed Munawar* (1908) 31 Mad 467
(c) *Mangar* v *Bhitoo* (19..) 5 Pat L J 672 *Ramji Lal* v *Karam Singh* (1917) 39 All 532, 4 I C 424
(d) *Rama Ayyan* v *Sreenivasa* (1896) 19 Mad 230, *Ponnusami* v *Letchmanan* (191.) 35 Mad 6.. 1. I C 6.7
(e) *Mahadeo* v *Musammat Hamidan* (1923) 45 All 304 71 I C 457 (.23) A A 271
... I C 562
(h) *Hansa* v *Bhawa* (1916) 40 Bom 333 33 I C 232
(i) *Trimbak* v *Hari* (1910) 34 Bom. 575 7 I C 910 per Heaton J

O. 21, r. 2.

executing a decree can in no case recognize a payment or adjustment not certified as required by this rule (j) The High Court of Calcutta has consistently held that it is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by this rule even if fraud is imputed to the decree holder (k) The same view has been taken by the Chief Court of the Punjab (l), and by the High Court of Patna (m)

The law allows the judgment debtor 90 days within which he may apply to have the payment or adjustment certified [Limitation Act, Sch I, art 174] If he does not make the application, and the decree holder applies for execution within that period he may in answer to the application for execution apply to have the payment or adjustment certified, but this he should do within 90 days And it has been held that *objections* filed by a judgment debtor to the decree holder s application for execution may be treated as an *application to certify* the payment or adjustment provided the objections are filed within 90 days of the adjustment (n) But the judgment debtor is not entitled to an extension of time even if fraud is established on the part of the decree holder Such extension he can claim only under s 18 of the Limitation Act, and that section provides only for the case where an applicant has by means of fraud been kept *from the knowledge of his right* to make the application, it does not provide for the case where he is kept by means of fraud *from the exercise of his right* to make the application (o)

Uncertified payment and limitation —Sub r (3) of this rule provides that an uncertified payment *shall not be recognized* by any Court executing the decree The third paragraph of the old section provided that an uncertified payment or adjustment shall not be recognized *as a payment or adjustment of the decree* by any Court executing the decree It was accordingly held under that section that there was nothing to prevent an uncertified payment from operating as a part payment within the meaning of s 20 of the Limitation Act, so as to extend the period of limitation for applying for execution under that Act (p) The words ' as a payment or adjustment of the decree ' have been omitted in sub r (3) The result is that under the present rule the Court cannot recognize an uncertified payment or adjustment *for any purpose whatever* It follows that an uncertified payment can no longer operate as a part payment so as to extend the period of limitation for an application for the execution of a decree (q) This may be explained by an illustration *A* obtains a decree against *B* in January, 1921, for Rs 4,000 *B* pays *A out of Court* Rs 2 000 in January 1923, but the payment is not certified *A* applies for execution of the decree for the balance in January 1925, that is, more than three years after the date of the *decree* but within three years from the date of *payment* under the decree Under the old section the payment, though not certified, operated as a fresh starting point for limitation and the application was therefore not barred Under the present rule the payment, not being certified, cannot be recognized by the Court even for the purpose of limitation, and the application must be rejected as barred by limitation

Nice questions have arisen in this connection as to the meaning of "certify" and as to the modes in which payments made out of Court may be certified It has been

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All 36

(q) *Bhajan Lal* v *Cheda Lal* (1914) 12 All L J 825 24 I C 215 *Bireswar* v *Ambika Charan* (1918) 45 Cal 630 42 I C 472

21, r. 2. held by the High Courts of Calcutta (r), Madras (s), Bombay (t), and Rangoon (u) that where interest on the decretal amount has been paid by the judgment debtor out of Court, or where part payment has been made of the decretal amount by the judgment debtor out of Court, the decree holder may apply to 'certify' the payment by an application made expressly for that purpose either prior or subsequent to the application for execution *or* he may 'certify' the payment by a declaration that he has received such payment in an application for execution of the rest of the decree [O 21, r 11 (e)] According to the Allahabad High Court, the payment should be certified *prior* to the application for execution, and neither an application for certifying made *subsequent to* the application for execution nor a declaration made in the application for execution amounts by itself to certifying within the meaning of this rule (v) Stating it in other words, the certification by a decree holder, according to the Calcutta, Madras, Bombay and Rangoon Courts, may be (1) prior to, or (2) contemporaneous with and part of or (3) subsequent to the application for execution According to the Allahabad High Court, the certification must be a distinct and prior proceeding This may be explained by an illustration *A* obtains a decree against *B* for Rs 4 000 and interest in January 1919 He then applies for execution of the decree in January 1924, that is, more than three years from the date of the decree In his application *A* states that *B* paid to him interest on the decretal amount in June 1921 According to the Calcutta Madras Bombay and Rangoon High Courts *A*'s declaration in the application amounts to *certifying* the payment of interest within the meaning of this rule, and the payment being *certified*, it saves the bar of limitation the application for execution having been made within three years from the date of the *certified payment* According to the Allahabad High Court, *A*'s declaration in the application for execution does not amount to *certifying* at all and the payment *being uncertified*, it cannot operate to save the bar of limitation

An application by a decree holder to certify payments made within three years from the date of the decree may be made at any time within three years from the date of such payments, and, if so made, will afford the decree holder a fresh starting point for limitation for an application for execution of the decree The alleged payment must be within three years from the date of the decree, and the application to certify must be within three years from the date of payment (w)

Uncertified adjustment and estoppel—Since an uncertified adjustment cannot be recognized by the Court executing the decree, it cannot operate as an estoppel against the decree holder *A* obtains a decree against *B* The decree is adjusted, but the adjustment is not certified to the Court *A* receives payments under the adjustment and then applies for execution of the decree The adjustment being uncertified the fact that *A* has received payments under the adjustment does not estop him from applying for execution (x)

Restitution of uncertified payment on reversal of decree in appeal.—If a decree is reversed in appeal, the judgment debtor is entitled to recover back all payments made by him under the decree, though the payments have not been certified

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(r) *Eavuffreman* v *San h a Lal* (1916) 43 Cal 207 [illegible]

(s) [illegible]

(t) *Lanlu ang* v *Jagya* (1921) 45 Bom 91 59 I C 399

(u) *Maung Law San* v *Maung Po Thein* (1924) 2 Rang 293 84 I C 473 [illegible] A R 26

(v) *Gokulchand* v *[illegible]* (1914) 12 All L J 387 3 I C 7[illegible]3 *Thajan Lal* v *Chheda Lal* (1914) 12 All L J 825 24 I C 215 *Chattar Singh* v [illegible]

The decree being reversed in appeal, the payment, whether certified or not, is one made without consideration, and the judgment debtor is entitled to a refund by an application to the Court of first instance (*y*) See s 144

Joint decree-holders —See notes to O 21, r 16 'Payment by judgment debtor out of Court to one of several holders of a joint decree'

Minor —An adjustment of a decree made by a guardian without obtaining the permission of the Court as required by O 32, r 7, cannot be certified under this rule (*z*).

Assignment of decree —The assignee of a decree cannot execute a decree without first making an application under r 16 below to the Court which passed the decree. When such an application is made it is made to the Court *as a Court which passed the decree* and not *as a Court executing the decree* within the meaning of sub r (3) It is therefore open to the judgment debtor to plead that the decree has already been satisfied even though the payment has not been certified (*a*)

Representative —The word "judgment debtor" in this rule includes persons claiming under him Such persons therefore are as much precluded from setting up an uncertified adjustment in execution proceedings as the judgment debtor himself would be (*b*) Compare s 146

Limitation for application under this rule —A decree holder may apply *at any time* for having a payment or an adjustment certified to the Court (*c*) But the application by a judgment debtor for the issue of a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified, must be made within 90 days from the date of the payment or adjustment See Limitation Act, 1908 Sch I, art 174 The judgment debtor may apply even if the decree is not drawn up (*d*) Where the right to apply is barred by limitation the judgment-debtor is not entitled to agitate the matter as a proceeding under s 47 (*e*)

Oral adjustment —The High Court of Allahabad has expressed the opinion that where the agreement constituting an adjustment of a decree is oral s 92 of the Evidence Act 1872, is a bar to the proof of such agreement (*f*)

Appeal —An order allowing or refusing an application to record an adjustment of a decree or a payment made out of Court under a decree is *a decree* within the meaning of s 2, cl 3 read with s 47, and is therefore appealable under s 96 (*g*)

Criminal proceedings —The prohibition against the recognition of an uncertified payment or adjustment is confined to *civil Courts executing decrees*, and does not extend to criminal Courts Hence an uncertified payment or adjustment may be recognised by criminal Courts and proof thereof is admissible in the investi

(*y*)

(*z*)

159 50 I C 364 *Pandurang* v *Jagya* (1921) 45 Bom 91 59 I C 399

(*d*) *Giribala* v *Biswambhar* (19?4) 40 Cal L J 87 8? I C 746 (24) A C 1?64

(*e*) *F* *Jha* *Kant* v *Musammat Parbati* (19?1) 6 Pat L J 337 63 I C 535

(*f*) *Lachhman* v *Baba* (19..) 44 All 258 64 I C 990 (2) A A 13

O. 21, rr. 2-4.

gation and trial of offences by those Courts *A* holds a decree against *B* for Rs 1,000 *B* pays the full amount of the decree to *A* out of Court, but the payment is not certified *A* then applies for execution of the decree, but omits to state in the application for execution, though required to do so by r 11, sub r (2), cl (e), of this Order, that the full amount of the decree has been paid *A* is guilty of the offence of "giving false evidence" within the meaning of ss 191 and 193 of the Indian Penal Code, and if the decree is executed, he is also guilty of the offence of 'fraudulently causing a decree to be executed after it has been satisfied" within the meaning of s 210 of the Penal Code In either case, proof of the uncertified payment may be admitted by a criminal Court (*h*) It must, however, be noted that a mere application for execution not followed by execution does not constitute an offence under s 210 of the Penal Code, for it is of the essence of the offence under that section that the decree must have been "caused to be executed" (*i*)

Courts executing Decrees.

Lands situate in more than one jurisdiction

3 [*New*] Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Land situate in more than one jurisdiction—This rule is new It gives effect to a ruling of the Calcutta High Court in the undermentioned case (*j*) The rule, when amplified, may be stated thus where immovable property attached in execution of a decree forms one estate, of which a part is situate within the local limits of the jurisdiction of the Court executing the decree, and the rest beyond such limits, the Court executing the decree has the power to attach and sell *the whole estate*, though only a part thereof is situate within the local limits of its jurisdiction

Transfer to Court of Small Causes

4 [**S. 223, 5th para.**] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

(*h*) *Queen Empress* v *Lapuji* (1886) 10 Bom 298 *Mathi* [illegible] v [illegible] *Norodeep* (1889) 16 Cal [illegible] *Queen Empress* v *Pillala* (1888) 9 Mad 101 *Queen Empress* v *Muttaram* [illegible] (1882) 4 Mad 325

(*i*) *Shama Charan* v *Kasi Naik* (1896) 23 Cal 971

(*j*) *Ram Lal* v *Rama Sundari* (1886) 12 Cal 307.

Mode of transfer

5. [S. 223, 6th para] Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed

Procedure where Court desires that its own decree shall be executed by another Court

6. [S 224] The Court sending a decree for execution shall send—

(*a*) a copy of the decree ,

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied , and

(*c*) a copy of any order for the execution of the decree , or, if no such order has been made, a certificate to that effect

Clause (b)—The omission to transmit to the Court executing the decree the certificate referred to in cl (b) is not a material irregularity within the meaning of r 90 of this Order Hence it is not a good ground for setting aside a sale in execution (*k*)

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge requires such proof

Court receiving copies of decree etc to file same without proof

Proof of jurisdiction—The old section contained the words or of the jurisdiction of the Court which passed it after the words or of the copies thereof This gave rise to a conflict of opinion whether a Court to which a decree was sent for execution had the power to inquire whether the Court that passed the decree had jurisdiction to pass it and to refuse execution if it found that the decree was passed without jurisdiction it being held in some cases that it had the power (*l*) and in others

(*k*) *Abdul bakar* v *Mohidin* (1897) 20 Mad 10

(*l*) *Haji Musa* v *Purmanand* (1891) 15 Bom 216 219 *Bhajrantappa* v [illegible] (1904) 28 Bom 378 See also *Leake* v *Daniel* (1868) 10 W R F B 10 11

O. 21, r. 7-10.

that it had not (m) The words "or of the jurisdiction of the Court which passed it" have been omitted in the present rule The result is that a Court to which a decree is transferred for execution has now no power to question the jurisdiction of the Court which passed the decree under execution (n) It has been recently held by a Full Bench of the Calcutta High Court that where a decree presented for execution was made by a Court which apparently had no jurisdiction to pass it, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction (nn) It is not clear whether the decision was intended to apply to a case where a decree passed by one Court is transferred for execution to another Court

Execution of decree or order by Court to which it is sent

8. [S. 226] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Subordinate Court.—If a Munsiff in district X sends a decree passed by him for execution *direct* to a Munsiff in district Y, the latter has no jurisdiction to execute the decree The proper course is for the Munsiff in district X to send the decree to the *District Court* of district Y, and the latter Court may then under this rule transfer the decree for execution to the Munsiff in that district (o)

Execution by High Court of decrees transferred by other Court

9. [S 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Application for Execution.

Application for execution

10. [S. 230, **1st para.**] When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Court by which decree may be executed—See s 38

"Court which passed the decree"—See s 37 as to the definition of "Court which passed a decree," and notes thereto

What decrees may be executed—See notes to s 36

(m) *Chagmalal* v *Truman* (1883) 7 Bom 481, *Kastarche* v *Rama* (1884) 10 Bom 65

(n) *Hari* v *Narsingrao* (1914) 38 Bom 194 23 I C 123 *Shergat Lal* v *Harak Chand* (1919) [illegible] 46 I C 419 *Zamindar of Ettiyapuram* v *Chidambaram* (1920) 43 Mad 675 [illegible] 58 I C 871

(nn) *Gora Chand* v *Prafulla* (1925) 53 Cal 166 [illegible] A I R 907

(o) *Debi Dial* v *Moharaj* (1895) 22 Cal 764

"If the decree has been sent to another Court"—Where the decree of a District Court has been sent to the Court of a Munsiff for execution and has not been returned to the District Court the proper Court within the meaning of the Limitation Act 1908 art 182 (5) in which to apply for execution of the decree is the Court of the Munsiff (p)

11 [Ss 256, 235.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the Court

Oral application

(2) Save as otherwise provided by sub rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case and shall contain in a tabular form the following particulars, namely —

Written application

(a) the number of the suit,

(b) the names of the parties,

(c) the date of the decree,

(d) whether any appeal has been preferred from the decree,

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree,

(f) whether any, and (if any) what, previous application have been made for the execution of the decree, the dates of such application and their results,

(g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed,

(h) the amount of the costs (if any) awarded,

(i) the name of the person against whom execution of the decree is sought, and

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(p) Maharajah of Bobbili v. Narasaraju (1916) 43 I A [illegible] 39 M [illegible] 30 I C [illegible]

O. 21, r. 11.

(*j*) the mode in which the assistance of the Court is required, whether—

(*i*) by the delivery of any property specifically decreed;

(*ii*) by the attachment and sale, or by the sale without attachment, of any property;

(*iii*) by the arrest and detention in prison of any person;

(*iv*) by the appointment of a receiver,

(*v*) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

Sub rule (1) corresponds with s 256 of the Code of 1882 and sub rule (2) with s 235

Difference between old section 256 and sub-rule (1)—Section 256 of the Code of 1882 ran as follows—

Power to direct immediate execution of decree for money not exceeding Rs 1,000

"When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application, of the decree holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment debtor if he is within the local limits of the jurisdiction of the Court or against his movable property within the same limits"

Sub rule (1) differs from s 256 in the following particulars—

1 Under s 256 immediate execution could only be issued if the amount of the decree did not exceed Rs 1,000 Under the present rule there is no limit to the amount of the decree But the decree must be one for the payment of money

2 As a general rule, a decree holder seeking to arrest the judgment debtor must present an application *in writing* to the Court, and the Court may then direct a warrant to issue for the arrest of the judgment-debtor who, as a rule cannot be arrested without a warrant S 256 of the Code of 1882 dispensed with a written application, and enabled the Court to issue a warrant for the arrest of the judgment debtor on an *oral* application Sub rule (1) goes further, and empowers the Court to order immediate arrest of the judgment-debtor *prior to the preparation of a warrant, if he is within the precincts of the Court*

3 Execution can no longer issue against the movable property of the judgment-debtor on an *oral* application as it could under s 256.

Privilege from arrest.—The privilege from arrest under civil process conferred by s 135 of this Code does not extend to a judgment-debtor against whom an order has been made for immediate arrest under this sub rule See s 135, sub s (3)

Alterations in sub-rule (2)—Sub rule (2) corresponds with s 235 of the Code of 1882 except in the following particulars—

1 In cl (g), the words, "together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed," are new

2 In cl (j) sub cl (ii), the words "or by the sale without attachment," are new

3 Cl. (j), sub cl (iv), is new.

The application shall be verified—An application for execution may be verified by any person acquainted with the facts of the case It may therefore be verified by a person who holds a general power of attorney from the decree holder, notwithstanding that the decree holder may be residing within the jurisdiction of the Court (*q*) Where the application is made by a person other than the decree holder all that is necessary is that the Court should be satisfied that such person is acquainted with the facts of the case. It is not necessary that it should be verified *after* the application for permission to verify it has been made, nor is it necessary that the verification should be made in the presence of the Court (*r*)

The application shall state the date of the decree.—The date of the decree means the date on which the judgment was pronounced (*s*). See O. 20, r. 7

The application shall specify the mode in which the assistance of the Court is required.—Where an application did not specify the mode in which the assistance of the Court was required, it was rejected (*t*) See r 17 below

Sub rule (3)—This sub rule is new The Court may under this sub rule require the applicant to produce a certified copy of the decree Such copy, however, is not a necessary annexure to an application for execution An application, therefore, which is not accompanied by a copy of the decree, cannot be said to be an application not "in accordance with law" within the meaning of art 182 (5) of sch I of the Limitation Act (*u*)

Amendment of application.—See r 17 below

Application for attachment of moveable property not in judgment debtor's possession

12. [S. 236] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Failure to annex inventory—Where no such inventory as is required by this rule is annexed to the application for execution, the application cannot be said to be one "in accordance with law" within the meaning of art. 182 of the Limitation Act, 1908 (*v*)

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(*u*) *Raghunandan* v *Badan Singh* (1918) 40 All 209 43 I C 914

(*v*) *Abdul Rafi Khan* v *Maula* (1915) 37 All 527, 29 I C 479

O. 21 rr. 13-15.

13 [S 237] Where an application is made for the attachment of any immoveable property belonging to a judgment debtor, it shall contain at the foot—

Application for attachment of immoveable property to contain certain particulars

(*a*) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers, and

(*b*) a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

Clause (a)—In cl (a) the words and in case such property can be identified or numbers are new

14 [S 238] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land, or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors

Power to require certified extract from Collector's register in certain cases

Alterations in the law—Under the old section it was *necessary* where the application was for the attachment of land registered in the Collector's Office that the application should in each case be accompanied by a certified extract from the register of such office Under the present rule the Court *may at its option* require the applicant to produce such extract The object is to save costs to the applicant of procuring such extract

15 [S 231] (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary apply for the execution of the whole decree for the benefit of them all or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased

Application for execution by joint decree holder

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

Alterations in the rule —This rule corresponds with s 231 of the Code of 1882 except in the following particulars — **O. 21, r. 15.**

1. The words "or his or their representatives" which occurred in s 231 after the words "one or more of such persons," have been omitted in view of the provisions of s 146 See notes below under the head "Any one or more of such persons"

2. The words "unless the decree imposes any condition to the contrary" in sub rule (1) are new See notes below under the same words

What is a joint decree —A decree jointly passed in favour of more persons than one is a joint decree *A* and *B* obtain a decree against *C* for Rs 5 000, this is a joint decree It is not the less a joint decree, because the shares of *A* and *B* in the decretal amount have been determined by the decree Thus if it is *determined* by the decree that the share of *A* is Rs 2,000, and the share of *B* is Rs 3,000, the decree is still a joint decree But though the decree in such a case is a joint decree, the interest of *A* and *B* being determined by the decree, either of them may apply for execution to the extent of his interest (*w*)

Application by one of several decree-holders for execution of the whole decree —Ordinarily *all* the decree holders in a joint decree must join in an application for execution of the decree The present rule provides for the case in which all decree holders are unable or are unwilling to join in the application, and in such case enables *one or more* of such decree holders to apply for execution of the *whole* decree "for the benefit of them all" Where an application is made under this rule by *some only* of several joint decree holders, the Court may, in its discretion, grant or refuse the application (*x*) Similarly, it is in the discretion of the Court whether or not to give notice to the other decree holders or to the judgment debtor before making an order for execution under this rule it is not obligatory upon the Court to do so (*y*) If the application is allowed, the Court will under sub r (2) make such order as it deems necessary for protecting the interests of the other decree holders and of the judgment debtor (*z*)

"Unless the decree imposes any condition to the contrary." —The provisions of this rule do not apply where by the terms of the decree execution has been made dependent on *all* the decree holders joining in the application (*a*)

Application by one of several decree-holders for execution in respect of his share of the decree.—The application under this rule by *one* of several holders of a joint decree must be for the execution of the *whole* decree and further, it must be for the benefit of himself and the other decree holders A joint decree cannot be executed by one of several joint holders in respect of what the applicant considers his *share* in the decree (*b*) Thus, if a decree is passed for *A* and *B* for Rs 5,000, the decree is joint, and neither *A* nor *B* can apply for execution of his proportionate share of the decree But one of several holders of a joint decree may apply for execution of the decree to the extent of *his interest* therein, *if the extent of such interest is determined by the decree* Thus, if in a suit for possession of land by *A* and *B* against *C*, the Court

(*w*) *Hurrish Chunder* v *Kali Sunderi* (1883) 9 Cal 482 10 I A 4

(*x*) *Sheikh Ahmed* v *Shah ala* (1880) 7 C L R 537

(*y*) *Durga Das* v *Dewraj* (1906) 33 Cal 306

(*z*) *Tarasundari* v *Beharilal* (1868) 1 B L R A C 28

(*a*) *Farrand* v *Abdullah* (1884) 6 All 69

(*b*) *Collector of Shahjahanpur* v *Surjan* (1889) 4 All 72 *Banarsi Das* v *Maharani* (1883) 5 All 26 35 *Dalchand* v *Bai Shickor* (1891) 15 Bom 242, *Muthusami* v *Natesa* (1895) 18 Mad 464 *Meik* v *The Midnapur Zamindary Co, Ltd* (1919) 4 Pat L J 575, 53 I C 803

O 21, r. 15. has *declared* each of the plaintiffs to be entitled to a moiety of the land, the Court may allow either plaintiff to execute the decree to the extent of his one half share, though the decree is a joint decree (c)

The rule set forth above that one of several holders of a joint decree is not entitled to execution in respect of his share of the decree, but that he must apply for execution of the whole decree, applies only in those cases where the *whole* decree has remained unsatisfied That rule does not apply where a joint decree has been satisfied *in part* before the date of the application for execution In such a case, execution cannot issue for the *whole* decree, but only for so much thereof as has remained unsatisfied This subject is considered in the next following paragraph

Payment by judgment-debtor out of Court to one of several holders of a joint decree—*A* obtains a decree against *C* for Rs 5 000 *C* may pay the amount of the decree *into Court* (r 1), and the Court will then pay the amount to *A* on his application If *C* does not adopt that course, and pays the amount to *A out of Court* (r 1), *C* must see that *A* the decree holder, certifies the payment to the Court If *A* fails to certify the payment, *C* may apply to the Court to record the payment as certified If *C* also fails to do so, the Court executing the decree will not recognise the payment Hence if *A*, notwithstanding payment to him of the amount of the decree out of Court applies for execution of the decree against *C*, the Court will direct execution to issue (r 2)

Suppose now that there are two or more decree holders, and the payment is made by the judgment debtor to *one* of them What are the rights of the other decree holders to execute the decree? We proceed to answer this question

I (1) *A* and *B* obtain a decree against *C* for Rs 5,000 *C* pays *B* his (*B's*) *share* of the decretal amount out of Court, and the payment is certified to the Court *A* then applies under this rule for execution of the *whole* decree *A* cannot execute for more than his own share, as the decree has been satisfied as to *B*s share (d)

(2) Suppose that in the above case, the payment is not certified to the Court, but *B* admits the payment The result will be the same as in ill (1) (e) But if *B* does not admit the payment, the Court may allow execution to issue for the *whole* decree

II *A* and *B* obtain a decree against *C* for Rs 5,000 *C* pays the *whole* amount of the decree to *B* out of Court, and the payment is certified to the Court *A* then applies for execution of the decree to the extent of his own share Is *A* entitled to execute the decree to the *extent of his share, regard* being had to the fact that *B* has certified satisfaction of the *whole* decree? It has been held that he is, for one of several joint decree holders is not competent to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree, without the concurrence of the other decree holders, though he may certify satisfaction in respect of his own share therein (f) In the case put above, *A* has another remedy besides proceeding in execution against *C* That remedy is by way of suit against *B* to recover his share from him, *B* having certified to the Court that he has received payment from *C* of the *whole* amount of the decree, thus *admitting* receipt of the whole amount (g)

(c) *Hurrish Chunder* v *Kalisunderi* (1883) 9 Cal 482 10 I A 4
(d) *Tarruk* v *Direndro* (1883) 9 Cal 831
(e) *Sultan* v *Saralayammal* (1892) 15 Mad 343
(f) *Tamman Singh* v *Lachhmin* (1904) 26 All 318 *Moti Ram* v *Hannu* (1904) 26 All 334 *Lachman* v *Chaturbhuj* (1906) 28 All 232 *Umrao Beg* v *Mukhtar Beg* (1923) 45 All 491 74 I C 987 (23) A A 494 *Idrlakkulli* v *Doraiswami* (1924) 47 Mad L J 434 82 I C 544 (25) A M 29
(g) *Somasundram* v *Krishnaswamy* (1906) 29 Mad 183

O 21, rr 15, 16.

"Any one or more of such persons"—This expression includes persons claiming under such persons A transferee of a decree within the meaning of r 16 below is such a person (*h*)

Amendment—An application for execution of a joint decree by one only of the decree holders should state that the application is made on behalf of all the decree holders If the application contains no such statement it should be rejected It cannot be allowed to be amended for O 21 r 17, while it empowers the Court to allow a defect in the requirements of rr 11 to 14 to be amended does not include the present rule in it (*i*)

Appeal—An order determining any question mentioned or referred to in s 47 is a 'decree (s 2) and is therefore appealable under s 96 The questions referred to in s 47 are questions arising *between a decree holder on the one hand and the judgment debtor on the other*, and relating to the execution discharge or satisfaction of the decree Hence orders determining such questions are appealable as decrees under s 96 Bearing this in mind we proceed to note the following cases —

(1) *A* and *B* obtain a decree against *C* *A* alone applies for execution of the whole decree *C* (the judgment debtor) contends that *A* alone should not be allowed to execute the whole decree Here the question being one *between the decree holder on the one hand and the judgment debtor on the other*, any order made upon the application is appealable as a decree If *A* s application is allowed *C* may appeal from the order, and if the application is disallowed *A* may appeal from the order (*j*)

(2) Suppose that in the above case, the objection to execution was raised not by *C*, the judgment debtor, but by *B* the other decree holder In such a case the question being *between the decree holders inter se*, no appeal will lie from any order made upon the application whether the application is allowed or refused (*k*)

Limitation—See Limitation Act Sch I art 182, Expln 1

Application for execution by transferee of decree

16. [S 232] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

(*h*) *Dwar Buksh* v *Fatik* (1899) 26 Cal 250
(*i*) *Mek* v *The Midnapur Zamindary Co Ld* (1919) 4 Pat L J 575 53 I C 803
(*j*) *Lakshmi* v *Ponnassa* (1894) 17 Mad 394
(*k*) *Jhaniklal* v *Bai Gulab* (1899) 23 Bom 623

O. 21, r 16

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Alterations in the law :—

1 The words, ' or if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree," have been added into the first paragraph to make it clear that the rule is not confined in its application to a transferee of the *whole* decree, but extends to a transferee of the *interest* of any holder of a *joint decree* This was, in fact, the interpretation put upon the old section (*l*)

2 The words, " if that Court thinks fit," which occurred in the old section in the first paragraph before the words " the decree may be executed " have been omitted See notes below " Right to execution does not depend upon discretion of Court "

" Decree "—The expression " decree " in the first paragraph and the first proviso of this rule is not confined to a money decree It includes a mortgage decree (*m*) The second proviso is confined to money decrees

Application for execution by transferee of decree—No order should be made under this rule for the execution of a decree on the application of a transferee of the decree unless—

I the decree has been transferred by *assignment in writing or by operation of law*, [an oral assignment is not sufficient (*n*)],

II the application for execution is made to the Court which *passed the decree*; and

III where the decree has been transferred by assignment, *notice* of the application has been given to the transferor and the judgment debtor

No application by the transferee is necessary *for recognition as transferee* The rule does not provide for any such application All that the rule requires is that where the decree has been transferred by assignment, the transferee should give notice of the application *for execution* to the transferor and the judgment debtor (*o*) See notes below, " Transfer of decree against a company in liquidation "

We proceed to consider the above conditions in order

1. Who may apply for execution under this rule—The following persons, and no others, may apply for execution under this rule (*p*) —

(a) The transferee of a decree under an assignment *in writing* [A transferee under an *oral* assignment has no *locus standi* to apply for execution under this rule (*q*)]

(b) The transferee of a decree by *operation of law, e g*, the legal representative of a deceased decree holder, or the Official Assignee in the case of an insolvent decree holder, or the purchaser of a decree at a Court sale in execution of a decree against the decree holder (r 53) (*r*) A transfer

(*l*) *Mallunarayana* v *Palakrishna* (1896) 19 Mad 196.

(*m*) See *Sarju* v *Thakur* (1920) 42 All 544 = I C 743 See also *Kudhal* v *Sheo Dayal* (1888) 10 All 570

(*n*) *Jitendra Nath* v *Lever Deve P H* (1916) 43 Cal 990 999 43 I A 108 112 34 I C 69

(*o*) *Ramachandra* v *Subramania* (1904) 14 Mad L J 333, *Annamalai* v *Janaker* (1908) 18 Mad L J 24, 25

(*p*) *Vithal* v *Mahadev* (1924) 26 Bom L R 333 333 80 I C 219 ('24) A B 426

(*q*) *Parvati* v *Digambar* (1891) 15 Bom 507

(*r*) See *Gour Sundar* v *Hem Chunder* (1889) 16 Cal 355

O. 21, r. 16.

of property by *A* to *B*, which is the subject matter of a suit by *A* against *C*, does not amount to a transfer by operation of law of the decree that may be *subsequently* obtained by *A* against *C* so as to entitle *B* to apply for execution under this rule (*s*) A deed of transfer of property which is the subject matter of a suit may involve a transfer of the decree passed on the very day on which the deed is executed, but the transfer in that case is not by operation of law, but by an assignment in writing (*t*) A transfer by operation of law means a transfer on death, or by devolution or by succession This rule does not recognize an equitable assignment of a decree The dicta in a Bombay case recognizing such an assignment (*u*), have not been accepted by other High Courts (*v*)

(c) A transferee under an assignment in writing or by operation of law from the transferee mentioned in cls (a) and (b), whether by immediate or mesne assignment (*w*)

Explanation I—The expression "transferee" in cls (a), (b) and (c) is not confined to a transferee of the *whole* decree, but includes a transferee of a *portion* of the decree (*x*), or, where the decree is a joint one, the transferee of the *interest* of any one of the decree holders in the decree (*y*) But it has been held that where a decree awards a substantial relief *plus* costs, the decree is one and indivisible and it can be transferred only as a whole (*z*)

Illustrations of Explanation I

1 *A*, who holds a decree against *B* for Rs 5,000, transfers his interest in the decree to the extent of Rs 2,500 to *X* Here *X* is in the position of a joint decree holder [r 15 above] The application for execution may be made by *X*, or it may be made by *A*, the decree holder, or by *A* and *X* both together In any case the application must be for execution of the *whole* decree, *Kishore* v *Gisborne & Coy* (1890) 17 Cal 341, *Gyamonee* v *Radha* (1880) 5 Cal 592, and not merely for the portion transferred

2 *A* and *B* obtain a decree against *C* for Rs 5 000 *A* assigns his interest in the decree to *X* Here *X* occupies the double character of a *transferee* within the meaning of this rule and of a transferee of an interest in a *joint decree* within the meaning of r 15 Hence any application that *X* may make for execution will be governed by the provisions both of this and the preceding rule *Duar Bux* v *Fatik* (1899) 26 Cal 250

Explanation II—A person to whom a party to a suit agrees to transfer any decree *that may be passed* in the suit is not a transferee within the meaning of this rule

Illustration.

A sues *B* to recover Rs 5,000 During the pendency of the suit, *A* agrees with *C* to transfer to him any decree that may be passed in his favour in the suit A decree is subsequently passed for *A* *C* is not a transferee within the meaning of this rule, and he is not entitled to execute the decree against *B* The word decree holder in this rule means a person in whose favour a decree has already been passed When *A* agreed to assign to *C*, there was no decree in existence *Basrooruthil* v *Ramachandra* (1907) 17 Mad. L. J 391

(*s*) *Mathurapore Zamindary Co Ld* v *Bhasaram* (1924) 51 Cal 703 80 I C 881 (1924) A C 661

(*t*) *Anandi* v *Promotha* (1920) 25 Cal W N 861 57 I C 877

(*x*) *Kishore* v *Gisborne and Co* (1891) 17 Cal

(*z*) *Ramachandra* v *Abdul* (1913) 35 All 204, 19 I C 314 *Ahmad Shah* v *Faujdar* (1920) 2 Lah L J 1, 55 I C 963

O. 21, r. 16.

Explanation III —A person who is entitled under a decree to an assignment of a decree obtained by *A* against *B*, but who has not obtained such assignments, is not a transferee of the latter decree [*A*'s decree] so as to entitle him to apply for execution of the decree against *B*. But he will be entitled to apply if he has obtained an assignment *before* the date of the application (*a*)

Explanation IV —A person to whom the holder of a decree for possession of immoveable property sells *a portion of the property* is not a transferee *of the decree* within the meaning of this rule, and he is not therefore entitled to execute the decree. A transfer of property is not the same thing as a transfer of a decree (*b*)

Explanation V —A transferee of a decree awarding maintenance is entitled to execution under this section. The reason is that though a right to future maintenance cannot be transferred having regard to the provisions of s. 6, cl. (d) of the Transfer of Property Act, 1882, there is no objection to a transfer of such right when it is awarded by a decree. The transferee therefore of such a decree is entitled to recover by execution maintenance that has fallen due. He cannot, of course, attach maintenance before it has fallen due (*c*). See s. 60, sub-s. (1), cl. (n), and notes thereto on p. 176 above.

Benamidar —*A* obtains a decree against *B*. *C* purchases the decree from *A* in the name of *D*. Here *C* is the real transferee, and *D* is *benamidar* or ostensible transferee. Is *D* entitled to take out execution of the decree? Yes, according to the High Court of Allahabad (*d*). No, according to the High Court of Calcutta; but if he has succeeded in taking out execution (as where it is not brought to the notice of the Court that he is a *benamidar*), the application for execution made by him will save a subsequent application by *C* from the bar of limitation (*e*)

Where the alleged transferee of a decree is found to be the *benamidar* of a judgment-debtor, the Court is bound by the second proviso to this rule to refuse to allow the decree to be executed against the other judgment-debtors in favour of the alleged transferee (*f*)

It has been held in some cases that the mere fact that an order for execution has been made on the application of a *benamidar* does not preclude the real transferee from applying under this rule to continue the execution proceedings himself; but the real transferee will be bound by proceedings in execution up to that date (*g*). In a recent case, however, the High Court of Madras held that where a decree has been transferred by assignment in writing, the transferee alone can apply for execution under this rule, though he may be a mere *benamidar* and that the real transferee is not entitled to apply under this rule (*h*)

11. Application for execution by a transferee should be made to the Court which passed the decree —A transferee of a decree must apply for execution to the Court which passed the decree, though the decree has been sent for execution to another Court (*i*). The Court to which a decree has been transmitted for execution has no jurisdiction to make an order for execution on the application of a transferee of the decree. If such an order is made, it is illegal, and it must be set aside in appeal (*j*). As to the definition of "Court which passed the decree," see s. 37 and notes thereto.

(e) [illegible] v. [illegible] (1879) 5 C. L. R. 2[illegible]3; *Gour Sundar* v. *Hem Chunder* (1889) 16 Cal. 35[illegible]

[illegible] v. *Bedmati* (1893) 20 Cal. 3[illegible]; 393

[illegible]

III. Notice shall be given to the transferor and the judgment-debtor. **O 21, r. 16.**

The notice which is required by the first proviso is not notice of the assignment but notice of the application for execution of the decree (*k*) The provisions of the rule as to notice are mandatory, and if execution is issued without notice, the proceedings in execution are void (*l*) The object of the notice is to enable the transferor and the judgment debtor to raise such objections as regards the assignment as may be available to them, *e g*, that the consideration money was not fully paid, or that the transferee is a *benamidar* for some of the judgment debtors (*m*) Hence the mere issue of a notice is not sufficient It is incumbent upon the Court to hear the objections, if any, of the transferor and the judgment debtor, before directing execution to issue It is competent to the Court to determine the question even as to the validity of the transfer as between the transferor and the transferee (*n*) If the property of the judgment debtor is attached without hearing his objections, the attachment is illegal, even if the Court subsequently hears his objections and confirms the attachment after such hearing (*o*) Where the judgment debtor is dead, the notice required by this rule should be given to his legal representative (*p*) Where no notice is given as required by this rule, it is in the discretion of the Court to grant time to the transferee to enable him to serve the notice (*q*) *The Patna High Court has held that the notice required by this rule need not be in writing* (*r*)

Where on an application by the transferee of a decree to have his name substituted as decree holder, no objection is taken by the judgment debtor as to the validity of the transfer, the judgment debtor will be precluded from questioning the validity of the transfer on an application by the transferee for execution of the decree (*s*) Similarly where no objection is taken by the judgment debtor that no notice was given to the transferor, he will be precluded from raising that objection at a subsequent stage of the execution proceedings (*t*)

There is nothing to preclude a transferee of a decree from applying under s 39 to the Court which passed the decree to send the decree for execution to another Court (*u*) But the notice required by this rule must be issued by the Court which *passed the decree*, and not by the Court to which the decree is sent for execution (*v*)

It has been held by the High Court of Calcutta that the mere issue of a notice under this rule does not operate as a revivor within the meaning of arts 182 and 183 of the *Limitation Act* (*w*) *The contrary has been held by the High Courts of Allahabad and Madras* According to these Courts a mere application by the transferee for substituting his name for that of the decree holder operates as a revivor of the decree and gives a fresh starting point of limitation for executing the decree (*x*) And it has been held by the Madras Court that an application by the transferee to bring the representative of the deceased judgment debtor on the record to serve him with notice under this rule has the same effect (*y*)

Execution does not depend upon discretion of Court.—In the old section the words were 'and *if that Court thinks fit*, the decree may be

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[illegible]

(*n*) *Sheo Prasad* v *P E Lall* (1925) 4 Pat 120 127 86 I C 564 ('25) A P 440

(*o*) *Hird Ilax* v *Nigahia* (1922) 4 Lah L J 259, ('2) A L 396

(*o*) *Kissen Coolam* v *Dayabhai* (1912) 36 Bom 58 12 I C 547

(*p*) *Khushrobhai* v *Hormasha* (1887) 11 Bom 727

(*q*) *Maharaja Sir Rameshwar* v *Harihar* (1920) 5 Pat L J 390, 57 I C 250

(*r*) *Mussammat Bhagwanta* v *Dewan Zamir* (1924) 3 Pat 506 78 I C 766 ('24) A P 570

(*s*) *Taj Singh* v *Jagan Lal* (1916) 38 All 289 35 I C 234 *Dwarka Das* v *Muhammad* (1925) 47 All 86 80 I C 722 ('25) A A 119

(*t*) *Brajlal* v *E M Atkinson* (1920) 5 Pat L J 639 57 I C 707

(*u*) *Chathoth* v *Saithandavide* (1903) 26 Mad 258

(*v*) *Nando Lal* v *Chutterput* (1902) 29 Cal 235

(*w*) *Manohar Das* v *Futteh Chand* (1903) 30 Cal 979

(*x*) *Pitam Singh* v *Tota Singh* (1907) 29 All 301 *Annamalai* v *Ramaier* (1908) 19 Mad L J 24

(*y*) *Mahalinga* v *Kuppanacharyar* (1907) 30 Mad 541

O. 21, r. 16. executed,' &c It was accordingly held under that section that the Court had a discretion to grant or refuse an application for execution made by a transferee (x) The word "if that Court thinks fit" have been omitted in this rule The result is that where the conditions specified in this rule are satisfied a transferee of a decree is entitled to execution as of right like the original decree holder

Transfer of decree for the payment of money against two or more persons to one of them—This subject may be considered under the following two heads —

1 Where the whole decree has been transferred

2 Where the decree is a joint one, and part only of the decree has been transferred

First as regards transfer of the whole decree—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several judgment debtors, the decree is wholly extinguished Hence the transferee cannot *execute* the decree against the other judgment debtors, but his remedy against them is by a *regular suit* for contribution, as if the decree had been satisfied by him The object of the second proviso to the rule is not to deprive the transferee of a decree, who might happen to be one of the judgment debtors, of all relief, but to impose upon him the duty of proceeding by what was considered a more appropriate procedure that is, a suit for contribution (*a*) The provisions of this rule cannot be evaded by the judgment debtor who satisfies the decree by taking a transfer of the decree in the name of a *benamidar* (*b*)

Illustrations

(a) *A* obtains a decree against *B* and *C* for Rs 5 000 *B* satisfies the decree by paying Rs 5 000 to *A* In such a case *C* is bound to pay to *B* his (*C*'s) share of the judgment debt If *C* fails to contribute his share, *B*'s remedy is by way of *suit* against *C* to recover the amount [This illustration is merely introductory]

(b) *A* obtains a decree against *B* and *C* for Rs 5 000 *B* purchases the decree from *A* Here *B*'s position is exactly the same as in ill (a), that is to say, the decree must be taken as having been satisfied by *B* *B* cannot therefore execute the decree against *C* and his only remedy is to bring a suit against *C* for contribution *Saroop Chunder v Troylokhonath* (1866) 6 W R 230

(c) *A* obtains a decree against *B* and *C* for Rs 5,000 *A dies, and on his death the* decree passes to *B* as his heir The position is the same as in ill (b) *Banarsi v Maharani* (1883) 5 All 27

(d) *A* obtains a decree against *B* and *C* for Rs. 5,000 *B* pays the amount of the decree to *A* At *B*'s request *A* transfers the decree to *F* *F*, being merely a *benamidar* for *B* is not entitled to execute the decree against *C* It is competent to *C* in such a case to show that *B* and not *F*, paid the amount of the decree to *A*, and such payment may be proved even if it has not been certified under O 21, r 2, *Ponnusami v Letchmanan* (1912) 35 Mad 659 12 I C 657, *Ramayya v Krishnamurti* (1917) 40 Mad. 296, 32 I C 952 *Raghunath v Gangaram* (1923) 47 Bom 643 75 I C 893, (23) A B 404, *Ganpaya v Krishnappa* (1924) 26 Bom L R 491, 80 I C 423, (24) A B 314, *Sadogopa v Sellappa* (1922) 43 Mad L J 761, (22) A. M 510

Next, as regards transfer of a portion of a joint decree—Where a decree has been passed jointly in favour of two or more persons and the interest of any decree holder in such decree has been transferred by assignment or by operation of law to one of several judgment debtors the decree is extinguished to the extent of the interest so transferred, and execution can only issue for the rest of the decree

(x) *Megh Narayan v Lalha* (187) 4 B L R A C 2?? *Larmia v Digambar* (1891) 15 Bom 3?

(a) *Ismail v Nagappa* (1898) 32 Bom 193 197

(b) *Ramayya v Krishnamurti* (1917) 4? Mad 2?6 3? I C 952

Illustration. **O. 21, r. 61.**

A and *B* obtain a decree against *C* and *D* for Rs 5,000 *A*'s share of the decree is Rs 2,000 *A* dies, and on his death his interest in the decree passes to *C* as his heir The decree is extinguished to the extent of Rs 2,000 and neither *B* (as *decree holder*) nor *C* (as *transferee of A's interest in the decree*) can execute the decree against *D* for more than Rs 3 000 *Pogose* v *Fukurooddeen* (1876) 25 W R 343, *Banarsi* v. *Maharani* (1883) 5 All 27

"Decree for the payment of money"—The expression "decree for the payment of money" in the second proviso to the rule does not include mortgage decrees for sale (*c*)

It has been held by the High Court of Bombay that the expression "decree for the payment of money against two or more persons," means a *personal* decree for the payment of money against two or more defendants Hence the proviso does not apply where the decree is not against the defendants *personally* *A* obtains a decree against *B* as the legal representative of *X* and against *C* as the legal representative of *Y* for Rs *20,000 to be paid out of the estates of X and Y* *A* dies leaving *B* as his heir, and on his death the decree passes to him by operation of law The decree not being a personal decree against *B* and *C*, *B* is entitled, as transferee of *A*'s decree, to have the decree executed against the estate of *Y* (*d*) The High Court of Madras has dissented from this view According to that Court the fact that one of the defendants is directed by the decree to pay the amount of the decree out of the family property in his hands does not make the decree any the less a decree for payment of money against him (*e*)

Further, the expression "decree for the payment of money against two or more persons" means a decree against two or more persons *jointly* Hence the rule laid down in the second proviso does not apply where the decree is not passed against the defendants *jointly* In a suit by *A* against *B* and *C*, *A* obtains a decree against *B* for Rs 90 and against *C* for Rs 30 *A* then assigns the decree to *C* The decree not being a *joint* decree, *C* may execute the decree passed against *B* for Rs 90 (*f*)

Award—The Calcutta High Court has held that a transferee of an award filed in Court under the provisions of the Arbitration Act 1899, is entitled to apply for execution under this rule (*g*) See notes to r 29 below

Application for substitution by transferee—Where a decree holder applies for execution, and *pending execution* assigns his interest in the decree, an application by the transferee of the decree for substitution of his name in place of that of the assignor is not a fresh application for execution but merely an application for continuing the execution proceedings then pending (*h*)

Appeal—An order determining any questions between the judgment debtor and the representative of the decree holder (s 47) is a decree (s 2), and is therefore appealable as such (s 96) A transferee of a decree is a "representative" of the decree holder within the meaning of s 47 Therefore an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment debtor is a decree, and appealable as such (*i*)

[illegible]

Zamir (1924) 3 Pat 596 78 I C 766 (24 A P 576

(*i*) *Badri Narain* v *Jai Kishen* (1894) 16 All 483, *Tameshar* v *Thakur* (1903) 25 All 3 *Ganga Das* v *Yakub* (1900) 27 Cal 670 *Subbutha ammal* v *Chilambaram* (1902) 2 Mad 383 *Hardatta* v *Nigahia* [illegible] Lah L J [illegible]

O 21, rr. 16, 17.

Suit by transferee—A transferee of a decree whose application is rejected under this rule on the ground that the transfer is not a valid one is not precluded from instituting a regular suit for a *declaration* of the validity of the transfer Such a suit is not barred by the provisions of s 47 (j)

Equities enforceable against original decree-holder—See s 49 and notes thereto

Transfer of decree against a company in liquidation—Where a decree against a company in liquidation is transferred pending the winding up proceedings and the liquidator refuses to recognize the transferee the transferee may apply to the executing Court under s 47 (3) to be substituted for the original decree holder to enable him to prove his claim before the liquidator S 171 of the Indian Companies Act 1913 is no bar to the granting of such an application (k)

17 [S 245] (1) On receiving an application for the execution of a decree as provided by rule 11, sub rule (2) the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it

Procedure on receiving application for execution of decree

(2) Where an application is amended under the provisions of sub rule (1) it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented

(3) Every amendment made under this rule shall be signed or initialled by the Judge

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree

Changes in the law—This rule corresponds with s 245 of the Code of 1882 except in the following particulars —

1 The words may allow the defect to be remedied in sub-rule (1) have been substituted for the word may allow it [application] to be remedied as being more comprehensive and covering the case of omission to produce a copy of the decree as now required by r 11 (3)

2 Sub rule (2) is new See notes below Sub-rule (2) limitation

(j) *Lommanapa v. Chenthunty* (1903) 26 Mad [illegible]

(k) *Kash v. The Union Bank of India* (1919) 41 All 43 50 I C 115

Sub-rule (1)—This rule lays down the procedure to be adopted by the Courts on receiving an application for execution Sub r (1) empowers the Court to reject the application or allow an amendment The Court should in each case exercise its discretion, and where an amendment ought to be allowed it should allow the amendment (l) Thus where an application is not signed, it should not reject the application, but allow it to be amended (m) The amendment may be allowed even after the application for execution is registered provided the execution of the decree has not at the date of the application for amendment become barred by limitation (n) The High Court of Madras has held that where an application for amendment is made after the expiration of 12 years provided by s 48 the Court may in its discretion accept it or reject it (o)

Sub-rule (2): limitation—Article 182 of the Limitation Act provides *inter alia* that the first application for execution must be made within three years from the *date* of the decree If the decree has not been executed and it is necessary to make further application each successive application must be made within three years from the date of the last application But the last application in each case must have been one ' in accordance with law, otherwise it cannot give a fresh starting point for limitation An application which does not comply with the requirements of rules 11 to 14 of this order is not one in accordance with law ' (p) With these observations we proceed to consider the bearing of sub rule (2) on the provisions of the Limitation Act Sub rule (1) provides that where an application is made for execution but it does not comply with the requirements of rr 11 to 14, the Court may allow the applicant to amend it within a time to be fixed by the Court If the application is amended within the time fixed or within such further time as may be allowed by the Court (s 148), it will be deemed by virtue of sub rule (2) to have been an application " in accordance with law,' and presented on the date when it was first presented Under the old section it was held that where an order was made for amending an application for execution and the amendment was made, the application should be deemed to have been presented not on the date when it was *first presented*, but on the date when it was *amended* The result was that if the *amendment* was not made *until after* the expiration of the period of limitation the application was held to be time barred though the amendment was made within the time fixed by the Court (q) Those decisions are no longer law Compare s 149 Sub r (2) applies only if the application is returned for amendment for *non compliance with the provisions of rr 11 to 14*, and the application is subsequently amended Sub r (2) does not apply in terms to cases where an application is returned for amendment *for some other reason* (r)

Illustration

The last day for presenting an application for execution is 31st July 1925 The decree holder presents the application on that day The application does not comply with the requirements of O 21, r 11 (2) The Court may under this rule return the application for amendment and fix a date within which it should be amended If the application is amended within the time fixed by the Court it will be deemed to have been presented

L J 6-1 76 I C 750 *Sankaran* v
(19-5) 49 Mad L J 699 (26) A M 960
v *Trailokya* (1890) 17 Cal 631 639,
l *Sah* v *Janki Koer* (1896) 23 Cal 917

O. 21, rr. 17, 18.

on 31st July 1925 Further it will be deemed to have been an application' in accordance with law' within the meaning of art 182 of the Limitation Act 1908, so as to give a fresh starting point of limitation

Where on an application for execution presented by an agent it is objected that the agent is not duly authorized and the agent thereupon files a power of attorney the Court should not dismiss the application, but treat it as having been filed on the date on which the power of attorney was filed (s)

Execution in case of cross decrees

18 [S 246.] (1) Where applications are made to a Court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

(*a*) if the two sums are equal, satisfaction shall be entered upon both decrees, and

(*b*) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself

(3) This rule shall not be deemed to apply unless—

(*a*) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits, and

(*b*) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations

(a) *A* holds a decree against *B* for Rs 1 000 *B* holds a decree against *A* for the payment of Rs 1 000 in case *A* fails to deliver certain goods at a future day *B* cannot treat his decree as a cross decree under this rule

(s) *Ganga Ram* v *Dina Nath* (1919) Punj Rec no 118 p 404 18 I C 596

(b) *A* and *B*, co plaintiffs, obtain a decree for Rs 1,000 against *C*, and *C* obtains a decree for Rs 1,000 against *B* *C* cannot treat his decree as a cross decree under this rule

(c) *A* obtains a decree against *B* for Rs 1,000 *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs 1,000 *B* cannot treat *C*'s decree as a cross decree under this rule

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs 1,000 under a decree obtained by *F* *A* obtains a decree for Rs 100 against *F* singly and applies for execution to the Court in which the joint decree is being executed *F* may treat his joint decree as a cross decree under this rule

Changes in the law —

1 The words "where applications are made to a Court for the execution of cross decrees" in sub rule (1) are new They give effect to certain decisions noted below under the head 'Application of the rule'

2 The words 'separate suits' in sub rule (1) are new They have been added to show that, for the purposes of execution a counter claim is not a separate suit (*t*)

3 Sub rule (4) and the illustration thereto, that is ill. (d), are both new This sub rule gives effect to the decisions noted under the head 'Sub rule (4)'

Application of the rule —The meaning of sub rule (1) may be explained by the following illustration *A* holds a decree against *B* for Rs 5 000 *B* holds a decree against *A* for Rs 3,000 *A* and *B* each applies for execution of his decree to Court X which has jurisdiction to execute both decrees The decrees being cross decrees they will be set off against each other Hence *B*, who is the holder of the decree for the smaller amount, will not be allowed to take out execution of his decree Execution will only be allowed of *A*'s decree to the extent of Rs 2,000, being the difference between the amount of his and *B*'s decree If in the case put above the decree held by *B* was also for Rs 5,000 neither party should be allowed to take out execution, and satisfaction should be entered upon both decrees

This rule does not apply unless—

(1) the cross decrees are for the payment of two *sums of money*

(2) the decrees have been obtained in *separate* suits [see notes above under the head 'Alterations in the rule']

(3) both the decrees are capable of execution *at the same time* [ill (1)], and *by the same Court*, and

(4) the decree holder in one of the suits in which the decrees have been passed is the judgment debtor in the other, and each party fills *the same character in both the suits* [ills (b) and (c)]

[illegible]

If either decree holder omits to apply for execution of his decree, the other decree holder may take out execution of his decree for its full amount (*u*) Note the words with which the rule begins

"Cross-decrees in separate suits"—An order for payment of mesne profits made under s 144 is a decree by virtue of s 2 (2) Hence it has been

(*t*) *Stumore* v *Campbell & Co* [1892] 1 Q B 314, 317 per Esher M R

(*u*) *Chajmal Lal* v *D aram* (1902) 24 All 481, *Rewa Mahton* v *Ram Kishen* (1887) 1 Cal 18 24 13 I A 106-110 *Ponnusamy* v *Doraisamy* (1909) 32 Mad 336, 17 I C 247,

O. 21, r. 18. held that there is no distinction for the purposes of this rule between a decree in a *suit* and a decree in a *proceeding under* s 144 *A* obtains a decree against *B* In execution of the decree *B* s property is sold and it is purchased by *A* The decree is reversed in appeal, and *A* is directed to deliver possession of the property to *B* and to pay to *B* Rs 714 for mesne profits *B* applies for execution against *A* in respect of Rs 714 *A* claims to set off another decree obtained by him against *B* The set off may be allowed under this rule (*i*)

"Cross-decrees for the payment of two sums of money."—*A* sues *B* on a mortgage, and obtains a decree for Rs 1,800, to be realized *by sale of the mortgaged property* *B* obtains a decree against *A* for Rs 2,000 Here *A*'s decree, though it is one for sale in enforcement of a mortgage, and not strictly for the payment of money, may be set off against *B* s decree, by virtue of the provisions of r 20 of this order (*w*)

Where execution is taken out for the smaller sum—This rule provides that where applications are made for the execution of cross decrees, one for a larger amount and the other for a smaller amount, execution should be taken out only for the difference This means that the decree for the smaller amount cannot be executed at all, and no separate execution should issue of that decree (*x*) It is to be noted however, that if the Court in contraventon of the provis ons of this rule, allows execution to issue of the decree for the smaller sum, and a sale is made in such execution, the sale is not void, the reason being that a purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount " (*y*)

Same character in both suits—The provisions of this rule do not apply unless the decree holder in one suit is the judgment debtor in the other, and each party fills the same character in both suits *A* holds a money decree against *B* *B* holds a decree for sale passed in a suit brought by him as mortgagee against *C*, the mortgagor and *against A, a purchaser of a portion of the mortgaged property from C* *A* applies for execution of his decree against *B* *B* is not entitled to set off his decree against *A*'s decree The reason is that *A* does not fill the same character in both the suits The decree held by *A* is in his favour personally which he may execute against *B* by the arrest of his person or the attachment of his property This cannot be said of *B* s decree against *A*, for *B* is not ordered by the decree *personally* to pay any sum of money, but is only given an option to pay if he likes to save from sale the property in which he is interested (*z*) If in the case put above *C*, the mortgagor, was the holder of the money decree against *B* instead of *A*, and *C* applied for execution against *B*, *B* (the mortgagee) could have set off his decree against *C* (*a*)

Assignment of decree—If *A*, who has obtained a decree against *B*, attaches in execution of his decree a decree held by *B* against *C*, *A* is an assignee of *B* s decree within the meaning of this rule (*b*) [See O 21, r 53 (3)] It has been held by the High Court of Calcutta that a decree obtained against the assignor in a suit pending at the date of the assignment may be set off against the decree assigned, if the assignee had notice of such suit (*c*) *A* obtains a decree against *B* for Rs. 5 000 *B* then sues *A* for Rs 2,000 Pending *B* s suit *C* obtains a transfer of *A*'s decree *with notice of the suit* A decree is then

(*v*) *Adwaita* v *The Chittagong Co Ld* (1923) 28 Cal W N 938 84 I C 747 (25) A C 102
(*w*) See *Krishnan* v *Venkatapathi* (1906) 29 Mad 318
(*x*) *Sinnu* v *Santhoji* (1903) 26 Mad 498.
(*y*) *Lewa Malton* v *Ram Kishen* (1887) 14 Cal 18 13 I A 106
(*z*) *Sheo Shankar* v *Chunni Lal* (1916) 38 All 669 36 I C 918
(*a*) *Nagar Mal* v *Ram Chand* (1911) 33 All 240, 8 I C 835
(*b*) (1923) 28 Cal W N 938 84 I C 747, (25) A C 102 *supra*
(*c*) *Kristo Ramani* v *Keda Nath* (1890) 16 Cal 619

passed for *B* in his suit against *A* *C* applies for execution against *B* of the whole decree for Rs 5 000 He is not entitled to execute for more than Rs 3 000, as the transfer was taken with notice of *B* s suit See notes to s 49

Sub-rule (4) —This sub rule gives effect to the decisions in the undermentioned cases, where it was held that the holder of a decree passed jointly and severally against several judgment debtors, one of whom holds a decree against such decree holder singly may treat his joint decree as a cross decree (*d*) See ill (1) to the sub rule

19. [S 247] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross claims under same decree

(*a*) if the two sums are equal, satisfaction for both shall be entered upon the decree ; and,

(*b*) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

Object of the rule —The object of this rule is to prevent each side executing a decree in respect of sums due, whether for costs or otherwise, under the *same decree* (*e*)

Application of the rule —This rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature *A*, a mortgagor, sues *B* the mortgagee, for redemption *A* decree is passed in the suit ordering that upon *A* paying to *B* Rs 1 000 (mortgage debt) on a day fixed by the Court *B* should reconvey the mortgaged property to *A* and that if such payment is not made within the time fixed by the Court the property should be sold At the same time *A* is awarded costs, Rs 100, to be paid *by B* Here both the sums being payable *under the same decree* the provisions of the present rule apply, though *B*'s remedy, if *A* failed to pay the mortgage debt would be *by sale of the mortgaged property*, and *A* s remedy, if *B* failed to pay the costs, would be *against B personally* Hence *A*, being entitled to the *smaller* amount (Rs 100), cannot take out execution against *B* (*f*) *B*, being entitled to the *larger* amount (Rs 1,000), is alone entitled to take out execution But he cannot take out execution for more than Rs 900, which is the same thing as saying that he must reconvey the property to *A*, if *A* paid Rs 900, and he cannot insist on payment of the full sum of Rs 1,000 as a condition of reconveyance (*g*) The point to be noted is that in the case of cross claims under the same decree, execution may be taken out only by the party entitled to the larger sum The party entitled to the smaller sum is not entitled to take out execution It follows from this that if *A* is entitled to recover from *B* mesne profits amounting to Rs 445 under a decree, and *B* is entitled to recover from *A* under the same decree costs amounting to Rs 855, *A* being entitled to the smaller sum cannot take out execution against *B*, though *B*'s claim to execute his decree for costs is barred by limitation (*h*) It may also be noted that if the party

(*d*) *Hury Doyal* v *Din Doyal* (1883) 9 Cal 479 *Ram Sukh Das* v *Tota Ram* (1892) 14 All 339

(*e*) *Bhagwan* v *Ratan* (1894) 16 All 305 at 307 *Venkatanarayana* v *Purreda* (1923) 44 Mad L J 590 72 I C 865 ('23) A M 639

(*f*) *Sankara* v *Gopala* (1900) 23 Mad 181

(*g*) *Bhagwan* v *Ratan* (1894) 16 All 305 *Ishr* v *Gopal* (1884) 6 All 351

(*h*) *Madappa* v *Jaki* (1916) 40 Bom 60 30 I C 893

O. 21, r. 22. turn to cases where a notice is served, but, as it turns out subsequently, upon a *wrong person* The leading case upon the subject is *Malkarjun* v. *Narhari* (r) In that case a decree was passed against a person, who afterwards died, and in executing the decree against his estate, a person was served as his legal representative with notice under this rule The person served objected that he was not the legal representative of the deceased The executing Court decided, and as it turned out subsequently, decided erroneously, that he was to be treated as such representative [see s 47] After that the execution proceedings went on with the result that certain property belonging to the deceased judgment debtor was sold and purchased by a third party The question arose whether the sale was void as made without jurisdiction, or whether it was merely voidable Their Lordships of the Privy Council held that a notice having been served in fact, though upon a wrong person the Court *had* jurisdiction to sell the property, and the sale was not void Their Lordships further held that the omission to give notice to the right person constituted a serious irregularity, and that the sale was therefore voidable, that is to say, it was valid until it was set aside under O 21, r 90, or by independent suit brought within a year as provided by art 12, cl (a), of the Limitation Act Their Lordships said 'He (the person served) contended that he was not the right person, but the Court, having received his protest, decided that he was the right person and so proceeded with the execution *In doing so the Court was exercising its jurisdiction It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right* (s) ' But where the decree holder knows who the legal representative of the deceased judgment debtor is, and deliberately serves the notice upon a wrong person as his legal representative, and there is no adjudication by the executing Court as to who the legal representative is, the sale, it has been held, is absolutely void (t)

More than one year after the date of the decree—The term 'decree' in sub r (1), cl (a), means the decree capable of execution Thus where an appeal is preferred from a decree, and the appeal is dismissed for default under O 41, r 11, the decree of the lower Court is the decree capable of execution, and the period of one year is to be calculated from the date of that decree (u) See notes to s 36, "What decree may be executed" Even where the decretal amount is made payable by instalments, the period of one year is to be calculated from the date of the decree It is not to be calculated from the date of default (v)

More than one notice—The High Court of Patna has held that once the original decree has been put into execution after notice as provided by this rule, no fresh notice need be served for every application for execution made more than one year from the date of the last order for execution (w)

Notice when not necessary—It has been held by the High Court of Madras that where property is attached on an application for execution, no notice need be given to the judgment debtor of the *application for sale*, though the latter application is made more than a year after a prior *application for execution* (x) In the Madras case the attachment was subsisting at the date of the application for sale, and the fact of the attachment was known to the judgment debtor

Irregular service of notice—Irregularity in the service of notice as distinguished from non service is a material irregularity within the meaning of O 21, r 90 (xx)

(u) *Shyam Mandal* v *Satinath* (1917) 44 Cal 954 38 I C 493

(v) *Kora Lal* v *Punjab National Bank* (1923) 5 Lah L J 67

(w) *Mahadeo* v *Dhobi* (1923) 2 Pat 916, 74 I C 833 (23) A P 283

(x) *Sitaramayya* v *Gopalakrishnamma* (1920) 43 Mad 57 53 I C 257

(xx) *Das* v *Mir* (1921) 6 Pat L J 319 61 I C 82?

Death of judgment-debtor pending execution by Court to which decree is sent for execution —See notes to s 50, ' The application for execution against a legal representative, ' &c , on p 155 above **O. 21, r. 22**

"Court executing the decree"—It may either be the Court which passed the decree or the Court to which the decree is sent for execution

Sub-rule (2) —This sub rule is new See notes above, ' Changes in the law

Reasons to be recorded for dispensing with notice —In a recent Madras case the opinion was expressed that the omission to record the reasons for dispensing with the notice as required by sub r (2), is a mere irregularity (y)

Limitation to set aside sale for want of notice —An application to set aside a sale which is *void*, *e g*, for want of notice under this rule, is governed by art 181, and not art 166, of Sch I of the Limitation Act (z)

Appeal —An application to set aside a sale held without notice as required by sub r (1) falls within s 47, and hence a second appeal lies (a)

Decree against two or more persons jointly.—Art 182 of the Limitation Act, 1908, applies to decrees of Courts other than Chartered High Courts By Explanation I to that article it is provided that when a decree has been passed jointly against more persons than one, the application for execution of the decree, if made against any one or more of them, shall take effect against them all The result is that an order of revivor of a joint decree made under this rule against one or more of the judgment debtors will operate against the other judgment debtors, though no notice is given to them under this rule No such Explanation is appended to art 183 which applies to decrees of Chartered High Courts The result is that where a joint decree is passed by a Chartered High Court, an order of revivor of such decree made against one of several judgment debtors does not operate against other judgment debtors to whom no notice is given under this rule (b)

Notice under this rule and limitation —Art 182 of the Limitation Act 1908, which applies to decrees of Courts other than Chartered High Courts, provides *inter alia* that a decree of such Court must be enforced within three years from the date thereof unless a notice has been issued under this rule, in which case the application may be made within three years from the " date of *issue of* notice" under that section. It has been held by the High Court of Calcutta that " the date of issue of notice " referred to in art 182 means the date when the notice is *actually issued* and not the date when the Court *passes the order* for issuing the notice (c) On the other hand, it has been held by the High Courts of Bombay and Allahabad, that " the date of issue of notice " means the date when the Court passes the order for issuing the notice, and not the date on which the notice is actually issued (d) But it has been held by the High Court of Bombay that if no notice is issued at all, a mere order for issuing a notice will not give a fresh starting point for limitation (e) It is not, however, necessary that the notice must have been actually served (f)

Art 183 of the Limitation Act, which applies to decrees of Chartered High Courts, provides *inter alia* that a decree of such Court must be enforceed within twelve years

(y) *Rajagopala v Ramanujachariar* (1924) 47 Mad 288, 294, 80 I C 92, (24) A M 431
(z) (1924) 47 Mad 288 80 I C 92, (24) A M 431 (F B) *supra Seshagiri v Srinivasa* (1920) 43 Mad 313, 56 I C 260, *Ram Kinkar v Sitala Ram* (1918) 27 Cal L J 528
(a) (1924) 47 Mad 288 290-291, 80 I C 92, (24) A M 431 *supra*
(b) *Krishnaiyah v Gajendra* (1917) 40 Mad 1127, 40 I C 609
(c) *Kadaressur v Mohim Chandra* (1902) 6 C W N 656

from the date thereof, unless the decree has been *revived* It has been held by the High Court of Calcutta, that an *order for execution* operates as a revivor within the meaning of this article (*g*), but mere *issue and service of a notice* under this rule does not (*h*)

23. [S 249.] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

Procedure after issue of notice

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

24. [Ss 250, 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree

Process for execution

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

Delegation of authority to execute —The officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution It is not necessary that the " proper officer " should himself execute all warrants sent to him (*i*) But a warrant addressed to the *peon* of a Court cannot be executed by a *Nazir* (*j*)

Arrest without warrant —Where an officer of the Court arrests a judgment debtor without having in his possession the warrant of arrest at the time of arresting the arrest is illegal (*k*)

" Shall be sealed "—The provisions of this rule being mandatory, the omission of the Court s seal on the warrant renders the attachment illegal (*l*)

Specification of day on or before which warrant should be executed.—The warrant should specify the date on or before which it is to be executed Resistance to the execution of a warrant which does not specify such date is not illegal (*m*) Further,

(1895) 22 Cal 759
(*j*) *Mohini* v *King-Emperor* (1916) 1 Pat L J 550 36 I C 872
(*k*) *Empress* v *Amar Nath* (1883) 5 All 318
(*l*) *Khidir Bux* v *King Emperor* (1918) 3 Pat L J 636 49 I C 171
(*m*) *Mohini* v *King Emperor* (1916) 1 Pat L J 550, 36 I C 871

a warrant cannot be executed after the expiration of the date specified in the warrant for its execution (n) If the warrant is extended the date to which it is extended must be specified on the warrant If this is not done the warrant is not a good warrant and resistance to its execution after the date originally specified in it cannot amount to an offence under s 186 of the Indian Penal Code (o)

Endorsement on process

25 [S 343] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed the reason why it was not executed and shall return the process with such endorsement to the Court

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit summon and examine witnesses as to such inability, and shall record the result

Stay of execution

When Court may stay execution

26. [Ss 239, 240] (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto

(2) Where the property or person of the judgment debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

Power to require security from, or impose conditions upon judgment-debtor

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the Court may require such security from, or impose such conditions upon the judgment debtor as it thinks fit

(n) *Anand Lall v Empress* (1881) 10 Cal 18 *Abinash v Ananda* (1904) 31 Cal 474

(o) *Sheikh Nasur v Emperor* (1910) 37 Cal 1?? 5 I C 409

O. 21, rr. 26-29.

Stay of execution —See notes under the same head to s 47, on p 133 above

27. [S 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment debtor discharged

Contrast with this the provisions of s 58, sub s (2)

28 [S. 242] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to

29. [S 243] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.

Stay of execution pending suit between decree holder and judgment debtor

[illegible] Code relating to execution of decrees apply to [illegible]

1899 is *not a decree*, although it is enforceable, as provided by s 15 of that Act, *as if it were a decree* The execution therefore of such an award cannot be stayed under this rule (p) On the other hand, it has been held by the High Court of Calcutta that an award filed in Court under s. 11 of the Arbitration Act being enforceable under s 15 of the Act as if it were a decree of the Court, the provisions of the Code applicable to the execution of decrees apply to an award so filed It has thus been held that an award against a firm stands on the same footing as a *decree* against a firm for the purposes of O 21, r 50 (q), and that a transfer of an award stands on the same footing as a transfer of a *decree* for the purposes of O 21, r 16 (r) The High Court of Allahabad takes the same view as the Calcutta High Court (s) No such question, however, can arise where a decree is passed in terms of an award under para 16 of Sch II of the Code (t), for the award in that case is merged in the decree

Inherent power to stay execution —A Court may under this rule stay execution of a decree obtained by *A* against *B* pending the decision of a *suit* brought by *B* against *A* If *B* s suit is dismissed and an appeal is preferred by *B* from the decree, the Court may under s 151 stay execution of *A*'s decree pending the decision of *B*'s *appeal* (u)

(p) *Tribhuwandas* v *Jivanchand* (1911) 35 Bom 196 8 I C 179
(q) *Louis Dreyfus & Co* v *Purusottum Das* (1920) 47 Cal 29, 56 I C 325
(r) *Gladstone Wyllie & Co* v *Joosub* (1923) 27 Cal W N 666 77 I C 868, (24) A C 117
(s) *Sital Prasad* v *Messrs Clement Robson &* [illegible]

Appeal—See s 47 notes under the head Changes introduced by the section p 127 above

Mode of execution

30. [S. 254] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment debtor or by the attachment and sale of his property, or by both

Decree for payment of money

Alternative to some other relief—See O 20 r 10

Property charged with payment of decretal amount—No attachment is necessary where by a consent decree certain property is charged with payment of the decretal amount and liberty is given to the decree holder to sell the property in case of default of payment (r)

31 [S 259] (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor or by the attachment of his property, or by both

Decree for specific movable property

(2) Where any attachment under sub rule (1) has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree holder in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property such amount and in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, had been refused, the attachment shall cease

Alterations in the rule—The words or for the recovery of a wife which occurred in the corresponding sec 259 of the Code of 1882 after the words share in a

(r) *Jagannath v Deb Prasad* (1923) 2 Pat 768 73 I C 598 ('24) A P 8

specific movable have been omitted for there can be no decree under the law for the recovery of a wife as a wife cannot be treated as a chattel to be delivered over to the husband Where any third person prevents the wife from returning to her husband the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both, under r 32

Decree for specific movable property—As to the cases in which a decree may be passed for the delivery of specific movable property, see Specific Relief Act I of 1877, s 11

Rule when not applicable—It has been held by the High Court of Calcutta that this rule does not apply where the property sought to be attached is not in the possession of the judgment debtor (*w*)

Decree for specific performance for restitution of conjugal rights or for an injunction

32. [S 260, R.S C., O. 42, r 30] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced *in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction* (*x*) by his detention in the civil prison, or by the attachment of his property or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation, or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as he thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of the one year from the date of the

(*w*) *Padma Chand v Chundi Dat* (1896) 1 C W N 170

(*x*) The italicized words were added by Act 29 of 1923

attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. **O. 21, r. 32.**

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B* *A* in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building The Court is of opinion that no sum realizable by the sale of *A* s property would adequately compensate *B* for the depreciation in the value of his mansion *B* may apply to the Court to remove the building and may recover the cost of such removal from *A* in the execution proceedings

Alterations in the rule—Sub rules (2) and (5) are new See notes below under the head "Sub rule (5)"

The words "or for an order requiring the performance of, or abstention from, any other particular act which occurred in s 260 of the Code of 1882 have been omitted and in lieu thereof the words ' or for an injunction have been substituted. See notes below under the head Sub rule (1) decree for injunction

Specific performance—As to specific performance of contracts see Specific Relief Act I of 1877, ss 12 30

Injunction—As to perpetual injunctions see Specific Relief Act I of 1877, ss 54 57

Restitution of conjugal rights—The words italicized in sub rule (1) were added by Act 29 of 1923 Having regard to those words, a decree for restitution of conjugal rights can no longer be enforced by detention in the civil prison, whether it be against a husband or a wife As to decree against a husband, see also r 33 below

Sub-rule (1): decree for injunction—Sub rule (1) applies to both prohibitory and mandatory injunctions (y) Where an injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within three years of such breach under art 181 of the Limitation Act (z) A separate suit to enforce the injunction is barred by the provisions of s 47 (a) If the decree is enforced by the imprisonment of the defendant, the period of imprisonment should not at any one time exceed six months see s 58

(y) *Sachi Prasad* v *Amarnath* (1919) 46 Cal 103 107 45 I C 864

(z) *Venkatachallam* v *Veerappa* (1906) 29 Mad 314 *Sachi Prasad* v *Amarnath* (1919) 46 Cal 103, 45 I C 864 but see *Iru Singh* v *Chatar Singh* (1901) 23 All 465, *Bhagwan Das* v *Sukhdei* (1906) 28 All 300

(a) *Sachi Prasad* v *Amarnath* (1919) 46 Cal 103 45 I C 864

O 21, r. 32

Where a woman, who had been directed by a decree to refrain from preventing her daughter returning to her husband, *permitted* the daughter, who was of age, to reside in her house, it was held that such conduct did not constitute a breach of the direction under the decree so as to render it punishable under this rule (*b*)

It was held under the old section that an order directing a defendant to render accounts within a specified time was an "order requiring the performance of a particular act within the meaning of that section, and that disobedience to the order was punishable under that section (*c*) The words "performance of or abstention from any other particular act" which occurred in the old section were held to have a very wide general meaning, and they have been omitted from this rule, and in lieu thereof the word ' injunction " has been substituted The result is that disobedience to an order directing a party to render accounts can no longer be punished under this rule, as such an order cannot be said to be an "injunction" within the meaning of this rule (*d*)

Opportunity of obeying the decree—All that the Court has to see before directing execution to issue under this rule is whether the party bound by the decree has had an *opportunity* of obeying the decree or injunction and has wilfully failed to obey it If the party has had the opportunity and has *wilfully* failed to obey the decree, the Court may order execution to issue under this rule without giving him any further opportunity, and it is not obligatory upon the Court in such a case to serve a notice upon the party calling upon him to obey the decree or injunction (*e*)

Where an application is made under this rule, but the party bound by the decree has had no opportunity of obeying the decree, the application will be dismissed. But the dismissal of the application is no bar to another application made after an opportunity has been afforded to the party of obeying the decree Thus if a decree is made directing the defendant to deliver certain articles necessary for the performance of the duties of priest in a temple to the plaintiff, the plaintiff is not entitled to execute the decree under this rule unless it is proved that he went to the temple after notice to the defendant to receive the articles from him (and thereby afforded an opportunity to the defendant to comply with the decree) and that the defendant failed to deliver the articles If such an opportunity has not been afforded, the plaintiff's application will be dismissed, but its dismissal will be no bar to a subsequent application after such opportunity has been afforded (*f*)

"Party against whom a decree for injunction has been passed"—See notes to s 50, ' Decree for injunction, ' on p 155 above

Sub-rule (5)—This sub rule is new It corresponds to O 42, r 30, of the English Rules In the absence of any provision in the old section similar to the one contained in this sub rule, it was held that where a decree directed the defendant to remove an obstruction such as pulling down a wall or opening a path way, and the defendant failed to obey the decree, it was not competent to the Court to depute any of its officers to remove the obstruction, as that was not one of the modes of execution sanctioned under that section (*g*) Under the present rule, the Court may direct the act to be done so far as practicable by the decree holder or some other person appointed by

(*b*) *Ajnasi Kuar* v *Suraj Prasad* (1877) 1 All 501

(*c*) *Degambar* v *Kally Nath* (1881) 7 Cal 654, *Raghunath* v *Ganpatji* (1905) 27 All 374

(*d*) *Arjun* v *King Emperor* (1918) 3 Pat L J 106, 44 I C 737

(*e*) *Durga Das* v *Dewraj* (1906) 33 Cal 306

(*f*) *Kishore Bun* v *Dwarkanath* (1894) 21 Cal 784 21 I A 89

(*g*)

O. 21, rr. 32, 33.

the Court (*h*) But the Court has no power under this rule to order the police to see that its decree is carried out Thus where a decree is passed declaring the plaintiff's right to perform certain ceremonies in a temple and restraining the defendant from obstructing the plaintiffs from performing the ceremonies the Court has no power under this rule to order the police to see that the plaintiffs performed the ceremonies without interference on the part of the defendants (*i*)

The expression the act required to be done means what has to be done to enforce the injunction (*j*) Hence if a defendant is directed by a decree to demolish a certain wall and the wall is demolished he cannot in execution proceedings be directed to remove a new wall built after the date of the decree in a different place The plaintiff's remedy in respect of the new wall is to file a fresh suit against the defendant (*k*) In a recent Calcutta case (*l*) Richardson J, expressed the opinion that sub r (5) applied to prohibitory as well as mandatory injunctions

33. [*New*] (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *shall be executed in the manner provided in this rule*

Discretion of Court in executing decrees for restitution of conjugal rights

(2) Where the Court has made an order under sub rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree holder such periodical payments as may be just, and, if it thinks fit, require that the judgment debtor shall, to its satisfaction, secure to the decree holder such periodical payments

(3) The Court may from time to time vary or modify any order made under sub rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money

Compare the Matrimonial Causes Act 1884 (47 and 48 Vict c 68)

Amendment of the rule—The italicized words in sub rule (1) were added by Act 29 of 1923 The words and the decree holder is the wife which occurred in

103 45 I C 864

(*k*) *Maluka* v *Sundar Singh* (19) 7 Lah L J 0 83 I C 5 (2) A L 333

(*l*) *Sashi Prasad* v *Amarnath* (1919) 46 Cal 103 107 45 I C 864

O. 21, r. 35 felt in executing decrees obtained by the owner of an undivided share in immoveable property for joint possession as against his co sharers and persons holding under them, as also the difficulty felt in executing decrees obtained by a purchaser of the rights of a co sharer for joint possession of the property with the other co sharers

Resistance to delivery of possession to decree-holder.—Where the holder of a decree for the possession of immoveable property is *resisted or obstructed* by any person in obtaining possession of the property, the procedure to be followed is that prescribed by rr 97 103 of this order

Actual and formal possession.—The possession referred to in sub rules (1) and (3) is *khas* or *actual* possession, while that referred to in sub r (2) and r 36 below is *formal* or *symbolical* possession *Formal* or *symbolical possession* is delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree

Rules 35 and 36 refer to cases where a suit is brought for possession of immoveable property, and a decree is passed in the suit for the delivery of the property to the decree holder Rules 95 and 96 refer to cases where immoveable property belonging to a judgment debtor is sold in execution of a decree passed against him, and possession of the property is sought by the auction purchaser In considering the distinction between actual and symbolical possession, it is desirable to consider both these sets of rules together, for they are both governed by the same principles Where the immoveable property of which possession is directed by the decree to be delivered to the decree holder is in the possession of the judgment debtor, *actual possession* must be delivered to the decree holder under r 35 (1) Where it is in the possession of a tenant or other person entitled to occupy the same, only *symbolical possession* can be delivered, and that is to be done under r 36 Likewise where immoveable property is sold in execution of a decree, and possession is sought by the auction purchaser, *actual possession* must be delivered to him under r 95, if the property is in the possession of the judgment debtor But if the property is in the possession of a tenant or other person entitled to occupy the same, only *symbolical possession* can be delivered, and that is to be done under r 96

It is clear from what is stated above that there are only three cases in which the law allows symbolical possession to be given, namely, the cases contemplated (1) by sub rule (2) of the present rule, (2) by r 36, and (3) by r 96 of this order *Symbolical* possession given in such cases operates as actual possession against the judgment debtor, but not against third persons who were not parties to the decree (r) In other words, *symbolical* possession is no possession at all as against third parties This distinction is of great importance in the law of limitation The rule to be deduced from the cases on the subject is that where in execution of a decree *symbolical* possession is delivered of immovable property to the person entitled to possession thereof, and such person subsequently institutes a suit for *actual* possession, the symbolical possession is to be treated as actual possession where the suit is *against the judgment-debtor or his representatives* and the period of 12 years allowed for such a suit is to be calculated not from the date of sale, but from the date of the subsequent dispossession [ill (2)] But where a suit for actual possession is instituted *against a third party claiming to be in possession of the property adversely to the judgment debtor*, no regard is to be had at all to the

(r) *Ranjit Singh* v *Banwari Lal* (1884) 10 Cal 993 *Juggobundhu* v *Ram Chunder* (1880) 5 Cal 584 *Juggobundhu* v *Purnanand* (1889) 16 Cal 530 *Radha Krishna* v *Ram Bahadur* (1917) 20 Bom L R 502 43 I C 268 [P C] *Mahadevappa* v *Bhima* (1922) 46 Bom 710 66 I C 320 ('22) A B 28, *Ranganatha* v *Srinivasa* (1925) 49 Mad L J 656, 660-661 90 I C 1037, ('26) A M 42

symbolical possession of the plaintiff in determining the period of limitation and the period of 12 years is to be calculated, not from the date on which symbolical possession was delivered to the plaintiff, but from the date on which the possession of such third party became adverse as against the judgment debtor [ill (1)]

Illustrations

(1) *P* obtains a decree against *D* In execution of the decree certain property alleged to belong to *D* is sold, and it is purchased by *A* *A* applies for possession, and he is placed in *symbolical* possession of the property *C* has been in possession of the property adversely to *D* for 10 years prior to the date on which *A* is placed in *symbolical* possession *C* continues to be in possession of the property as before After three years *A* sues *C* for possession The defence is that *C* has been in adverse possession for more than twelve years, and the suit is therefore barred under art 144 of the Limitation Act *A* contends that his symbolical possession operated to break the continuity of the adverse possession of *C*, and that the period of twelve years allowed by art 144 for a suit for possession should be calculated from the date on which symbolical possession was delivered to him The suit is barred, for *A*'s possession, being merely symbolical, did not operate at all as possession as against *C* who was not a party to the suit, and it could not therefore break the continuity of *C*'s possession (s) In other words, delivery of symbolical possession to *A* did *not* amount to a *dispossession* of *C*

(2) *A* obtains a decree against *B* for possession of certain immoveable property The property *being in the occupancy of B's tenants, symbolical* possession is delivered to *A* under r 36 Subsequently *B* dispossesses *A* by receiving the rents and profits *A* thereupon sues *B* for actual possession The period of limitation for such a suit is twelve years from the date of dispossession (t) The same principles apply where a person is placed in *symbolical* possession under sub rule (2) of this rule in cases where the decree is one for *joint* possession, and also where he is placed in *symbolical* possession under r 96 of this Order (u)

Note—It will be observed that in ill (2) the suit is against the judgment debtor, and in ill (1) it is against a third person who was not a party to the suit *Symbolical* possession operates as actual possession against the *judgment debtor*, that being the only means by which, *as between the parties*, the Court could effectuate and carry out its object But it does not operate as actual possession against third persons who were not parties to the suit, and the reason for this is very plain A suit might be brought, and a decree obtained, by a person who has neither title nor possession, against another person who has neither title nor possession, and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years, and who was no party to the suit, it would operate most unjustly (v)

It has been stated above that where a judgment debtor himself is in possession, *actual* possession must be delivered to the person entitled to possession under sub r (1) of this rule or under r 95, as the case may be Suppose now that *symbolical* possession is delivered in a case where actual possession ought to have been delivered Does symbolical possession given under these circumstances operate as actual possession against the judgment debtor? It has been held by the High Court of Calcutta that it does, exactly as if symbolical possession were rightly delivered Symbolical possession given

(s) *Harjivan v Shivram* (1895) 19 Bom 620 *Lunjit Singh v Bunwari Lal* (1884) 10 Cal 993

(t) *Joggobundhu v Ram Chunder* (1880) 5 Cal 584 [F B]

(u) *Joggobundhu v Purmanand* (1890) 16 Cal 530 [F B]

(v) *Lunjit Singh v Bunwari Lal* (1884) 10 Cal 993, 995

O. 21, rr. 35, 36.

in circumstances in which actual possession ought to have been delivered is not a nullity according to those Courts The delivery of symbolical possession *even erroneously* operates *as actual possession* against the judgment debtor and his representatives, for it is said that after all it is possession obtained *through an officer of the Court and by process of law*, and the judgment debtor must be taken to be a party to the proceeding relating to the taking of possession From this point of view, a suit for *actual* possession may be brought at any time within 12 years from *the date on which symbolical possession is given* (*w*) On the other hand, it has been held by a Full Bench of the Bombay High Court that symbolical possession given in circumstances in which actual possession ought to have been given is a *nullity*, and the period of limitation for a suit for actual possession is 12 years from *the date of sale* The reason given by the High Court of Bombay is that symbolical possession is not actual possession nor is it equivalent to actual possession except where the Code expressly or by implication provides that it shall have that effect, and there is no section of the Code by which it is provided that where symbolical possession is given in a case in which actual possession ought to have been given, such possession should be treated as equivalent to actual possession (*x*) The High Court of Allahabad has taken the same view as the Bombay High Court (*y*) In an earlier case (*z*), the Madras High Court took the same view as the High Court of Calcutta, but in later cases it has followed the Bombay ruling (*a*)

Illustrations

In execution of a decree obtained by *A* against *B* certain property belonging to *B* is sold, and it is purchased by *C* in the year 1895 *B is in possession* of the property at the date of sale *C* applies for possession, but instead of actual possession being delivered to him under r 95, symbolical possession is given to him in the year 1905 *C* subsequently sues *B* for actual possession in the year 1908, that is, more than 12 years after the date of sale, but within 12 years from the date of delivery of symbolical possession According to the Bombay and Allahabad High Courts the suit is barred by limitation, according to the Calcutta High Cout, it is not

Sub-rule (2): affixing copy of warrant.—Where in a case falling within sub r (2) of the present rule, or rule 36 below, or r 96 below, no copy of the warrant is affixed, but the substance of the decree is proclaimed by beat of drum *in the presence of the judgment debtor*, the possession so delivered is good symbolical possession and carries with it all the incidents of such possession as against the judgment debtor, as he *had notice* of the proceeding (*b*), but not if he had no such notice (*c*)

36 [S. 264.] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the

Decree for delivery of immoveable property when in occupancy of tenant

(*w*) *Lokessur* v *Purgun* (1881) 7 Cal 418 *Hc Mohan* v *Baburali* (1897) 24 Cal 71 *Bhilu Beg* v *Jatindra Nath* (1922) [illegible]

[illegible] 598 [illegible] 44 [illegible] 25 [illegible] 40 [illegible]

[illegible] 16 Bom 722 *Shridhar* v *Ganpati* (1919) 43 Bom 559 *Raghunath* v *Kondiba* (1922) 24 Bom L R 499 68 I C 91 (22) A B 2

(*y*) *Jang Bahadur* v *Hanwant* (1921) 43 All 520 [F B] 63 I C 212

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(*c*) *Khub Ram* v *Surat* (1917) Punj Rec no 21, p 74 39 I C 753 See also *Rariland* v *Jana* (1921) 3 Lah L J 138 59 I C 770 [no symbolical possession obtained at all under decree for joint possession—2nd suit for possession held not maintainable]

O 21, rr 36-38

Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property

Symbolical possession —See notes to r 35 above

Other person entitled to occupy the same —A person disturbing the possession of another without any right legitimately derived from any competent person to do so is not a person entitled to occupy the property within the meaning of this rule (*d*) He is no more than a trespasser

Arrest and detention in the civil prison

Discretionary power to permit judgment debtor to show cause against detention in prison

37. [S 245 B] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall if the decree holder so requires issue a warrant for the arrest of the judgment-debtor

Discretionary power to issue notice under this rule —When a decree is for the *payment of money* and execution is applied for against the *person* of the judgment debtor the Court may issue a notice to the judgment debtor calling upon him to show cause why he should not be committed to the civil prison in execution of the decree As to the procedure to be followed when the judgment-debtor appears in pursuance of the notice see r 40 below

No discretion to refuse execution in other cases —Where an application is made for *attachment of the property* of a judgment debtor the Court has no power either to refuse or stay execution except in the cases expressly provided for by the Code (*e*) See r 83 below

Privilege from arrest —See s 135 sub-section (2)

Warrant for arrest to direct judgment-debtor to be brought up

38. [S 337] Every warrant for the arrest of a judgment debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been

(*d*) *Ibrahim v Konammal* (1922) 43 Mad L J 179 O I C 755 (23) A M 2[illegible]

(*e*) *Ishan Chunder v Ashanoollah* (1884) 10 Cal 617

O 21, rr 38-40.

ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid

Subsistence allowance

39. [Ss 339, 340] (1) No judgment debtor shall be arrested in execution of a decree, unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the Court

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his sub sistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month

(4) The first payments shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison

(5) Sums disbursed by the decree holder for the subsis tence of the judgment debtor in the civil prison shall be deemed to be costs in the suit

Provided that the judgment debtor shall not be detained in the civil prison or arrested on account of any sum so dis bursed

Proceedings on appear ance of judgment-debtor in obedience to notice or after arrest

40. [S 37A] (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any in stalment thereof, the Court may, upon such terms (if any)

as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be

(2) Before making an order under sub rule (1), the Court may take into consideration any allegation of the decree holder touching any of the following matters, namely —

(*a*) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account,

(*b*) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree,

(*c*) any undue preference given by the judgment debtor to any of his other creditors,

(*d*) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it,

(*e*) the likelihood of the judgment debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (2) are being considered, the Court may, in its discretion, order the judgment debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court

(4) A judgment-debtor released under this rule may be re arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Sub-rule (1) Unable to pay —Where a decree is passed against *A* *B* and *C*, and the Court is satisfied that *A* is unable to pay and that *B* and *C* each possesses property

O. 21, rr. 40-42.

which may be realized by the decree holder in execution of the decree, the Court may reject an application made by the decree holder for the arrest of *A* (*f*)

Appeal —An order rejecting an application for the arrest of a judgment debtor falls within s 47, and is appealable as a decree (*g*)

Attachment of Property.

Examination of judgment debtor as to his property

41. [*Cf.* S. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(*a*) the judgment-debtor, or

(*b*) in the case of a corporation, any officer thereof, or

(*c*) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents

Object of the rule.—The object of this rule is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and must not be lightly made (*h*)

"Any and what other property."—This refers to property which is liable to attachment and sale under the decree against the judgment debtor Property of a judgment debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgaged debt (see s 73) If the mortgagee claims that he is *in possession* as mortgagee, he may be *examined* under this rule (*i*) See note to r 62 below

What property may not be attached.—See s 60

Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment under a preliminary decree.—In a suit by *A* against *B* for the recovery of possession of immovable property and for mesne profits, a preliminary

(*f*) *Lala Das* v *Mina Mal* (1922) 4 Lah L J 266 79 I C 551 ('22) A L 259

(*g*) (1922) 4 Lah L J 266 79 I C 551 ('22) A L 259 *supra*

(*h*) *National Bank of India Ltd* v *Ghutnam* (1916) 43 Cal 285 34 I C 297

(*i*) *In re Premji* (1893) 17 Bom 514 See *Mudhun Mohun* v *Gokul Doss* (1866) 10 M I A 563 571 as to attachment of property in possession of a mortgagee

decree is passed against *B* for the delivery of the property to *A*, and an inquiry is directed as to the mesne profits due by *B* to *A*. *B* delivers possession of the property to *A*. Subsequently while the inquiry as to mesne profits is still pending *A* applies for attachment of certain property belonging to *B*. The attachment may be allowed under this rule (j). See O. 20, r. 12.

Attachment of movable property other than agricultural produce in possession of judgment debtor

43. [S. 269.] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Movable property in possession of judgment-debtor.—This rule provides for attachment of movable property in the possession of the judgment debtor. As to movable property not in possession of the judgment debtor, see r. 46 below.

Attachment by actual seizure.—Where a warrant of attachment is executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to "actual seizure" within the meaning of the present rule (k).

Security bond to produce attached property.—Goods attached under this rule by an Amin are made over by him to a third person for safe custody on his passing a bond undertaking to produce them in Court. The surety fails to produce the goods when required by the Court. Is the decree holder entitled to proceed against the surety under s. 145 (c)? No, according to the Madras High Court, there being no order of the Court as contemplated by cl. (c) of s. 145 (l). Yes, according to the Allahabad High Court (m).

Rateable distribution.—See notes to s. 73, "Assets held by a Court," Case H, on p. 212 above.

Attachment of agricultural produce

44. [*New.*] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out

(j) See *Sharoda Moyee v. Wooma Moyee* (1867) 8 W. R. 9.

(k) *Mullan Chand v. Bank of Madras* (1904) 27 Mad. 346.

(l) *Rajah of Venkatagiri v. Sura* (1920) 39 Mad. L. J. 472, 60 I. C. 131.

(m) *Matho Prasad v. Pearey Lal* (1921) 19 All. L. J. 247, 62 I. C. 719.

O. 21, rr. 44, 45.

grain or the like or fodder stack on or in which it is deposited,

and another copy on the outer door or some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain, and the produce shall thereupon be deemed to have passed into the possession of the Court

Attachment of agricultural produce—This and the following rule provide for the attachment of agricultural produce Both these rules are new Growing crops are under this Code included in the category of movable property [see s 2 cl (13)]. But the procedure relating to the *actual seizure* of movables cannot be applied in its entirety to growing crops for considerable injury would result to both parties if such crops were allowed *to be removed* on attachment like other movable property With a view to prevent such injury and to secure to both parties the fullest value from the property attached it is enacted by the next following rule that where agricultural produce is attached the Court should make such arrangements for the custody thereof as it may deem sufficient and subject to such conditions as may be imposed by the Court the judgment debtor should be allowed to continue to perform all acts of husbandry and if he endeavours to defeat the attachment by neglecting the crop the decree holder should be allowed to intervene and protect his interests

45 [*New*] (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered

Provisions as to agricultural produce under attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment-debtor fails to do all or any of such acts, the decree holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Time at which the crop is likely to be cut or gathered.—The decree-holder should specify in the application for attachment the time at which the crop is likely to be cut or gathered The object is to enable the Court to make necessary arrangements for the custody of the crop [sub r (1)] If the application is presented within twenty days before the maturity of a crop not lending itself to storage, it should be refused [sub r (5)] See notes to r 44 above

Attachment of debt, share and other property not in possession of judgment-debtor

46. [S. 268.] (1) In the case of—

(*a*) a debt not secured by a negotiable instrument,

(*b*) a share in the capital of a corporation,

(*c*) other movable property not in the possession of the judgment debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(*i*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court,

(*ii*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon,

(*iii*) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be fixed on some conspicuous part of the Court-house, and another copy shall be

O. 21, r. 46. sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (*i*) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Attachment of debt.—A debt to be attached must be *actually due* from the garnishee (judgment debtor's debtor) to the judgment debtor It may be either presently payable, or payable in the future by reason of a *present obligation* (*n*) As stated by their Lordships of the Privy Council in the undermentioned case (*o*), " an *existing* debt, though payable at a future day, may be attached " But only such debts can be attached as the judgment debtor could deal with properly and without violation of the rights of third persons (*p*) For instances of attachable debts, see notes to s 60, "Debts," p 172 above

The following are some of the important rules relating to the attachment of debts —

1 It is not necessary for the purpose of attaching a debt that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of attachment *B* delivers certain goods to his agent *C* for sale The goods are sold by *C* and the sale proceeds are received by him In execution of a decree obtained by *A* against *B*, *A* may attach the sale proceeds in the hands of *C*, though the exact amount due to *B* may not then have been ascertained (*q*)

2 The attachment of a debt does not prevent the judgment debtor from suing his debtor or from taking any other step necessary for the recovery thereof, but he is not entitled to *receive payment* thereof from his debtor unless the claim in respect of which the debt is attached is first satisfied *C* owes a debt to *B* The debt is attached in execution of a decree obtained by *A* against *B* This does not preclude *B* from *suing C* to recover the debt, or from *prosecuting the suit* if a suit has already been instituted, but he cannot receive *payment* of the debt from *C* unless he first satisfies *A*'s decree (*r*) See sub rule (1), cl (i)

Attachment of mortgage-debt.—*A* executes a mortgage of his immovable property to *B* to secure payment of Rs 5,000 lent and advanced to him by *B* It is provided by the mortgage bond that if *A* fails to pay the mortgage debt on the due date, *B* should have the right to sue *A* personally for the debt, and also to realise the debt by the sale of the mortgaged property In such a case *B*'s interest in the mortgage bond comprises (1) the right to sue *A personally* for the mortgage debt and (2) the right to realise the debt by a *sale of the mortgaged property* Suppose now that *X* obtains a decree against *B*, the mortgagee, for Rs 5,000, and that in execution of the decree he seeks to attach the mortgage debt due to *B* Is the mortgage debt a "debt" within the meaning of this rule, or, because it is secured by a mortgage of *immovable* property, is it " immovable property " within the meaning of r 54 and attachable in the mode prescribed by

(*n*) *Tapp* v *Jones* (1875) L R 10 Q B 591, 592, *Webb* v *Stenton* (1883) 11 Q B D 518 527 *Chatterton* v *Watney* (1881) 17 C D 378, 383

(*o*) *Syud Tuffuzzool* v *Rughoonath* (1871) 14 M I A 40 50

(*p*) *Badeley* v *Consolidated Bank* (1888) 38 C D

(*q*) [illegible]

(*r*) [illegible] 22 I A 31

O. 21, r. 46.

that rule? The answer afforded by the decisions on the subject, eliminating what are merely *obiter dicta* (s), is that a mortgage-debt is a 'debt' within the meaning of this rule and it is therefore to be attached in the manner prescribed by this rule (t) Suppose now that the mortgage debt due to *B* is attached under this rule in execution of *X*'s decree, and that it is sold in execution and purchased by *P* What are the rights of *P*? The answer is that they are entirely the same as those of *B*, the mortgagee *P* may sue *A* for a *personal* decree against him He may also sue him for a decree for the *sale* of the mortgaged property (u)

As regards attachment of the interest of a usufructuary mortgagee, if there *is a debt* which the mortgagee is entitled to recover from the mortgagor at the time of the attachment, the attachment is to be made in the manner prescribed by this rule (v) But if there is *no debt* payable by the mortgagor, all that can be attached is the mortgagee's interest in the immovable property mortgaged to him, and the attachment is to be made in the manner prescribed by r 54 of this Order for attachment of immovable property (u)

Attachment of debt after the same is paid by a cheque.—*A* gave a cheque to *B* for work done Before the cheque was presented by *B* for payment, *X*, who had obtained a decree against *B*, attached in *A*'s hands the amount due by him to *B* *Held* that *A* having handed over the cheque to *B*, the payment was complete, and that there was no debt due by *A* to *B* which could be attached (x)

Procedure where garnishee denies debt.—Where the garnishee denies the debt, the decree holder may have it sold, or he may have a receiver appointed under s 51 with power to him to sue the garnishee to recover the debt from him (y) As to release of debt from attachment, see notes to O 21, r 58 Rules 58 to 63 apply to debts also A decree holder is not entitled to recover from the garnishee more than what the judgment debtor himself could recover from the garnishee (z)

Garnishee's right of set off—If a cross debt is due to the garnishee from the judgment-debtor at the date of the attachment, the garnishee is entitled to set it off against the amount due by him (a)

Procedure where garnishee resides outside jurisdiction and debt also is payable outside jurisdiction.—It is not competent to a Court under this rule to issue a prohibitory order upon a person resident outside the limits of its jurisdiction in respect of property which also is beyond such limits Thus where *A* obtains a decree in the Court of Bardwan against *B* residing in Bardwan, and there is a debt due to *B* from *C* who resides in Calcutta, the debt being also payable in Calcutta, the proper course for *A* to adopt, if he seeks to attach the debt is to apply to the Bardwan Court to issue a *prohibitory order upon B prohibiting him from recovering the debt, and also to apply* to that Court to transfer the decree for execution to the Calcutta Court, and, after the decree is so transferred, to apply to the Calcutta Court to issue a prohibitory order upon *C* prohibiting *C* from paying the debt to *B* (b)

(t) *Chullile* v *Othenam* (1914) 27 Mad L J 239 26 I C 508, *Ramasami* v *Srinivasa* (1916) 39 Mad 389 23 I C 234

(v) *Manilal* v *Motibhai* (1911) 35 Bom 288 10 I C 812

(x) *Bhagvandas* v *Abdul Husein* (1879) 3 Bom 49

(b) *Begg Dunlop & Co* v *Jagannath* (1912) 39 Cal. 104 11 I C 417, *Bank of Bengal* v *Sarat* (1919) 4 Pat L J 141 48 I C 943

O. 21, rr. 46-48.

Claims over which Courts in British India have no jurisdiction, as where a debt is due to the judgment debtor from a non resident foreigner in respect of which no suit could be brought by the judgment debtor in a British Indian Court, are not debts liable to be attached under this rule (c) But where a judgment is recovered in the High Court of Bombay against a foreign corporation, the corporation having submitted to the jurisdiction of the Court, and there is a debt due from a bank in Bombay to the Corporation, and the debt is payable in Bombay, the High Court of Bombay has jurisdiction to attach the debt and direct the bank to pay the amount of the debt into Court (d)

Shares.—A deed of transfer of shares in a company which does not comply with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company is invalid as against a person who has purchased the shares in execution of a decree against the shareholder (e). See rr 79 and 80 below

Sub-rule (3): payment into Court.—*A* obtains a decree against *B* In execution of the decree *A* attaches a debt due ostensibly from *C* to *D*, but alleged by *A* to be in reality due from *C* to *B* In such a case, if the Court orders the amount of the debt to be paid into Court, it is incumbent upon the Court to provide by its order that the money when deposited should not be paid to the decree holder [*A*] until adjudication of the question as to who is entitled to the money *B* or *D* (f)

Garnishee order—Company in liquidation.—Where a judgment is recovered against a company which is in voluntary liquidation, the invariable practice of the Courts is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise Thus if *A* obtains a decree against a limited company, and the company thereafter goes into liquidation, and a debt is due by *D* to the company, the debt forms part of the general assets of the company, and is divisible among the creditors *pari passu*, such being the case *A* is not entitled to a garnishee order against *D* (g)

Attachment of share in moveables

47. [*New.*] Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interests or charging it in any way.

Attachment of share in moveables.—This rule is new It provides for the attachment of a share or interest in *moveable property* belonging to the judgment debtor and others in co-ownership Such a share or interest is obviously incapable of actual seizure, and provision has therefore been made for the issue to the judgment debtor of a notice prohibiting him from transferring his share or interest in any way.

Attachment of salary or allowances of public officer or servant of railway company or local authority

48. [*New.*] (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer

(c) *Ghanshamlal* v *Bhansali* (1881) 5 Bom 249
(d) *Swiss Bank Corporation* v *Boehmische Industrial Bank* [1923] 1 K B 673
(e) (1922) 45 Mad 537, 70 I C 659, (23) A M 241
(f) *Harinath* v *Haradas* (1916) 43 Cal 269, 29 I C 580
(g) *Anglo-Baltic and Mediterranean Bank* v *Barber & Co* [1924] 2 K B 410

is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct, and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be

O 21, r 48

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

Attachment of salary of public officer, etc —This rule is new It provides a special procedure for the attachment of the salary of public officers railway servants and servants of local authorities The rule follows upon the lines of section 151, sub section (3), of the Army Act (44 and 45 Vict, c 58) which, it may be observed, applied only to officers of the army Under the Code of 1882 the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree (h) This led to considerable inconvenience in the execution of decrees, and put the decree holder in many cases to an enormous expense The present rule substitutes a less expensive, and at the same time more effective machinery for the execution of decrees against this class of judgment debtors Under it the salary of a public officer or a railway servant or a

(h) *Rango Jairam* v *Balkrishna* (1888) 12 Bom 44 *Sayadkhan* v *Davies* (1904) 28 Bom 198 | *Abdul Gafur* v *Albyn* (1903) 30 Cal 713

O. 21, rr. 48, 49.

servant of a local authority may be attached *wh ther the judg nent debtor or the d sbursing off cer is or is not u th n the local lim ts of the jurisdict on of the Court executing the decree* As to the extent to which the salary of such persons may be attached, see s 60 cls (h) and (i)

Sub-rule (3) Liability of Government —Sub r (3) provides that if an attachment order is not returned in accordance with the provisions of sub r (2) the Government shall be liable for such sum as should have been stopped out of the judgment debtor s pay But no order can be made against the Government unless the Government is on the record (i)

Attachment of partnership property

49 [*New* **53 & 54 Vict, c 39, s 23 R S C, O 46, rr 1A and 1B**] (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India

(5) Every application made by any partner of the judgment debtor under sub rule (3) shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within British India

(6) Service under sub rule (4) or sub rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served

(i) *Madar Mal v B ddulph* (1919) Punj Rec no 93 p 397 14 I C 737

Attachment of partnership property.—This rule is new. The first three sub rules are a reproduction of the English Partnership Act, 1890 [53 and 54 Vict, c. 39] s 23 The last three rules correspond to O 46, rr 1A and 1B of the English Rules. As to suits by and against firms, see O 30 below

This rule provides that no execution can issue against any *partnership property* except on a decree passed *against the firm or against the partners in the firm as such* (j), but a judgment creditor of a partner in a firm may apply for an order charging *that partner's interest*, and for a receiver The share of a partner in a partnership business is liable to attachment under s 60 (k) See notes to r 50 under the head "Where decree has been passed against a firm"

"Against the partners in the firm as such."—These words in sub r (1) do not occur in s 23 of the English Partnership Act They have been added to show that the operation of this rule is not ousted by the mere circumstance that the decree is passed, not against the firm, but against the partners constituting it, where those partners have been sued as such

"Direct accounts."—It has been held in England under the Partnership Act, s 23, sub s 2, of which sub r (2) is a reproduction, that the discretion given to *direct accounts* should only be exercised under special circumstances, as for instance, with a view to a dissolution The decision is based upon the words "if a *charge* had been made in favour of the decree holder by such partner" These words, it has been said, should be read with s 31, sub s 1, of the English Partnership Act, which provides that an assignment by a partner of his share in the partnership either absolute *or by way of charge*, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require *any accounts* of the partnership transactions, but entitles the assignee only to receive the share of the profits of the assigning partner and the assignee must accept the account of profits agreed to by the partners Relying upon these provisions, Rigby, L.J, said "I think it plain that the intention of the legislature was that *under ordinary circumstances*, in dealing with a case under sub s 2 of s 23 [sub r (2) of this rule] the analogy of an assignment by a partner of his share should be adhered to' (l) Before the passing of the Partnership Act there was some doubt in England as to whether the assignee of a share in a partnership had a right to compel the other partners to come to an account with him during the continuance of the partnership *Whetham* v *Davey* (m) and *Glyn* v *Hood* (n) favoured the view that he had But the better opinion seemed to be the other way (o), and it is the one adopted in the Partnership Act There is no provision in the Indian Contract Act corresponding to that contained in s 31 of the English Partnership Act If the decision in *Whetham's case* be adopted in India as the law governing the rights of an assignee, the Court may under sub r (2) direct accounts to be taken whether the circumstances of the case are special or ordinary, so that the amount of the share attached may be determined, and it may be handed over to the decree holder But if what is called the better opinion above is adopted as the law in this country,—and it is probably the view that would be adopted here,—the Court should not direct accounts to be taken under sub r (2) except under special circumstances

(j) The same was the law before the present Code came into force *Karimbhai* v *Conservator of Forests* (1879) 4 Bom 2 2

(k) *Jagat Chunder* v *Iswar Chunder* (1893) 20 Cal 693

(l) *Brown Janson & Co* v *Hutchinson & Co* (1895) 2 Q B 126

(m) (1885) 30 C D 574

(n) (1859) 1 Giff 328

(o) Lindley on Partnership, 9th Ed (1924), p 449 See also *Juggut Chunder* v *Rada Nath* (1884) 10 Cal 669

O 21, r 50.

Execution of decree against firm

50 [*New* R S C, O 48A, r 8] (1) Where a decree has been passed against a firm execution may be granted—

(*a*) against any property of the partnership,

(*b*) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner,

(*c*) against any person who has been individually served as a partner with a summons and has failed to appear

Provided that nothing in this sub rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872

(2) Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub rule (1), clauses (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined

(3) Where the liability of any person has been tried and determined under sub rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer

Scope of the rule—This rule is new It is a reproduction of O 48A r 8 of the English Rules Execution under this rule can only be granted where a decree has been passed against a *firm* A decree passed against a *firm* must perforce be *in the firm's name* Under this rule execution may be granted *against the partnership property* It may also be *granted against the partners* in which case the decree holder may proceed against the separate property of the partners It is not to be supposed however that where a decree has been passed against a firm execution will be granted *as a matter of*

course against all the partners , in certain cases, *special leave* is necessary to issue execution against a partner It is only when execution is applied for against a person referred to in sub r (1), cls (b) and (c), that it will be granted as of course But where execution is sought against any other person alleged to be a partner, the decree holder must apply to the Court which passed the decree *for leave* to execute the decree against him Thus if in a suit against a firm a person has been individually served as a partner with the writ of summons, but fails to appear at the hearing, and a decree is passed against the firm, the decree holder is entitled to execution against him as a matter of course , see cl (c) of sub r (1) But a decree holder is not entitled to execution as of course against a person who is sought to be made liable as a partner, but who was not served with the summons, and who did not appear at the hearing In such a case the decree holder must apply for leave to execute the decree against such person If such person admits the liability, the Court may grant leave without further inquiry (*p*) But if he disputes the liability, the Court may direct an issue to determine whether he was a partner or held himself out to be a partner in the defendant firm (*q*) These rules follow from the peculiar nature of a suit against a *firm* and from the special rules as to service of summons in such a suit To understand the present rule, it is necessary to peruse rules 3, 6 and 7 of Order 30 The important point to note is that where persons are sued as partners *in the name of their firm* it is not necessary that the summons should be served upon each one of them or for the matter of that upon any one of them it may be served upon any one or more of the partners, or at the principal place of the firm s business *upon any person having the control or management of the business though he may not be a partner*

"Where a decree has been passed against a firm."—Execution under this rule can only be granted where a decree has been passed against a firm in the firm s name A decree cannot be passed against a firm, unless the suit is against partners in the name of their firm And, conversely, where a suit is against partners in the name of their firm, the decree must be against the firm in the firm s name See O 30, r 6, and notes thereto

"Against any property of the partnership"— Property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such See r 49 (1) above.

"Against any person who has appeared"—See O 30 rr 3, 6 and 7, and notes thereto

Leave to issue execution —Order 30 deals with suits by or against firms Rule 1, provides that two or more persons being liable as co partners may be sued in the firm s name It does not matter that the firm is dissolved at the date of the suit, so long as the claim in respect of which the suit is brought arose during the continuance of the partnership (*r*) But where a firm is dissolved *to the knowledge of the plaintiff* before the institution of the suit, the plaintiff is bound to serve the summons upon every person within British India whom it is sought to make liable as provided by O 30, r 3. No order can be made under sub rule (2) against a former partner who has, to the knowledge of the plaintiff, left this firm before the institution of the suit The reason is that O 30, r 3, over rides sub r (2) of the present rule Sub r (2) applies only where there has been no dissolution or none to the knowledge of the plaintiff Where there has been a dissolution to the knowledge of the plaintiff, an outgoing partner cannot be made liable unless he has been served with the summons in accordance with the proviso to rule 3 of Order 30 (*s*)

(*p*) *Jagat Chandra* v *Gunny* (19..) 53 Cal 214 219-220 91 I C 8 4 (26) A C 271
(*q*) *Davis* v *Hyman & Co* [1903] 1 K B 854
(*r*) *Ellis* v *Wadeson* [1899] 1 Q B 714 716
(*s*) *Wigram* v *Cox Sons B ckley & Co* [1894] 1 Q B 792

O. 21, rr. 50, 51.

The wording of sub r (2) is wide enough to cover the case of a deceased partner (t) In such a case a consolidated notice may be given under O 21, r. 22, and the present rule (u).

Issue to determine liability.—See notes above, "Scope of the rule"

"Court which passed the decree."—See notes below, "Award"

Sub-rule (4).—This sub rule relates to persons other than those referred to in sub r (1), cls (b) and (c) The "summons to appear and answer" in sub r. (4) does not mean the writ of summons It means a summons or a notice to appear and answer the *application specified in sub r.* (2) The object of sub r. (4) is to give an opportunity to a person against whom the decree holder seeks to execute the decree other than such a person as is referred to in sub r. (1), cls (b) and (c), of disputing his liability as a partner, if he desires to do so (v)

Minor partner.—The proviso to sub r. (1) declares that nothing in that sub rule should be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act The combined effect of that section and the present rule is that where a decree has been passed against a firm containing a minor who is admitted to the benefits of a partnership, execution may be granted against the property of the firm including "the share of such minor in the property of the firm," but it cannot be granted against the separate property of the minor Having regard to the definition of a 'firm" in s 239 of the Contract Act and to a minor s inability to contract, "the share of such minor in the property of the firm," mentioned in s. 247, is merely his right to participate in the property of the firm after its obligations have been discharged (w)

Award.—It has been held by the High Court of Calcutta (x) and Allahabad (y), that an award against a firm filed under s. 11 of the Indian Arbitration Act, 1899, stands on the same footing as a decree, and that the provisions of this rule apply to such an award In the case of an award "the Court which passed the decree" referred to in sub r. (2) is the Court in which the award is filed (z) The High Court of Allahabad has held, relying on s. 42 of the Code, that where an award is sent for execution by one Court to another, the latter Court has the power to try the issue as to partnership under sub r (2) (a)

Insolvency of firm.—Where a decree has been passed against a firm, execution may be taken out against any partner who was served with the summons The insolvency of the firm is no bar to execution against individual partners (b)

51. [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of negotiable instruments

The proper method of attaching a promissory note in the hands of an individual is by its actual seizure, and not by the issue of a prohibitory order (c)

(t) *Jivraj* v *Bhagvandas* (1922) 24 Bom L R 1037, 68 I C 627, ('23) A B 66
(u) *Jagat Chandra* v *Gunny* (1926) 53 Cal 214, 225 91 I C 824 ('26) A C 271
(v) (1926) 53 Cal 214, 220, 224 91 I C 824 ('26) A C 271, *Jivraj* v *Bhagwandas* (1922) 24 Bom L R 1037, 68 I C 627 ('23) A B 66
(w) *Sanyasi Charan Mandal* v *Krishnadhan Banerji* (1922) 49 I A 108, 49 Cal 560, 67 I C 124, ('22) A PC 237
(x) *Louis Dreyfus & Co* v *Purusottum* (1920)

52. [S. 272.] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued ·

O. 21, r. 52

Attachment of property in custody of Court or public officer

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Attachment of dividends in the hands of Official Assignee.—The Official Assignee is a public officer within the meaning of this rule, and moneys in his hands payable by way of dividend to a creditor of an insolvent may be attached in execution of a decree against the creditor in the manner provided by this rule (*d*)

Attachment of property in the hands of a receiver.—A receiver is an officer of the Court An attachment therefore of money in the hands of a receiver made *without previous permission or sanction of the Court* for such attachment is improper and irregular, and cannot be recognized by the Court (*e*)

It has been held by the High Court of Bombay that where a plaintiff has obtained a decree against a firm, of which the assets are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, undertaking by the order to deal with the charge according to the order of the Court (*f*)

Anticipatory attachment —This rule does not allow of an anticipatory attachment of money *expected to reach* the hands of a public officer, but applies only to money actually in his hands An attachment made before the money has reached the hands of the officer is invalid (*g*)

Priority.—There is a conflict of decisions as to whether where a fund in Court is attached by several decree holders, they are entitled to share rateably or whether they are to be paid in the order of their attachments The former view was taken by the High Court of Madras in *Katum* v *Haji Mahomed* (*h*) and it was followed by the High Court of Calcutta (*i*) The decision in *Katum's* case has since been overruled by a Full Bench of the Madras High Court (*j*) The Bombay High Court, in a case not yet reported, has followed the Full Bench ruling of the Madras High Court

Form.—See Sch I, App E, No 7

(*j*) *Visvanadhan* v *Arunachelam* (1921) 44 Mad 100 60 I C 302, *Nachiappa* v *Subbier* (1923) 46 Mad 506, 513, 72 I C 820, ('23) A M 505

O 21, r 53

53 [S. 273.] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

Attachment of decrees

(*a*) if the decrees were passed by the same Court, then by order of such Court, and,

(*b*) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(*i*) the Court which passed the decree sought to be executed cancels the notice, or

(*ii*) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause (*a*) of sub rule (1), or receives an application under sub head (*ii*) of clause (*b*) of the said sub rule, it shall, on the application of the creditor who has attached the decree of his judgment debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub rule (1), the attachment shall be made by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required

O. 21 r. 53

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force

Alterations in the rule—This rule corresponds with s 273 of the Code of 1882 except in the following particulars —

1 The words or for sale in enforcement of a mortgage or charge ' in sub r (1) are new See notes below Attachment and realization of decrees

2 The words or his judgment debtor in sub r (1) cl (b) sub head (ii) are new The said words give effect to the opinion expressed by Maclean C J, in the undermentioned case (k)

3 Sub rules (3) and (6) are also new See notes below under these sub rules

Attachment and realization of decrees—For the purpose of this rule decrees have been divided into two classes namely —

(1) decrees for the payment of money or for sale in enforcement of a mortgage or charge and

(2) other decrees

First as to attachment of decrees—Decrees of the first class are to be attached in the manner prescribed by sub r (1) Decrees of the second class or to be attached in the manner prescribed by sub r (4)

Next as to realization of attached decrees—Decrees of the first class are to be realized in the manner prescribed by sub r (2) There is no provision made in this rule for the realization of decrees of the 2nd class e g a decree for partit on (l) or for fore closure of a mortgage (m) These decrees are to be realized by a sale thereof But decrees of the first class that is money decrees (n) and mortgage decrees are not to be realized by sale (o) They can only be realized in the manner prescribed by sub-r (2) The reason of this distinction is as follows —

Decrees are not expressly mentioned in s 60 as property liable to attachment and sale Hence they are attachable and saleable as comprised in the expression all other saleable property which occurs in that section Being liable to attachment as *saleable* property, they can be *sold* in execution of another decree But money decrees and mortgage decrees *must not be sold* because the present rule prescribes *special proce d re* for the realization of such decrees [sub r (2)] But for this provision money

(k) *Adhar Chand a v Lal Mohun* (1897) 24 Cal 778 779 The decisio in *Unni Koya v Umma* (1912) 35 Mad 6?? 9 I C 786 would

Tirurengada v Vythil nga (1883) 6 Mad 418 *Jot ndro Nath v Dwarka Nath* (1893) 20 Cal 111

(o) *Vithaldas v Subraya* (1921) 45 Bom 343 59 I C 541 *Maung Lun Bye v Maung Po Nyun* (1923) 1 Rang 360 76 I C 679 (24) A R 21

O. 21, r. 53. decrees and mortgage decrees would have to be realized by *sale* like other decrees The special procedure prescribed by sub r (2) is an exception to the general rule that property when attached can only be realized by a sale thereof

Under the old section, decrees were divided into two classes, namely —

(1) decrees for the payment of money, and
(2) other decrees

There was no specific provision for decrees for sale in enforcement of a mortgage Hence the question arose whether such decrees belonged to the first class or the second class The decisions on the subject were conflicting (*p*) To remove this doubt, the words " or for sale in enforcement of a mortgage or charge" have been inserted in sub r (1) These words make it clear that mortgage decrees are to be attached and realized in the same manner as money decrees [see sub rules (1) and (2)]

Decree for dissolution of partnership.—A decree for the dissolution of a firm and for the taking of accounts where a receiver has been appointed by the decree for the sale of the assets of the firm and for the payment of the partnership debts, is a " decree for the payment of money " within the meaning of this rule, though part of the partnership assets consist of immoveable properties (*p2*)

Decrees other than money-decrees and mortgage-decrees.—*D*1 holds a decree against *J* for *partition* of certain property passed in Court *X*. *D*2 obtains a decree against *D*1 for Rs 6,000 in Court *Y* If *D*1 fails to satisfy the decree obtained against him by *D*2, *D*2 may apply to Court *Y* to execute his decree *by attachment and sale* of the decree held by *D*1 against *J* The decree held by *D*1, being neither a money decree nor a mortgage decree, the only mode of realizing it in execution of *D*2 s decree is by attachment *and sale* thereof

Money-decrees and mortgage-decrees.—Where the decree attached is a money-decree or a mortgage decree, it can only be realized by execution, it *cannot be sold* in execution. For this purpose, two applications must be made, one for attachment of the decree, and the other for its execution The application for attachment must be made by the holder of the decree sought to be executed to the Court which passed it But the application for execution of the attached decree must be made to the Court which passed the decree attached, and it may be made either by the holder of the decree sought to be executed or by the holder of the decree attached We proceed to give illustrations

(*a*) *Where the decree sought to be executed and the decree sought to be attached are passed by the same Court* —*D*1 holds a decree against *J* for Rs 5,000 passed by Court *X* This is a *money decree* *D*2 obtains a decree against *D*1 also in Court *X* for Rs 6 000 If *D*2 seeks to attach *D*1's decree in execution of his decree, he should apply to Court *X* for attachment, and either he or *D*1 may then apply to that Court for execution of the decree held by *D*1 against *J* *D* can apply for execution, for he is deemed to be the *representative* of *D*1 [see sub r (3)]

(*b*) *Where the decree sought to be executed and the decree sought to be attached are passed by different Courts* —*D*1 sues *J* on a mortgage, and obtains a decree for sale of the mortgaged property under O 34 r 5 in Court *X* This is a *mortgage decree* *D*2 obtains a decree against *D*1 for Rs 6 000 in Court *Y*, and in execution of his decree applies to Court Y for attachment of the mortgage decree held by *D*1 against *J* The attachment is to be made by the issue to Court *X* of a notice by Court *Y* requesting Court *X* to stay execution of *D*1's decree against *J* unless and until—

(i) the notice is cancelled by Court *Y*, or
(ii) an application is made to Court *X* by *D*2 or *D*1 to execute the decree held by *D*1 against *J*

(*p*) See *Delhi and London Bank Ltd* v *Partab Singh* (1906) 28 All 771 (mortgage-decree held not to be a money decree) *Vardhinadasamy* v *Somasundram* (1905) 28 Mad 473 (mortgage-decree held to be a money decree)

(*p2*) *Sillingappa* v *Shankarappa* (1903) 27 Bom 556

If an application is made by D2 or D1 to Court X to execute the decree held by D1 against J, Court X will proceed to execute the decree and the nett proceeds that may be realized in execution will be applied in satisfaction of D2's decree

If in the case put above, Court X does not stay execution of D1's decree on receiving the notice from Court Y, and proceeds with the execution in spite of the notice, the proceedings will be deemed to be *ultra vires*, and a sale held in execution of that decree will be set aside as void (*q*)

Sub-rule (1): Stay.—The stay under sub r (1) (b) does not prevent either the holder of the decree sought to be executed or his judgment debtor from seeking to execute the original decree (*r*)

Sub-rule (3): Representative.—This sub rule is new It gives effect to the undermentioned decisions (*s*) under the Code of 1882 It declares in effect that one who attaches a decree is a *representative* of the decree holder within the meaning of s 47. Thus in the cases put above D2 is the representative of D1

A holds a money decree against *B* *B* holds a decree for sale in enforcement of a mortgage against *C* *A* attaches in execution of his own decree the decree held by *B* against *C* *C* brings into Court from time to time sums of money for satisfaction of the decree held against him by *B* Since *A* is the "representative" of *B*, the payments made by *C* become forthwith available to *A*, and operate from their respective dates as partial satisfaction also of the decree held by *A* against *B* Hence interest on the decree held by *A* runs only up to the dates of the deposits, and not up to the date when *A* withdraws the moneys from Court (*t*)

Sub-rule (6): Adjustment of attached decree.—This sub rule is new The latter part of the rule gives effect to a Bombay decision that where a decree is attached, no adjustment of the decree subsequent to the attachment can be recognized by the Court (*u*) See r 2 of this Order

"Decree."—A decree, whereby *B* was compelled to deliver up possession of certain lands to *C*, is reversed in appeal and *B* is declared to be entitled to recover back possession from *C* with mesne profits *A* obtains a decree against *B*, and applies in execution of his decree to attach *B*'s right to recover mesne profits from *C* The right is not attachable, for it is not a *decree* The language [of this rule] seems to apply only to cases where the right attached is a right expressly *settled by* the decree, and not a right *arising from* the decree by way of restitution (*v*)

54 [S. 274.] (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge

Attachment of immoveable property

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous

(*q*) *Barhma Din* v *Baji Lal* (1904) 26 All 91 29 Mad 318

(*t*) *Madan Mohan* v *Bishnupada* (1922) 35 Cal L J 109 64 I C 780

(*u*) *Gopal* v *Joharimal* (1892) 16 Bom 522

(*v*) *Vasudeva* v *Narayana* (1901) 24 Mad 341

O 21, rr. 54, 55.

part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Immovable property.—The equity of redemption of a mortgagor is "immovable" property within the meaning of this rule (*w*) The life interest taken by a Parsi widow under her husband s will in the income of his immoveable property is not moveable but immoveable property, and is attachable under this rule (*x*)

Proof of service of prohibitory order.—Where it is found as a fact that a prohibitory order was duly served on all the judgment debtors, mere failure to produce the return, the same having been destroyed, to prove the service, does not render the execution sale invalid (*y*)

Mortgage-debt.—The sale of a mortgage debt in execution of a decree carries with it the security without attaching the mortgaged property under this rule see notes to r 46, "Attachment of mortgage debt," p 648 above

Omission to beat drum.—Such an omission is a "material irregularity" within the meaning of r 90 of this Order (*z*)

Land paying revenue to Government.—Shrotriyam villages in the Madras Presidency are lands paying revenue to Government within the meaning of this rule (*a*)

Proclamation of sale.—See r 64 below and notes thereto See also notes to s 64, "Where an attachment has been made,' on p 182 above

Removal of attachment after satisfaction of decree

55 [S. 275.] Where—

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Alterations in the rule :—

1 The words "or certified to the Court' in cl (b) are new The effect of these words is to place satisfaction certified under r 2 of this Order on the same footing as satisfaction made through the Court

(*w*) *Parashram* v *Govind* (1897) 21 Bom 226 *Barendra Nath* v *Martin & Co* (1921) 33 Cal L J ? 13 62 I C 167
(*x*) *Natha* v *Dhunbaiji* (1899) 23 Bom 1
(*y*) *Mohammad Abdul* v *Akram* (1924) 22 All L J 703 83 I C 878 ('24) A A 747
(*z*) *Trimbak* v *Nana* (1886) 10 Bom 504
(*a*) *Ganamma* v *Kelireddi* (1923) 46 Mad 736 75 I C 369, ('24) A M 217 See also *Ahmad Yar* v *Bose* (1925) 7 Lah L J 501, 504, 88 I C 321, ('25) A L 583

2 The latter part of the rule commencing with the words the attachment shall be deemed to be withdrawn etc, is new Under the old section *an express order* was necessary for the withdrawal of the attachment No such order is necessary under the present rule The attachment is *to be deemed to be withdrawn* on the happening of any of the events specified in cls (a) (b) and (c)

Relation of this rule to s 73 —See notes to s 73 Assets not available for rateable distribution on p 208 above

"The attachment shall be deemed to be withdrawn"—*A* s property is attached in execution of a decree obtained by him against *B* *C* another judgment-creditor of *A* applies for execution of his decree but no attachment is issued upon his application On the date fixed for the sale *A* pays into Court the amount payable under *B* s decree The next day *C* applies for sale of the property *C* is not entitled to have the property sold because the effect of the payment into Court was the withdrawal of the attachment under this rule and there being no attachment under *C* s decree no sale can be ordered in execution of his decree (*b*)

56 [S 27.] Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same

Order for payment of coin or currency notes to party entitled under decree

57 [*New*] Where any property has been attached in execution of a decree, but by reason of the decree holder's default the Court is unable to proceed further with the application for execution it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date Upon the dismissal of such application the attachment shall cease

Determination of attachment

Object of the rule —The object of the rule is to put an end to doubts which have arisen from time to time as to the continuance of an attachment by reason of the practice of striking off proceedings or removing proceedings from the file for which there was no justification under any of the earlier Codes (*c*) This subject has already been discussed in the notes to s 64 under the head Effect of striking off execution proceedings or of removing them from the file on p 186 above

By reason of the decree-holder's default —The provisions of this rule that the attachment should cease upon the dismissal of the application for execution do not apply unless the dismissal was on the ground of default on the part of the decree holder (*d*) The word default is not confined to default in appearance or in

(*b*) [illegible] d v *Bedha* (1919) Punj Rec 410 413 5? I C 294
[illegible] v *Kanu* (191?) 34 All 490 15

O. 21, rr. 57, 58.

payment of process fees or in production of documents, but includes failure to do what a decree holder is bound to do, that is, to proceed with his application for execution Failure, therefore, to give notice to the judgment debtor prior to the drawing up of the proclamation as required by r 66 of this Order, is default within the meaning of this rule (e) Where a sale in execution of a decree is set aside for any reason other than this default on the part of the decree holder, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property and no fresh attachment is necessary (f)

Upon the dismissal of such application the attachment shall cease.— These words are imperative A Court therefore has no power while dismissing an application for default on the part of the decree holder to direct by its order that the attachment shall continue Thus where an executing Court made an order that ' the execution case is accordingly dismissed, the properties will *remain under attachment*, it was held that the order being one dismissing the application for execution, the attachment ceased by virtue of the provisions of this rule notwithstanding the direction that the attachment should continue (g) In a recent Allahabad case, the order ran in these terms ' The execution case should *for the time being* be dismissed but the attachment shall remain in force " The Court held that it was in effect an order *adjourning* the proceedings and was therefore valid (h) The points stated above derive importance from the fact that an alienation of property after the attachment has ceased is not within the prohibition contained in s. 64

Attachment before judgment —It has been held by a Full Bench of the High Court of Madras that the words " property attached *in execution of a decree* ' includes property attached before judgment where there has been a decree followed by an application for execution to bring the attached property to sale Hence upon the dismissal of such an application by reason of the decree holder s default the attachment, though it was made before judgment, ceases (i) *A* sues *B* and obtains an order for attachment before judgment *A* then obtains a decree in the suit against *B* Thereafter *A* applies for execution of the decree, but the application is dismissed for default of prosecution The dismissal of the application puts an end to the attachment before judgment The contrary has been held by the High Courts of Allahabad (j) and Calcutta (k)

Investigation of Claims and Objections.

58 [S. 278.] (1) Where any claim is preferred to, or any objection is made to, the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or

Investigation of claims to and objections to attachment of attached property

482 arain Din 543, Pat

(g) (1911) 38 Cal 482 9 I C 658 supra, (1919)

(j) *Bohra Akhey Ram* v *Basant Lal* (1924) 46 All 894 80 I C 106 (24) A A 860

(k) *Gones* v *Banwari Lal* (1912) 16 Cal L J 86, 14 I C 345

objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit: **O. 21, r. 58**

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponement of sale

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Rules 58 to 63.—These rules deal with investigation of claims preferred to property attached in execution of a decree and of objections to the attachment of such property

Scope of the rule.—Objections to attachment raised by a *party* to the suit in which the decree under execution was passed or his *representative* fall within the scope of s 47 Objections to attachment raised by a *third party* come under the present rule This distinction is important is two ways —

1 Where an objection to attachment is made by a *party* to the suit or his *representative* the objector should proceed by an *application under* s 47, *a separate suit for the purpose is barred* But where an objection to attachment is made by a *third party* the objector may *either* proceed by an *application* under this rule *or* he may bring a regular *suit* to establish his objection, failure to proceed by an application under this rule is no bar to a separate *suit* The object of this rule is to give a claimant a speedy and summary remedy, but the rule does not deprive him of his remedy by *suit* The summary remedy given by this rule is alternative to the remedy by way of suit (*l*) See notes to r 63 below Payment by claimant under protest

2 An order made under s 47 allowing or disallowing an objection to attachment is a decree (s 2), and is therefore *appealable* But orders under rr 60, 61 or 62 made upon an application under this rule are *not appealable* under the Code (*m*), and the remedy of the party against whom the order is made is by a regular *suit* to establish the right which he claims to the property in dispute (r 63) Such suit must be brought within one year from the date of the order [Limitation Act, art 11] (*n*), but subject to such suit, the order is conclusive (*o*) see r 63

The following illustration shows the operation of rr 58 62 In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached If the property attached is claimed by *C*, *C* may bring a regular suit for a declaration that the property attached belongs to him and for removal of the attachment *Or*, if he desires to avail himself of the speedy remedy provided by this rule, he may present an *application* to the Court executing the decree claiming that the property belongs to him and for the removal of the attachment If *C*'s claim is allowed (r 60), *A* (decree holder) may bring a suit under r 63 for a declaration that the property belongs to *B* (judgment debtor).

(*l*) *Kanhaya Lal* v *National Bank of India* (1913) 40 Cal 598 40 I A 56 18 I C 949 *Sundar Singh* v *Ghasi* (1896) 18 All 410 *Krishnabhupati* v *Vikrama* (1895) 18 Mad 13 17 *Raghunath* v *Sarosh Kama* (1899) 23 Bom 266

(*m*) *Abdul* v *Muhammad* (1882) 4 All 190 *Dayaram* v *Govardhandas* (1904) 28 Bom 458

O. 21, r. 58. and is therefore liable to attachment And if *C*'s claim is disallowed (r 61), he may bring a suit for a declaration that the property attached belongs to him, and is therefore not liable to attachment If no such suit is brought within one year from the date of the order under r 60 or 61, the order will be conclusive

Objections to attachment, though made by *a party* to a suit or his *representative*, come within the scope of this rule if the objection is based on the ground that the property attached is held by him *on behalf of a third party* as a trustee, guardian, or in any other *fiduciary* capacity See notes to s 47 under the heads, "Parties to the suit," p 134 above and "Objection by party or his representative that property attached is not liable to attachment, p 142 above

Mortgage-decree.—This rule does not apply where the property in dispute is directed to be *sold under a mortgage decree* The reason is that the property directed to be *sold* under a mortgage decree does not require to be *attached* by way of execution (*p*) and the benefit of the summary procedure afforded by the present rule is limited to claims and objections arising in respect of an *attachment* *A* obtains a decree against *B* for sale of certain property mortgaged to him, and applied in execution for the sale thereof If the property is claimed by *C*, he must proceed by a *suit* for a declaration that the property belongs to him, and not by an application under this rule (*q*)

Rules 58 to 63 apply to "debts" also.—*A* obtains a decree against *B* for Rs 5 000, and attaches in execution of the decree a debt alleged to be due by *C* to *B* Can *C* apply under this rule to have the attachment removed? Yes and if the attachment is not removed, he may institute a suit for a declaration that no debt is due from him to *B* within a year from the date of the order against him If no such suit is filed, the order will be conclusive against him (*r*) In an earlier Bombay case, the opinion was expressed that the procedure laid down in the sections of the Code of 1882 corresponding to rr 58 to 63 did not apply to a debt attached in execution of a decree, the reason given being that a *debt* was not property capable of *possession* within the meaning of rr 60 and 61, and that if *C* alleged that no debt was due, the proper course was for the Court to satisfy itself as to its existence (r 66), and if it was satisfied that no debt existed, it should abstain from proceeding to sell the debt (*s*) But this view has since been dissented from and it has been held that the words "possessed of" in rr 60 and 61 are not restricted to objects capable of *physical* possession, but apply also to objects capable of *constructive* possession, such as a debt Moreover, the word 'property' in the present rule is wide enough to include a debt As to a garnishee's right to set off, see notes to r 46 above

Appeal.—No appeal lies under the Code from an order made in a claim case [see notes to s 47, 'Objection by party or his representative that property attached is not liable to attachment,' p 142 above] But it has been held by the High Court of Madras, that an appeal lies from such an order under cl 15 of the Letters Patent. It follows from this that where an appeal is preferred from the order, the period of limitation for the suit contemplated by r 63 below is to be calculated from the date of the order made on appeal (*t*)

(*p*) [illegible] I C 271 (1904) 27 Mad 67, 1914) 38 Bom 631,

(*q*) [illegible] 4 Bom 323 [illegible] (1902) 25 Mad [illegible] *nkatasubbiah* (1916) 7

59. [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. **O. 21, r. 59**

Evidence to be adduced by claimant

"**Some Interest.**"—These words means "such an interest as would render the possession of the judgment debtor possession not on his own account but on account of or in trust for the claimant" (*u*)

"**Or was possessed of.**"—These words means "was possessed of for himself and not as trustee for the judgment-debtor" See the next rule and the notes thereto,

Limits of inquiry under rules 59 to 61.—In *Sardhari Lal* v *Ambika Prasad* (*v*), their Lordships of the Privy Council said "the Code does not prescribe the extent to which the investigation should go, and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Court at the time, leaving the aggrieved party to bring the suit which the law allows him" [see r 63] Rules 59 to 62 provide for a summary investigation into *possession* as distinct from a thorough trial of *ultimate right* It is impossible to separate altogether the question of possession and of title Thus if the judgment debt or was in possession, he may have been in possession as agent or trustee for another [rr 60 61], and this has to be inquired into. To that extent the title may be part of the inquiry in a claim case, but no ultimate questions of trust are intended to be thrashed out (*w*) In execution of a decree obtained by *A* against *B* three pieces of Government securities are attached The securities stand in the name of *C* *C* applies for removal of the attachment under r 58, alleging that the securities belong to him and they are held by him on his own account *A* alleges that the securities are held by *C* *benami* for *B* It is not open to the Court under these circumstances to inquire whether *C*, in whose name the securities stand is merely a *benamidar* for *B* The property must therefore be released from attachment (*x*) The question whether *C* is merely a *benamidar* is a question of *title*, and it should be gone into in a suit under r 63 Similarly if the property attached is claimed by a person as a Mutawali under a deed of wakf, and it is proved that he has been in possession as mutawali for upwards of 20 years, the property must be released from attachment The Court has no power under these rules to decide whether the deed of wakf is valid (*y*) The words 'possession of the judgment-debtor or of some person in trust for him' in rr 60 and 61 refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the judgment-debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances (*z*) If, instead of determining the question of possession, the Court determines the question of title, and disposes of th application on the question of title the order is open to revision under s. 115 of the Code (*a*) Similarly where a Court ought to inquire into the question whether the posses

(*u*) *Bhagwan* v *Khetter Moni* (1896) 1 C W N 617 *Sabhapathi* v *Narayanasami* (1902) 25 Mad 555
(*v*) (1888) 15 I A 123 126 15 Cal 521 526

290, *supra*

O. 21, rr. 59, 60. sion of the judgment-debtor was on his own account or on account of some other person, but it refuses to do so, the order is open to revision The word "conclusive" in r. 63 means 'non appealable, it does not mean 'not capable of revision' (b)

60. [S. 280.] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Release of property from attachment

Limits of inquiry under rules 59 to 61.—See notes to r 59 above under the same head

Property in possession of some person not in trust for judgment-debtor.—*A* obtained a decree against *B* as the heir and legal representative of his deceased father, and in execution of the decree attached certain money in the hands of *C* due to the estate of the deceased Prior to the date of the decree an order had been made by the High Court under ss 17 and 18 of the Administrator General's Act 2 of 1874 [now Act 3 of 1913, ss 10 and 11], authorising *the Administrator General to collect the assets of the deceased* It was held on the application of the Administrator General that the attachment should be removed. As the order under the Administrator General's act authorised the Administrator General to realise the debt from *C* as part of the assets of the deceased, the amount in the hands of *C* could not be said to be property in the possession of a third person in trust for the *judgment debtor* (*B*) (c) See notes to r 62 below.

Property in possession of a judgment-debtor not on his own account but on account of or in trust for some other persons.—Such property, if attached, should be released from attachment under this rule Thus where goods consigned by railway by *A* to *B* for sale *against which B had made specific advances* were attached, while they were yet in the hands of the railway company, in execution of a decree against *A*, it was held that though the goods were in the possession of *A* (judgment debtor) by the railway company, they were in his possession not on his own account, but "on account of or in trust for" *B*, and should therefore be released from attachment on *B*'s application (d)

Effect of order of release.—An order made under this rule releasing the property attached from attachment is only provisional and liable to be set aside by a regular suit (r 63) 'It is not conclusive; a suit may be brought to claim the property, not-

(b) *Phomon Singh* v *A J Wells* (1923) 1 Rang 276, 76 I C 677 (23) A R 195
(c) *Bhaiji* v *Administrator General of Bombay* (1899) 23 Bom 428
(d) *Velji* v *Bharmal* (1897) 21 Bom 237

withstanding the order" (e) It has not the effect therefore of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property as he likes If a suit is brought by the decree holder to establish his right to attach the property, and a decree is passed for him, the effect of the decree is *to set aside the order of release* and to maintain the attachment originally made The result is that any private transfer of the property by the claimant, though made *after* an order under this rule releasing the property from attachment, will be void under s 64, if the right to attach is subsequently established by suit under r 63 (*f*) In execution of a decree obtained by *A* against *B* certain property standing in the name of *C* (*B*'s son) is attached. *C* objects to the attachment, and the property is released from attachment under this rule *C then* mortgages the property to *M* *A* then sues *B* and *C* for a declaration that *B*, and not *C*, is the real owner of the property, and that the property is therefore liable to be sold in execution of his decree against *B*, and a decree is passed in his favour The property is then re attached and sold in execution of *A*'s decree, and purchased by *P* The mortgage to *M* is a transfer contrary to the attachment within the meaning of s 64, and *P* takes the property free from the mortgage Similarly any payment made by a debtor to his creditor, though after the attachment on the debt has been raised, cannot prevail over the attaching decree holder who eventually succeeds in a suit brought by him under this rule (*g*) In the case, however, of an attachment before judgment it is obligatory upon the Court to withdraw such attachment upon the dismissal of the suit [O 38, r 9], and the reversal of the judgment of dismissal on appeal does not operate to revive the attachment which has been withdrawn (*h*)

Appeal.—See Notes to r 58, "Appeal" on page 666 above

Revision.—See notes to r 59 above, "Limits of inquiry under rules 59 to 61

61. [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

Disallowance of claim to property attached.

Limits of inquiry under rr. 59 to 61.—See notes to r 59 above under the same head

Effect of order under this rule—An order in favour of a decree holder made under this rule does not enure for the benefit of other decree holders who are not parties to the proceedings (i)

Disallowance of claim—An order disallowing a claim under this rule is not a nullity and cannot be said to have been made without jurisdiction merely because the Court erroneously does not go into the question of *possession* but disallows the claim *on some other ground* Such an order, therefore, *is conclusive unless a suit is filed by* the claimant as provided by r 63 of this Order (*j*)

(*e*) *Sardhari Lal v Ambika Pershad* (1888) 15 Cal 521 15 I A 123

(*f*) *Bonomali v Prosunno* (1896) 23 Cal 829

Mad 84 69 I C 642 (2) A M 176

(*g*) (1922) 45 Mad 84 69 I C 642 (22) A M 176, *supra*

O. 21, rr. 61, 62.

Appeal.—See notes to r 58, "Appeal," on p 666 above

Revision.—See notes to r 59 above, "Limits of inquiry under rules 59 to 61"

Continuance of attachment subject to claim of encumbrancer

62. [S. 282.] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Scope of the rule.—This rule is an enabling rule, empowering the Court to pass a certain specified order on the fulfilment of two specified conditions The conditions are (1) that the Court is satisfied that the property attached is subject to a mortgage or lien in favour of some person not in possession, and (2) that the Court in its discretion *thinks fit to continue the attachment* Where those two conditions are satisfied then the rule empowers the Court to continue the attachment subject to the mortgage or charge An order which refuses to acknowledge a mortgage or charge, and directs the continuance of the attachment *free* from such mortgage or lien cannot be referred to this rule It is rather an order in proceedings under r 66 below (*k*) But it has been held that where a mortgagee applies to the Court to sell the property subject to the mortgage, but his application is disallowed, the order is to be referred to this rule, and the order will be conclusive unless he brings a suit under r 63 within a year from the date of the order (*l*)

"Subject to a mortgage."—The Code clearly makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by the present rule, and the latter by r 66 below In the former case the Court *after being satisfied of the existence of the mortgage* sells only the judgment debtor's equity of redemption, that is to say, the purchaser buys the property *subject to the mortgage.* In the latter case he buys the property with *notice* of the mortgage *and subject to such risk as the notice might involve*, the executing Court *does not decide whether the mortgage subsists or not* Such being the case, if there is in reality a subsisting mortgage, the purchaser has to redeem it If, on the other hand, the mortgage specified in the proclamation of sale turns out invalid, the purchaser acquires the property free from liability for the mortgage The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from questioning the validity of the mortgage (*m*) And it is also to be noted that if the mortgage specified *in the proclamation turns out invalid, the judgment debtor is not entitled to claim* from the purchaser the amount alleged to have been due on the mortgage (*n*)

"Mortgage in favour of some person not in possession."—It has been held by the High Court of Bombay that where a mortgagee is in possession of the mortgaged property at the time of attachment, he can claim to have the attachment removed under r 60, the reason given being that a mortgagee cannot be said to be in

(*k*) *Ganesh* v *Damoo* (1917) 41 Bom 64 30 I C 913 *Durga Prasad* v *Mansa Ram* (1904) 1 All L J 531

(*l*) *Velu* v *Arumugam* (1920) 38 Mad L J 397, 56 I C 491

(*m*) *Shib Kunwar* v *Sheo Prasad* (1906) 28 All 418 *Ganesh* v *Purshottam* (1909) 33 Bom 311 1 I C 106 *Narayan* v *Umbar* (1911) 35 Bom 275 10 I C 913, *Jairaj Mal* v *Radha Kishan* (1913) 35 All 257 20 I C 182, *Kalidas* v *Prasanna Kumar* (1920) 47 Cal 446 55 I C 189 *Agha Sultan* v *Mohabbat Khan* (1921) 43 All 499 63 I C 395, *Roshan Lal* v *Lallu* (1922) 44 All 714 68 I C 790 (22) A A 443

(*n*) *Izzat un Nisa Begam* v *Partab Singh* (1909) 31 All 583 36 I A 203 3 I C 793

possession as a trustee for the judgment debtor (o) The High Court of Patna has taken the contrary view (p) See notes to r 41 above See also s 73 (1)

63 [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property

Alteration in the rule.—S 283 of the Code of 1882 ran as follows "The party against whom an order under sections 280, 281 or 282 [now rr 60, 61 or 62] is passed may institute a suit to establish the right which he claims," etc The present rule, on the other hand, says that 'where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims," etc The specific reference to the previous sections or rules has been omitted. A corresponding change has also been made in the Limitation Act, 1908, Sch. I, art 11 See notes below, " Order against party to a claim or objection "

Parties to suits under this rule.—This rule provides that unless the party against whom an order is made institutes a suit to establish the right which he claims to the property in dispute [within the period of a year from the date of the order as provided by art 11 of the Limitation Act, 1908], the order made against him shall be conclusive Now the party against whom an order may be made may be the decree holder (r 60), or the claimant including an incumbrancer (r 61), or even the judgment debtor The result, therefore, is as follows —

1 The *decree holder* against whom an order is made under r 60 may sue the successful claimant for a declaration of his right to attach and sell the property released from attachment (q) To such a suit the judgment debtor is not a necessary party (r)

2 The *claimant* whose claim has been disallowed under r 61 may sue the decree holder to establish his right to the property attached (s) To such a suit the judgment debtor is a necessary party (t) The claimant *may* in his suit under this rule ask also for any further or *consequential* relief to which he claims to be entitled (u), e g , damages for wrongful seizure (v), but he is not bound to do so (w) And since the right conferred by this rule is not a personal one confined to the original claimant, a *purchaser* of the interest of the original claimant can also bring a declaratory suit under this rule (x)

3 *A* attaches a house in execution of a decree against *B* The property is claimed by *C* The Court allows *C*'s claim and the property is released from attachment This is an order against *A*, the decree holder (r 60) Does it also amount to an order against the *judgment-debtor*? In other words, can it be said by reason of the fact that *C*'s claim to the property is allowed that the order operates also against *B*, the judgment debtor? Assuming that the order does operate against *B*, it can only be if *B* is deemed to be a 'party against whom an order is made' within the meaning of this rule If so, *B* must bring a declaratory suit against *C* within a year from the date of the order other

(u) *Sadu* v *Ram Bin Govind* (1892) 16 Bom 608
(v) *Kissorimohun* v *Harsukh Das* (1890) 17 Cal 436 17 I A 17 See notes character of suit under this rule
(w) *Ambu* v *Ketlilamma* (1891) 14 Mad 23, 25, *Krishnam* v *Pathma Bee* (1906) 29 Mad 151
(x) *Ganesh* v *Kashi Nath* (1904) 26 All 89

O.21, r. 63. wise the order against him would be conclusive But it has been held that a judgment debtor who is not *in fact* a party to the claim proceedings does not in the eye of the law become such by reason solely of his being the judgment debtor Unless therefore he is a party *in fact*, the order is not binding upon him, and he may institute a suit even *after* the lapse of one year from the date of the order provided he does so within the ordinary period of limitation applicable to the suit, to establish his title to, and recover possession of, the property from the claimant [C] (y) But if he was a party in fact, the order would be binding on him unless he brought the suit within the period of one year

Alienee pendente lite.—A purchaser of property from a claimant, after an order has been passed in the claimant's favour removing the attachment on the property, but before the institution of a suit by the decree holder against the claimant under this rule, is an alienee pendente lite, and is not therefore a necessary party to the suit The alienee, however, takes the property subject to the provisions of s 52 of the Transfer of Property Act (z) In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached. *C* claims the property *C*'s claim is allowed, and the attachment is removed *C* then sells the property to *D* *A* then sues *B* and *C* for a declaration that at the date of attachment the property belonged to *B* and that he [*C*] is entitled to attach it *D* is not a necessary party to the suit But the alienation by *C* to *D* will be affected by the doctrine of lis pendens as laid down in s 52 of the Transfer of Property Act, 1882

Period of limitation for suit under this rule.—The period of limitation for a suit under this rule is one year from the date of the order [Limitation Act, 1908, Sch I, art 11] In *Sardhari Lal* v *Ambika Pershad* (a), the Judicial Committee said " It [that is, the order] is not conclusive, a suit may be brought to claim the property notwithstanding the order, but then the law of limitation says that the plaintiff must be prompt in bringing his suit The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought " Where an appeal is preferred from the order, the period of one year is to be calculated from the date of the appellate order (b)

Suit not necessary if the property is released from attachment within the period of limitation—Where after an order disallowing a claimant's claim and directing the attachment to continue, the attachment ceases within the period of one year from the date of the order, *e g*, by reason of the dismissal of the application for execution under r 57 above for default of prosecution (c), or by reason of the withdrawal of attachment on payment by the judgment debtor to be decree holder of the amount of the decree (d), it is not incumbent upon the claimant to institute a suit under this rule or to prosecute the suit if he has already brought one, and he will not be affected by any of the consequences which result from a failure to institute a suit under this rule In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached. *C* claims the property as his own, but the claim is disallowed Within one year from the date of the order *A*'s application for execution is dismissed under r 57 above *C* is not bound to bring a suit under this rule

(a) (1888) 15 I A 123 15 Cal 521

Venugopal v *Venkatasubbiah* (1915) 33 Mad 1196, 28 I C 367

Najmunnessa v *Nacharaddin* (1924) 51 Cal 548 83 I C 233 ('24) A C 744, *Kumara* v *Thevaraya* (1925) 48 Mad L J 616 87 I C 635 ('25) A M 1113, *Fateh Din* v *Qutab Din* (1922) 3 Lah 7, 67 I C 543, ('22) A L 109

Manilal v *Nathalal* (1921) 45 Bom 561, 59 I C 774 *Umesh Chunder* v *Raj Bullubh* (1882) 8 Cal 279

Character of suit under this rule.—This rule provides that a party against whom the order referred to in this rule is made may institute a suit "to establish his right to the property in dispute" The words "to establish his right to the property" are, it has been held, wide enough to cover a suit not only for a declaration, but a suit for a declaration and consequential relief Thus a plaintiff may under this rule sue for a declaration of his right to movables and also for a direction that the defendant at whose instance they were attached be ordered to pay to him the value of the movables (*e*).

A suit under this rule is not limited by any special standard of evidence or of law The *claimant* may, if necessary, thrash out his title in the fullest and most ultimate sense But if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be So, too, the *decree holder* may make out his debtor's title exactly as if it were a suit for possession by the debtor (*f*)

"Subject to the result of such suit, the order shall be conclusive."—This means that unless the suit is brought as provided by this rule, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceeding the right denied to him by the order (*g*) *A* obtains a decree against *B*, and in execution of the decree attaches certain property alleged to belong to *B* *C* claims that he is in possession of the property under a sale from *B* of a date prior to the attachment, and applies that the property be released from attachment The executing Court finds that *C* was in possession at the date of the attachment, but that the sale to him was fictitious and disallows *C*'s claim No suit is brought by *C* within the period of a year to establish his right to the property The property is then sold in execution, and purchased by *P* *P* then sues *C* for possession *C* is precluded in this suit from again asserting his right as purchaser from *B* No suit having been brought by him within the period of limitation, the order disallowing his claim became *conclusive* against him under this rule Similarly if *A* in execution of a decree against *B* attaches a debt alleged to be due by *C* to *B* and *C* objects to the attachment on the ground that no debt is due by him to *B*, and *C*'s objection is overruled, but no suit is brought by him under this rule, he will be precluded in a suit against him by the *purchaser* of the debt in execution from contending that no debt was due by him to *B* (*h*) The result would be the same even if *C* had brought a suit against *A* and *B* to establish his right to the debt and the suit was dismissed The result of failure to file the suit as also of the dismissal of the suit where one is filed, is that the order becomes conclusive not only as regards the parties to the order or the suit, but also as regards the auction purchaser In either case *C* cannot assert his claim in a substantive suit against the auction purchaser, nor can he set it up by way of defence to a suit against him by the auction purchaser (*i*)

The order is conclusive as against the party against whom it is made.—*A* obtains a decree against *B*, and attaches *B*'s property in execution of his decree *C* claiming to be a mortgagee of the property puts in a claim under r 58 *A* contends that the mortgage is not valid, but his contention is disallowed No suit is instituted by *A* as required by the present rule, and the order becomes conclusive against him The property is then sold subject to *C*'s mortgage, and it is purchased by *A*

(*g*) [illegible] *Lama* (193?) 0 Bom 3? *Ba lur* [illegible]

O. 21, r. 63. Subsequently *C* sues *A* (purchaser) and *B* (mortgagor) to recover the mortgage debt by sale of the mortgaged property. *B*, not being a party to the claim proceedings, may contend in *C*'s suit that the mortgage is not valid, but *A* cannot, for the order became conclusive against him The fact that *B*, the judgment debtor, can impeach the validity of the mortgage, and that the property purchased by *A* is the property which belonged to *B*, does not entitle *A* to be placed in *B*'s position so as to give him the same right to attach the mortgage as *B* has (*j*) See notes above, "Parties to suits under this rule," para 3

Property in respect of which order is conclusive.—An order in a claim case is conclusive only as regards the particular property in dispute (*k*)

Order "against" party to a claim or objection :—

1 An order made on an application which does not come within the scope of r 58 is not an order to which the present rule applies (*l*)

2 *Order dismissing a claim for default*—Section 283 of the Code of 1882 ran as follows "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit," etc It was accordingly held in some cases that the order referred to in s 283 must be one made *after investigation* of the claim *as contemplated by sections* 280, 281 *and* 282, and that an order dismissing a claim *for default and without investigation* did not come under that section Such being the case, it was held that an order dismissing a claim for default did not become "conclusive" against the party against whom it was made so as to preclude him from instituting a suit more than one year after the date of the order, provided the suit was within the ordinary period of limitation (*m*) The language of the present rule is more comprehensive than the language of s 283 There is no reference made in this rule to the previous rules, namely, rules 60, 61 and 62, and a corresponding change has also been made in art 11 of the Limitation Act The result is that the rule applies to every order made *against* a party to a claim preferred or an objection made under r 58, even if the order was made for *default and without investigation* (*n*) But this does not take away the right of the party to apply to have the order of dismissal for default set aside (*o*)

3 *Order refusing to investigate a claim on the ground of delay*—Where a claim or objection is preferred under r 58, and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the order is one made "against" the claimant or objector within the meaning of this rule (*p*)

4 An order on a claim petition stating that as the petition was filed late the claim will be notified to the bidders, is in effect an order rejecting the claim Such an order is one made "against" the claimant within the meaning of this rule (*q*) But an order in these terms, namely, "Sale stopped, the claim cannot be investigated by this Court, petition dismissed," has been held not to be an order "against" the claimant (*r*) Similarly where

(*j*) *Ramu Aiyar* v *Palaniappa* (1912) 35 Mad 35 8 I C 117

(*k*) *Ashna Bibi* v *Awaljadi Bibi* (1917) 44 Cal 698 37 I C 887

(*l*) *Balakrishna* v *Rangan* (1921) 41 Mad L J 334 69 I C 326 [attachment before insol

(*n*) *Nagendra Lal* v *Fani Bhusan Das* (1918) 45

A [illegible] 1115

(*q*) *Venkataratnam* v *Ranganayalamma* (1918) 41 Mad 985 48 I C 270 [F B]

(*r*) *Lakshmi* v *Kadiresan* (1921) 41 Mad L J 193, 63 I C 431

a mortgagee applied that the sale proceeds should be kept in Court to satisfy his mortgage, but the application was dismissed on the ground that the sale had already taken place and the Court had no jurisdiction to hear the application, it was held that there was no order ' against ' the mortgagee (s) Where *A* preferred a claim to the property attached on the ground that he was entitled to a share in the property, and the Court made an order in these terms, namely, " Whatever right the judgment debtor has will pass by the sale , the claim does not require any further investigation , the claim put forward will be noted in the sale proclamation,' it was held that it was not an order " against ' the claimant (t)

5 If a party prefers a claim on the footing that there was an attachment, there being no attachment in fact, and submits the merits of his claim to the Court for investigation, he is equally a person ' against " whom an order is passed so as to attract the application of the present rule (u)

6 See also notes to r 62 above, ' Scope of the rule, on p 670 above

Orders in proceedings for attachment before judgment —Rules 58 to 63 apply to claims preferred to property attached before judgment (v) But a Provincial Court of Small Causes has no power to attach immovable property before judgment, and an order made by such a Court adjudicating a claim to property so attached is *ultra vires* (w) See notes to s 7 on p 16 above

Suit for refund of purchase money —This rule applies to a suit to establish the plaintiff s right to the *property in dispute* It does not apply to a case where a plaintiff whose claim to the property is disallowed under r 61 sues the judgment debtor for a refund of the money paid by him for the purchase of the property *A* sells certain property to *B* *C* obtains a decree against *A* and attaches the property in execution *B* claims the property as purchaser, but his claim is disallowed *B* sues *A* for a refund of the purchase money more than a year after the date of the order, but within the ordinary period of limitation The suit is not barred by limitation The reason is that r 63 does not apply to such a suit (x)

Revival of attachment on the suit being decreed —See notes to r 60, " Effect of order of release on p 668 above

Payment by claimant under protest —If the claimant fails and the attachment is not removed, he is not compelled to bring a suit under this rule for a declaration of his title to the property he may prevent the sale of the property by paying the decretal amount to the decree holder and then sue for it as money paid under compulsion of law, i e under pressure of execution proceedings (y) Further the claimant is not bound to take proceedings at all under the Code to set aside the attachment He may pay the amount of the decree under protest and then sue as stated above (z) See notes to r 64 below

Jurisdiction —In a suit for a declaration that property is not liable to attachment and sale in execution of a decree where the value of the property is in excess of the amount claimed in execution of the decree, the value of the suit for purposes of jurisdiction is not the value of the property but the decretal amount (a) But where

8 I A 93 *Jugdeo v Rajah Singh* (1888) 15 Cal 656 See also *Jasvatsingji v Secretary of State* (1890) 14 Bom 299

(z) *Kanhaya Lal v National Bank of India* (1913) 40 Cal 598 40 I A 56 18 I C 949 See also *Mahadeo v Drigbijai* (1921) 43 All 272 60 I C 881 [debt attached admitted to be due]

(a) *Khetra v Mumtaz Begam* (1916) 38 All 72, 31 I C 879 *Anandi Kunwar v Ram Niranjana Das* (1918) 40 All 505 45 I C 491 See also *Phul Kumari v Ghanshyam Misra* (1905) 35 Cal 202 35 I A 22

O.21, r. 63. the plaintiff seeks not only for a declaration that the property is not attachable, but for a declaration of his title to the property as against the decree holder and the judgment debtor, the value of the suit for purposes of jurisdiction is the value of the property (*b*)

Burden of proof —The burden of proof in a suit under this rule lies on the plaintiff as in other cases, and not on the defendant (*c*)

Effect of attachment on adverse possession —It has been held by the High Court of Madras that attachment of property in execution of a decree does not arrest the running of time in favour of a party holding the property adversely to the judgment debtor (*d*) *A* obtains a decree against *B* In June 1921 *A* attaches certain property alleged to belong to *B* *C* objects to the attachment, and the attachment is raised in April 1922 In January 1923 *A* sues *C* under this rule for a declaration that the property belongs to *B* and that he is entitled to attach it *C* contends that he has been in possession of the property adversely to *C* for upwards of 12 years, and that *A* s suit is barred by limitation The fact is that *at the date of the attachment* *C*'s possession was for 11 years only, and *at the date of the suit* it was for upwards of 12 years. According to the Madras High Court, the period of *C* s possession is to be counted up to the date of the suit, and *A* s suit is therefore barred the reason given being that attachment could not prevent the running of time in favour of *C* On the other hand, according to the Bombay High Court the period of *C* s possession must be counted only up to the date of attachment and hence *A* s suit is not barred the reason given being that the real question in such a case was whether the judgment debtor [*B*] had a subsisting right to the property *at the date of attachment* (*e*) According to the Calcutta High Court also the material date is the date of attachment (*f*)

Fraudulent transfer by judgment-debtor —Where a claim is made to the property attached by one claiming to be the purchaser thereof, and the claim is disallowed, and the claimant subsequently institutes a suit under this rule to establish his title to the property, it is open to the attaching decree holder to plead in defence that the transfer was in fraud of creditors In execution of a decree obtained by *A* against *B*, *B* s property is attached *C* claims the property as having been purchased by him from *B* before *A* obtained the decree against *B*, but the claim is disallowed *C* then sues *A* and *B* under this rule to establish his right to the property *A* pleads in defence that the transfer by *B* to *C* was made with intent to defraud *B*'s creditors It has been held by a Full Bench of the Madras High Court that it is open to an attaching creditor [*A*] in a suit under this rule to plead in defence the fraudulent character of the alienation (*g*) The same view has been taken by the High Courts of Calcutta (*h*) and Bombay (*i*) If in the case put above *C*'s claim is allowed and the attachment is raised, it is competent to *A*, the attaching creditor to sue *B* and *C* under this rule to establish his right to attach the property, and he may prove in such suit that the transfer by *B* to *C* was fraudulent *A* is not bound to bring a representative suit on behalf of all the creditors of *B* (*j*)

Court-fee —The Court fee payable upon the plaint in a suit by a person whose claim to property attached in execution has been dismissed is Rs 10 under the Court Fees Act, Sch II, art 17 whether the claim is dismissed for default or after investigation (*k*)

(*b*) *Sardar Begam* v *Meher Chand* (1913) Punj Rec no 82 p 293 18 I C 8 0

(*f*) *Najmunnessa* v *Nacharaddin* (1924) 51 Cal 548 83 I C 233 ('24) A C 744

(*j*) *Ramaswami* v *Mallappa* (19 0) 43 Mad 760

59 I C 947 overruling *Subramania Ayyar* v *Muthia Chettiar* (1918) 41 Mad 612 45 [illegible]

[illegible] al L

L B

43 51

(*k*) *[illegible] Kumari* v *Ghanshyam Misra* (1908) 35 Cal 22 [I C] *Satindra Nath* v *Shiva* (1921) 26 C W N 126 128 64 I C 713 ([illegible]) A C 166

Revision—See notes to r 59, "Limits of inquiry under rules 59 to 61," on p 667 above.

Sale generally.

64. [S. 284] Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled

Sale of goods not belonging to judgment-debtor—*A* obtains a decree against *B* In execution of the decree *A* points out to the sheriff's agent goods belonging to *C* as the property of *B* *C*s goods are thereupon attached by the sheriff s agent, and sold in execution *C* is entitled to claim from *A* the market value of his goods as on the date of attachment The sheriff is not liable in such a case (l)

65. [S. 286] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made

"Save as otherwise prescribed."—See r 76 below

66. [S. 287.] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court

Proclamation of sales by public auction

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(*a*) the property to be sold,

(*b*) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,

(*c*) any incumbrance to which the property is liable,

(*d*) the amount for the recovery of which the sale is ordered,

(l) *Kessorimohun v Harsukh Das* (1890) 17 Cal 436 17 I A 17 *Goma v Gokaldas* (18[illegible]) 3 Bom 74 See also *Dorab Ally v Abdul Azeez* (1851) 5 I A 116

O. 21, r. 66.

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Alterations in the rule :—

1 The provision in sub r (2) for notice to be given to the decree holder and the judgment debtor is new

2 Sub r (3) is also new

Incumbrances to which the property is liable—Where a decree holder who held a simple money decree stated in his application [sub r (3)] that the property to be sold was subject to a mortgage in his favour, but no mention was made of the mortgage in the proclamation, the omission bot being due to any fraud on his part, it was held that he was not estopped from enforcing his mortgage against the auction-purchaser (m) But he would be so estopped if he omitted to mention his mortgage in the application (n) See notes to r 62 of this order

Value of the property—Clause (e) of the rule provides that the proclamation shall specify as fairly and accurately as possible "every other thing which the Court considers material for a purchaser to know in order to *judge of the nature and value* of the property" There can hardly be any doubt that the value of the property to be put up for sale is a material fact within the meaning of cl (e) As stated by the Judicial Committee in *Saadatmund Mohan v Phul Kuar* (o), "Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of these things 'which the Court considers material for a purchaser to know, and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated 'as fairly and accurately as possible'" If any enquiry into the value of the property is necessary, the Court should hold an enquiry (p) If the value is understated in the proclamation, and the understatement is such as is calculated to mislead bidders and to prevent them from offering adequate prices, and the sale results in a price altogether inadequate, the sale must be set aside on the ground of material irregularity in publishing or conducting

(m) *Ram Sarup v Bharat Singh* (1921) 43 All 703 64 I C 763

(n) *Kalidas v Prasanna Kumar* (1920) 47 Cal 446 455 456 55 I C 189

(o) (1898) 20 All 412 418 25 I A 146, *Munshi*

[illegible]

the sale within the meaning of r 90 below (q) In a Calcutta case it was said that the Court was not bound to investigate the value of the property (r), but these remarks were *obiter dicta* (s), and it was held in a later case that the Court is bound under this clause to investigate the value and insert it in the sale proclamation (t) In view of the decision of the Judicial Committee in the case cited above, there is no doubt that the value of the property should be stated as fairly and accurately as possible in the sale proclamation The Court may in an exceptional case state in the proclamation the values stated both by the decree holder and the judgment debtor instead of attempting itself to value the property (u)

Specifying property to be sold.—See notes to r 90 below, "Material irregularity in publishing or conducting sale," no 1A

Specifying revenue —See notes to r 90 below, "Material irregularity in publishing or conducting sale," nos 1A and 2

Specifying incumbrances.—See notes to r 90 below, "Material irregularity in publishing or conducting sale, " no 1A

Sale by Court—Duty of Court.—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a person present at the sale who asked that the terms be explained, and such person was thereupon misled into buying property which was subject to mortgages amounting to more than its value, the Judicial Committee in setting aside the sale observed "In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers It would be disastrous it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this " (v)

Non-compliance with provisions of this rule.—See notes to r 90 below, "Material irregularity in publishing or conducting sale,' nos 1A and 2

Appeal.—An order under this rule, not being included in the list of appealable orders given in O 43 is not appealable as an order The question then arises whether an order under this rule is an order in execution proceedings within the meaning of s 47 Now an order in execution proceedings may be a final order, that is, it may conclusively determine the rights of parties or it may be interlocutory In the former case the order operates as a decree and is appealable as such [s 2 (2)], but it is not so in the latter case [see notes to s 47, Interlocutory orders in execution proceedings , on p 144 above] The question therefore in each case is whether a particular order made under this rule *conclusively* determines the rights of the parties or not

It was held by a Full Bench of the High Court of Madras in *Sivagami* v *Subrahmania* (w), which was a case under the corresponding section 287 of the Code of 1882, that none of the proceedings of a Court under that section in relation to the proclamation of sale is an order within s 244 (now s 47) so as to be appealable as a decree In the course of the Order of Reference the learned Judges said "We are disposed to think that the preliminary objection is well founded and that under section 287, Civil Procedure Code, the proceedings are in themselves administrative and not judicial, but that if and when a sale does take place, if ever, and it has to be judicially confirmed, objections may be taken to the confirmation of the

(t) *Lachman* v *Ganga* (1912) 15 Cal W N 713,

(w) (1904) 27 Mad 259 *Chidambaram* v *Theivanai* (1923) 46 Mad 768, 780 74 I C 155, (24) A M 1

O. 21, r. 66. sale on any of the grounds mentioned in section 311, Civil Procedure Code [now O 21, r 90], some of which may relate to the contents of the proclamation This view receives strong corroboration from the provision enacted by section 288, Civil Procedure Code, that no Judge or other public officer shall be answerable for any error, mis statement or omission in any proclamation under section 287, Civil Procedure Code, unless the same has been committed or made dishonestly, a provision which in view of Act XVIII of 1850, would have been quite superfluous if proceedings under section 287, Civil Procedure Code, were 'judicial' and not 'administrative'" In delivering their opinion the Full Bench said "We concur in the reasons given in the Order of Reference, and we may add that the view that the proceedings in themselves, under section 287, are of an administrative and not of a judicial character is further supported by the fact that special provision is made in section 287 [now O 21, r 66 (4)] to summon witnesses and make enquiry into the matters referred to in the section, a provision which would be superfluous if the proceedings were judicial" It has accordingly been held by that Court that an order under this rule determining the value of the property to be sold, the place where the sale is to take place, the lots in which it is to be sold, and the amount for the recovery of which the property is to be sold, is not a judicial but an administrative order, and it does not come within s 244 (now s 47) and is not appealable (x) It has similarly been held that no appeal lies from an order directing in what order the property should be sold (y) It may here be stated that s 288 of the Code of 1882 has not been reproduced in the present Code In a recent case (z) the High Court of Madras observed that the Full Bench decision was good law even under the present Code, notwithstanding the omission of s 288, though in another case (a) Schwabe, C J, expressed a doubt on that point

The High Court of Calcutta has held that an order under this rule may be final or it may be interlocutory If it is final, it falls within s 47 and is appealable as a decree, but not if it is interlocutory It has accordingly been held that an order determining the value of the property to be sold is merely interlocutory and is not appealable (b) An order directing 'let sale proclamation be issued, in the meantime I shall hear the objection of the judgment debtor," is also interlocutory (c) But an order adjudicating upon a dispute as to the boundaries of the property sold and determining that certain accredited land should be included in the property to be sold is final and is appealable as a decree (d) It may be observed that such of the decisions under the Code of 1882, which were based on the definition of "decree" in so far as it was different from the definition in this Code, are no longer a guide in cases arising under this Code

The High Court of Allahabad has also held that an order under this rule determining the value of the property to be sold does not fall within s 47 and is not appealable The reason given is that in such a case "the Court judicially decides nothing" (e)

In two earlier cases the High Court of Patna held that an order under this rule determining the value of the property to be sold was merely interlocutory and was not therefore appealable (f) In a recent Patna case a Bench of three Judges held that an

(x) (1904) 27 Mad 259 *Ramanathan v Venkatachelam* (1923) 44 Mad L J 599 72 I C 836 (23) A M 619 (order fixing upset price)
(y) *Lanka v Lanka* (1924) 46 Mad L J 192 78 I C 879 (24) A M 527
(z) (1924) 46 Mad L J 192 78 I C 879 (24) A M 527
(a) *Kareembai v Mehta & Sons* (1924) 46 Mad L J 71 75 I C 901 (24) A M 234
(b) *Deokinandan v Bhan Singh* (1912) 16 Cal W N 154, 10 I C 371, *Panch Dhar v Mani* (1912) 16 Cal W N 970 17 I C 88
(c) *Jogesh v Hemendra* (1922) 35 Cal L J 170 64 I C 547
(d) *Devendra Nath v Kailash Chandra* (1924) 29 C W N 556 80 I C 861 (25) A C 318
(e) *Ajudhia Prasad v Gopi Nath* (1917) 39 All 415 39 I C 578
(f) *Deokinandan v Rajah Dhaleshwar Prasad* (1917) 2 Pat L J 13 38 I C 616 *Saurendranath v Mrityunjay* (1920) 5 Pat L J 270 56 I C 452

O. 21, r. 66,67.

order of the Court determining any of the particulars to be stated in the sale proclamation under this rule is not a final order and is not appealable It was accordingly held in that case that an order refusing to notify a lease in the sale proclamation was not final and was not appealable (*g*)

Letters Patent appeal.—An order of a single Judge of the High Court sitting on the Original Side refusing to alter the upset price fixed in a proclamation of sale or to direct the sale of the property in lots, or to postpone the date of sale, is not a "judgment" within the meaning of cl 15 of the Letters Patent, but merely an interlocutory order, and no appeal lies from it under that clause (*h*)

Non appearance of legal representative and res judicata.—Mere non attendance of the legal representative of a deceased judgment debtor pursuant to a notice under sub r (2) [App E, form no 28] at the hearing of an application to settle the terms of a sale proclamation does not estop the legal representative on the principle of res judicata from contending thereafter that the property attached belongs to him personally and that it does not form part of the estate of the deceased judgment debtor The notice under sub r (2) is merely to settle the terms of the proclamation, it is not for *determining the question of title to the property* (*i*)

Proclamation of sale.—For form of proclamation of sale, see Appendix E, form no 29

Notice under sub-rule (2)—For form of notice under sub r (2), see Appendix E, form no 28

67. [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

Mode of making proclamation

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

Sub-rule (3) : property divided into lots for separate sale—This sub rule is new It incorporates the decision in the undermentioned case (*j*)

Non-compliance with the rule.—Omission to carry out the provisions of this rule does not render the sale *ipso facto* void But such omission amounts to a 'material irregularity within the meaning of r 90 below and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (*k*) See the proviso to r 90 below

(*g*) *Mohit Narain v Thakan* (1925) 4 Pat 731 88 I C 332 ('25) A P 500

(*h*) *Kazenbai v Mehta & Sons* (1924) 46 Mad L J 71 75 I C 901 ('24) A M 234

(*i*) *Chidambaram v Theivanai* (1923) 46 Mad 768 779-781, 74 I C 155 ('24) A M 1 [F B]

(*j*) *Pedro v Jalbhoy* (1888) 12 Bom 363

(*k*) *Nana Kumar v Golam Chunder* (1891) 18 Cal 422

O. 21, rr. 67-69.

Sub-r. (2)—Note that under this sub rule the Court *may* direct publication of the proclamation, it is not incumbent on the Court to do so (*l*)

68. [S. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

Time of sale

Non-compliance with the rule.—If a sale is held before the expiration of the period prescribed by this rule, it is not void, but the case is one of material irregularity within the meaning of r 90, and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (*m*)

69. [S. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment:

Adjournment or stoppage of sale

Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

Omission to fix the "day" of adjourned sale.—Where a sale is adjourned, but no day is specified to which it is adjourned, the sale is void (*n*)

Omission to fix the "hour" of adjourned sale.—Such an omission amounts to a "material irregularity" within the meaning of r 90 below (*o*)

(*l*) *Gopi Chand* v *Benarsi Das* (1919) 1 Lah L J 197

(*m*) *Tasadduk* v *Ahmad* (1894) 21 Cal 66, 20 I A 176 *Kokil* v *Edal Singh* (1904) 31 Cal 383

(*n*) *Motahar* v *Mohammad* (1924) 40 Cal L J 311, 84 I C 700, (25) A C 201

(*o*) *Surno Moyee* v *Dakhina* (1897) 24 Cal 291, *Mahabir* v *Dhanukdhari* (1904) 31 Cal 815, 818, *Bhikhari* v *Surja Moni* (1901) 6 C W N 48

Omission to issue fresh proclamation.—Such an omission amounts to a "material irregularity" within the meaning of r. 90 below (*p*) See notes to r 90, "Material irregularity in publishing or conducting sale," No 7

Sale held on a date other than the one to which it is adjourned —Where a sale is adjourned to a certain date, but it is held on a different date, the case is one of material irregularity in conducting the sale (*q*).

Sub-rule (3): Sale in execution of a mortgage-decree —A mortgagor judgment debtor is entitled to stop the sale of the mortgaged property in execution of a mortage-decree by payment of the debt before the sale actually takes place *even after a final decree* for sale has been passed (*r*).

Rateable distribution.—Moneys paid into Court under sub r (3) to stop a sale are assets available for rateable distribution within the meaning of s 73 (*s*)

70. [*Cf* **S. 287, last para.**] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales

Execution of decree by Collector.—See ss 68 to 72, and Sch III below

71. [**S. 293.**] Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Defaulting purchaser answerable for loss on re-sale

Application of the rule.—This rule extends to all sales, whether of movable or of immovable property, and also to re sales made under the Code, whether made in consequence of default of payment of deposit under r 81 or of purchase money under rr 85 and 86 (*t*) But the re sale should only cover the property sold at the prior sale, and any substantial difference of description at the sale and re sale in any of the matters required by r 66 will not entitle the decree holder to recover the deficiency of price under this rule Thus where the defaulting purchaser had been induced to bid for the property as unincumbered by reason of the fact that the incumbrances were not mentioned in the proclamation of sale and the resale was on a proclamation in which the incumbrances were mentioned, it was held that he was not liable for the deficiency on re sale under this rule (*u*) The same was held where the property was described as that of *A* at the first sale and as that of *B* at the second (*v*) It is different, however, if the property re sold

588, 589, a decision under s 293 of the Code of 1882

(*t*) *Ramdhani* v *Rajrani* (1881) 7 Cal 337, *Jacherbai* v *Haribhai* (1881) 5 Bom 575

(*u*) *Baijnath* v *Moheep* (1889) 16 Cal 535

(*v*) *Gangadas* v. *Bai Sura* (1912) 36 Bom 329

O. 21, rr. 71, 72.

is substantially the same as that put up for sale at the first sale "The reasonable construction to place on rule 71 is that the re sale should be within a reasonable time after the first sale and the property resold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser s default (w) The deficiency may be recovered though the certificate referred to in this rule has not been issued (x)

It is to be noted that on the happening of any of the events that render a re sale necessary, the decree holder is *not bound to have the same property re sold* He may proceed against any other property of the judgment debtor, leaving the latter to his remedy against the defaulting purchaser (y)

By reason of purchaser's default —These words cover a default not only in paying the balance of the price, but in making the deposit of 25 per cent as provided by r 84 below (z)

At a Court sale *A* bids Rs 5,000, *B* bids Rs 6,000, and *C* bids Rs 7,000 *C* dies before his bid is accepted by the Court. Can *B* be said in the circumstances to be the highest bidder? No *C* s bid was revoked by his death before acceptance by the Court *B* s bid lapsed on the making of the higher bid by *C*, and *A* s bid lapsed on the making of the higher bid by *B* The property should therefore be put up afresh for sale (a)

Interest on deficiency —A defaulting purchaser is liable for interest on the deficiency from the date on which an order is made against him under this rule, and not from the date of sale (b)

Where defaulting purchaser merely an agent —The mere fact that the defaulting purchaser acted as the agent of another is no ground for exempting him from liability under this rule unless he informed the officer conducting the sale that he was merely an agent The fact that the judgment debtor knew that he was merely an agent does not disentitle the judgment debtor to an order under this rule (c)

Appeal —An order under this rule allowing or disallowing an application for the recovery of the loss by a re sale falls within s 47 and is appealable as a decree (d) See notes to s. 102, Execution, on p 279 above

Decree holder not to bid for or buy property without permission

72. [S 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Where decree holder purchases amount of decree may be taken as payment

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the

(z) Sita Ram v. Janki Ram (1922) 44 All 266, 271 65 I C 813 (22) A A 200

(a) Raja of Bobbili v. Suryanarayana (1919) 42 Mad 776 51 I C 805

(b) Kanthamma v. Manchiraju (1924) 46 Mad L J 134 78 I C 296 (24) A M 476

(c) (1924) 46 Mad L J 134, 78 I C 296 (24) A M 476 supra

(d) Amir Baksha v. Venkatachala (1895) 18 Mad 439, Kali Kishore v. Guru Prosad (1895) 25 Cal 93 Ram Dial v. Ram Las (1876) 1 All 181 Sita Ram v. Janki Ram (1922) 44 All 266 65 I C 813 (22) A A 200 overruling Deoki v. Tapasri (1892) 14 All 201 See also Gangadas v. Lal Suraj (1912) 36 Bom 329.

decree shall enter up satisfaction of the decree in whole or in part accordingly. **O.21, r. 72**

(3) Where a decree holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by order set aside the sale, and the costs of such application and order, and any deficiency of price which may happen on the re sale and all expenses attending it, shall be paid by the decree-holder.

Alterations in the rule.—

1 The words 'subject to the provisions of section 73' are new See notes below under the head Amount due on the decree

2 The words any other person whose interests are affected by the sale in sub r (3) have been substituted for the words 'any other person interested in the sale' This is merely a verbal alteration

No separate suit—Where a decree holder without leave of the Court buys the property of the judgment debtor at a Court sale, the remedy of the latter is by application under this rule and s 47, and not by a separate suit a separate suit is barred under s 47 The question whether the sale should be set aside or not is a question between the parties to the suit relating to the execution of the decree within the meaning of s 47, and it must therefore be decided by the Court executing the decree and not by a separate suit (e) Note the words may by *order* set aside the sale in sub r (3)

"The Court may, if it thinks fit, set aside the sale"—In *Rai Radha Krishna v Bisheshar Sahay* (f) their Lordships of the Privy Council in dealing with the corresponding s 294 of the Code of 1882 said Upon the construction of this section it is evident that a purchase by a decree holder who has not obtained permission is *not void nor a nullity* but is only to be avoided on the application of the judgment debtor or some other person interested It would be injurious to those interested in the sale if a decree holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities A sale is to be set aside upon application and upon cause shown Where a decree holder purchases without the permission of the Court the sale, as stated above is not absolutely void but merely voidable (g) The words the Court may, if it thinks fit set aside the sale show that a purchase by a decree holder without permission is not *ipso facto* void, the purchase is valid until it is set aside under this rule (h) Nor is the sale void because the decree holder purchases the property in the name of another after leave to bid is refused to him The sale is merely voidable It is voidable and not void even if the decree holder had applied for permission *and the permission was refused* (i) In considering whether the sale should be set aside the Court has to consider whether or

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[illegible]

(g) *Ganesh v Gopal* (1917) 41 Bom 357, 39 I C 3

(h) *Chintamanrao v Tulsabai* (1887) 11 Bom 588

(i) *Rai Radha Krishna v Bisheshar Sahay* (19) 49 I A 312 1 Pat 733 67 I C 914 ( ) A I C 336

O.21, r. 72. not the property has been realized to the best advantage, the question whether the decree holder has been contumacious is not material (j) Where a decree holder purchases without the permission of the Court through a benamidar, and this fact comes to the knowledge of the judgment debtor *after* confirmation of the sale under r 92 below, the sale may be set aside even after confirmation (k)

Setting off decretal amount against purchase-money.—It may be one of the terms on which the permission to bid is granted that there should not be this right of set off In such a case no set off can be allowed (l) Where a decree is transferred to the Collector for execution, and the Collector, who under the Rules framed by the Court is empowered to grant permission to the decree holder to bid for the property but has no power to allow a set off, grants such leave, and the decree holder is declared to be the highest bidder, the decree holder is entitled to apply to the Court under this rule for permission to set off the decretal amount against the purchase money (m)

Leave to bid.—Leave to bid should not be refused except upon good ground (n) A decree holder who has obtained leave to bid at a judicial sale is in the same position as any other purchaser, he is not bound more than any other person to disclose circumstances within his knowledge, and bearing on the sale (o) Similarly a mortgagee purchaser who has obtained leave to bid is in the same position as an independent purchaser (p), that is to say, he does not stand in the position of a trustee for the mortgagor, and he is only bound to give credit to the mortgagor for the actual amount of his bid, and not for what may be the actual value of the p operty (q) It may here be noted that if the decree holder himself is the purchaser, and the decree is subsequently reversed, the sale to him will be set aside (r) but the sale cannot be set aside against a *bona fide* purchaser who *is not a party to the suit* (s) See notes to s 65, "Effect of reversal of decree upon sale," etc, p 192 above

"Amount due on the decree"—When more than one decree holder has applied for execution, the amount due on the decree to the decree holder purchaser is the amount to which he would be entitled on a rateable distribution under s 73 (t) This is now made clear by the addition of the words ' subject to the provisions of s 73 " in sub r (2)

Interest—A decree, the satisfaction of which has resulted from the decree holder himself bidding the full amount of the decree at the execution sale, is not actually satisfied until the sale has been confirmed under r 92 below (u) If, therefore, the decree carries interest, the decree holder is entitled to claim interest between the date of the sale and the date of its confirmation (v)

Procedure.—A sale under this rule is to be set aside *upon application* and upon cause shown. It has been held by the High Court of Madras that where a decree holder purchases property in contravention of the provisions of this rule, and sues the judgment debtor and transferees from him for possession, it is open to the judgment debtor to apply to have the sale set aside *in that suit* by way of answer to the plaintiff s claim. It is not necessary that the judgment debtor should have previously *applied* to the Court under this rule and s 47 to set aside the sale The written statement of the judg

I A 17 *Satis Chandra* v *Porter* (1909) 36 Cal 2?6 1 I C 158

(l) *Hazarimal* v *Namdev* (1908) 32 Bom 379
(m) *Martand* v *Daya* (1920) 44 Bom 346 55 I C 527
(n) *Motilal* v *Fulchand* (1924) 26 Bom L R 770 83 I C 379 ('24) A B 515
(o) *Mahomed* v *Savan* (1900) 23 Mad 227, 27

(t) *Sorabji* v *Govind* (189?) 16 Bom 91
(u) *Ganesh* v *Purshottam* (1909) 33 Bom 311, 316 1 I C 106
(v) *Khalil ur-Rahman* v *Gokul* (1919) 41 All 526 50 I C. 772

ment debtor may be treated as an *application* to set aside the sale under s 47 (*u*) But the matter is one of pure discretion (*x*)

Leave obtained by misrepresentation —Where the leave to bid is obtained by the decree holder by misrepresentation the Court may refuse to confirm the sale (*y*)

Appeal —No appeal lies from an order refusing to give a decree holder permission to purchase at the Court sale (*z*) But an appeal lies from an order setting aside or refusing to set aside a sale under this rule [O 43 r 1 cl (j)]

73. [S 292] No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold

Restriction on bidding or purchase by officer

Pleader —This rule does not preclude a pleader of a party to the suit (*a*)

Sale of moveable property.

74. [*New*] (1) Where the property to be sold is agricultural produce, the sale shall be held,—

Sale of agricultural produce

(*a*) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(*b*) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

(2) Where, on the produce being put up for sale,—

(*a*) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(*b*) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market day,

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(*z*) *Jodoonath* v *Brojo Mohun* (1880) Cal 174 *Ko Tha Hnyin* v *Ma Hnin I* (1911) 38 Cal 717 38 I A 186 11 I C 545

(*a*) *Alagirisami* v *Ramanathan* (1887) 10 Mad 111 See also *Nundeep I* v *Alexander* (1870) 13 W R 203 214 215

O. 21, rr. 74-77.

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce

Place of sale of moveable property.—Except in the case of agricultural produce for which provision has been made by this rule a sale of moveables in execution of a decree should ordinarily be held at some place within the jurisdiction of the Court ordering the sale Good and sufficient reasons ought to be shown for directing otherwise A mere contention that a higher price is likely to be bid in some other place is not a good and sufficient reason (b)

Special provisions relating to growing crops

75. [*New*] (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it

Negotiable instruments and shares in corporations

76. [S 296] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker

"**May**"—A sale through a broker is permissive and not obligatory (c)

Sale by public auction

77. [S. 297.] (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re sold

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute

(3) Where the moveable property to be sold is a share in goods belonging to the judgment debtor and a co owner, and two or more persons, of whom one is such co owner,

(b) *Lakshmanbai* v *Santapa* (1889) 13 Bom [illegible] | (c) *Baboo* v *Lekraj* (1867) 8 W R 415

O. 21, rr. 77-79.

respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner

Where moveable property is sold by public auction —This does not apply to negotiable instruments or shares sold through a broker under r 76 above (*d*)

Payment of price —The officer holding the sale has a discretion to allow the price to be paid at a reasonable time after the sale (*e*)

In default of payment.—The provisions of r 71 apply to a re sale under this rule (*f*)

Sub-rule (3) —This sub rule is new It gives a right of pre emption to the co owner See as to immoveable property r 88 below

Irregularity not to vitiate sale but any person injured may sue

78 [S 298] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale, but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Scope of the rule.—This rule provides for the case of irregularity in publishing or conducting the sale of *moveable* property Rule 90 deals with irregularity in publishing or conducting the sale of *immoveable* property

Irregularity in publishing or conducting the sale —If the sale proclamation warrants a title the injured party may apply to set aside the sale, it not being a mere irregularity (*g*)

At the hand of any other person —Where moveable property not belonging to the judgment debtor is sold at the instance of the decree holder the real owner may sue the decree holder for the value of the property (*h*)

Money-decree —A money decree is not moveable property within the meaning of this rule (*i*) See O 21 r 53

Delivery of moveable property debts and shares

79 [Ss 299, 300 301] (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser

(2) Where the property sold is moveable property in the possession of some person other than the judgment debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from

(*d*) *Balaji v. Hira* (1885) 9 Bom 518
(*e*) *Shah Fareed v. Sheo Charun* (1870) 4 N W 1 H C R 37
(*f*) *Ramdhani v. Lajrani* (1881) 7 Cal 337
(*g*) *Framji v. Hormasji* (1878) 2 Bom 258
(*h*) *Mohanund v. Ali al* (1868) 9 W R 118
(*i*) *Maung Lun Bye v. Maung Lo Nyun* (1923) 1 Rang 360 ; 61 I C 679 ('24) A R 21

O. 21, rr. 79, 80

delivering possession of the property to any person except the purchaser

(3) Where the property sold is a debt not secured by a negotiable instrument or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser

Sale of share —See the undermentioned case (j) and r 80 below

Forms —See App E forms nos 3? 33 and 34

80 [S 302] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officers as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party

Transfer of negotiable instruments and shares

(2) Such execution or endorsement may be in the following form, namely —

A B by C D , Judge of the Court of (or as the case may be), in a suit by E F against A B

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same , and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself

Execution of deed of transfer of shares.—Where a deed of transfer of shares is executed by a Judge under this rule the company has no option as to registering the

(j) *Tadepall* v *S ram* (19?7) 45 Mad 537 70 I C 659 (?3) A M ?41

shareholder who purchased the shares in execution and if the purchaser cannot obtain the original share certificates from the judgment debtor, the company is bound to grant him new share certificates (k)

Vesting order in case of other property

81. [S 303] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct, and such property shall vest accordingly

Sale of immoveable property

What Courts may order sales

82. [S 304] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes

Postponement of sale to enable judgment debtor to raise amount of decree

83. [S 305] (1) Where an order for the sale of immoveable property has been made, if the judgment debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount

(2) In such case the Court shall grant a certificate to the judgment debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment debtor, but, save in so far as a decree holder is entitled to set off such money under the provisions of rule 72, into Court

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

(k) *Toolsee Dass v East Ind a Ry Co* (1867) 2 Ind Jur N S 133

O. 21, rr. 83, 84.

Alterations in the rule.—The words, "save in so far as a decree holder is entitled to set off such money under the provisions of rule 72" in sub r (2), have been added to make it clear that where a decree holder is entitled to a set off under r 72, he should not be required to pay in the monies A similar saving has been introduced into r 84, sub r 2, and r 85

Postpone the sale for such period as it thinks proper.—The postponement of sale under this rule is discretionary with the Court (*l*) But the postponement should be for a reasonable period (*m*)

The amount of the decree can be raised.—No sale should be postponed and no certificate should be granted under sub r (2), unless the *whole* amount due on the decree can be raised by mortgage, lease or sale (*n*)

Notwithstanding anything contained in section 64.—On compliance with the conditions of this rule, a private alienation, notwithstanding s 64, becomes absolute, not only against the claim of the decree holder, but against all claims enforceable under the attachment (*o*)

Confirmation of sale by Court.—Where permission to raise the amount of decree by private sale has been granted to the judgment debtor by two Courts in each of which there has been a decree passed against him, it is enough if the sale is confirmed by one Court it is superfluous to apply to the other Court for confirmation of the same sale (*p*)

Guardian and Wards Act 8 of 1890, s. 29.—A private alienation of property, though confirmed by the *executing Court* under this rule, is not valid, if such alienation is made by a guardian and the sale is not confirmed by the *Court by which the guardian was appointed* (*q*)

Decree for the enforcement of a mortgage.—This rule does not apply to a sale of property directed to be sold in execution of a decree for the enforcement of a mortgage The reason is that in the case of a mortgage decree, the right of sale does not depend upon the *attachment* in execution, but is conferred by the decree itself (*r*)

Rateable distribution.—Money paid into Court under the proviso to sub r (2) is liable to rateable distribution under s 73, as it is paid under a pending execution application (*s*).

Revision.—No appeal lies from an order refusing to postpone a sale under this rule But the party aggrieved may apply to the High Court under s 115 for a revision of the order and the High Court may in a proper case set aside the order (*t*)

Deposits by purchaser and re sale on default.

84. [S. 306.] (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per

(*l*) *Bishenmun* v *Land Mortgage Bank* (1884) 12 I A 7 10 11 Cal 244 248 A K R R M Chetty v M Subraja (1925) 3 Rang 132 136 89 I C 300 (25) A R 271

(*m*) *Mohinee* v *Ram Kant* (1871) 15 W R 329 *Sukhuj* v *Ram Pershad* (1874) 21 W R 146 *Ram Ruttun* v *Land Mortgage Bank* (187) 17 W R 193

(*n*) *Venkatasami Gurusami* v *Chanbasappa* (1891) 14 Mad 277

(*o*) *Shivlingappa* v *Chanbasappa* (1906) 30 Bom 337

(*p*) *Antanapa* v *Bhimrao* (1895) 19 Bom 539

O. 21, rr. 84, 85.

cent on the amount of his purchase money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be re sold

(2) Where the decree holder is the purchaser and is entitled to set off the purchase money under rule 72, the Court may dispense with the requirements of this rule

"Declared to be the purchaser. —An execution sale is not complete until the presiding officer has accepted the bid and declared the purchaser (u)

Material irregularity It has been held by the High Courts of Calcutta and Madras that failure to deposit the 25 per cent *immediately* as required by this rule is no more than a material irregularity within the meaning of r 90, which would render the sale *voidable* if substantial injury has resulted by reason of such irregularity (v) It was at one time held by the High Court of Allahabad that such failure rendered the sale altogether *void* (w) but these decisions have now been overruled by a Full Bench the view taken by the full Bench being the same as that of the Calcutta and Madras High Courts (x)

Sub-rule (2) —This sub rule is new See notes to r 83, ' Alterations in the rule

Rateable distribution —See notes to s 73 " Before the receipt of the assets on pp 206 207 above

85. [S 307] The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property

Time for payment in full of purchase-money

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72

On the fifteenth day from the sale —The purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule If the purchase money is not received by the Court in time, it will not avail him to say that he had posted the money in time for the Post Office is not the agent of the Court (y)

Material irregularity —The time for payment cannot be extended with*out the consent of the decree holder and the judgment debtor* If it be extended without their consent the case is one of material irregularity within the meaning of r 90 below ( )

Where the Court or office is closed on the fifteenth day —In such a case the payment may be made on the next day on which the Court or Office is open See General Clauses Act 10 of 189 s 10

Proviso —The proviso is new See notes to r 83 Alterations in the rule

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Janki Ram (19) 44 All 66 ( ) A A 00 [F B]
Lelva (189) Bom 415
Vylunda (19) 43 Mad
I C 1001 (3) A M 48

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Procedure in default of payment

Alteration in the rule.—The words "may, if the Court thinks fit," have been substituted for the word "shall." See notes below

Forfeiture of deposit to Government.—The old section provided that the deposit "*shall* be forfeited to Government" This provision led to hardship in certain cases (*a*). To obviate any hardship that may arise, the words "may, if the Court thinks fit," have been substituted for the word "shall." It is no longer obligatory upon the Court to forfeit the deposit *in every case*

87. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Notification on re-sale

Fresh notification.—A fresh notification is only necessary where the re sale is in default of payment of the *purchase money* within the time allowed by r 85 No fresh notification is necessary for a re sale in default of payment of the 25 per cent deposit required by r 84 (*b*)

88. [S. 310.] Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

Bid of co-sharer to have preference

See as to moveable property, r 77, sub-r. (3) above

Co-sharer—A *defeasible* title to a share is not sufficient to support a claim for pre emption under this rule (*c*) It has been held by the Allahabad High Court under the rules framed under s 70 of the Code that where a sale is confirmed by the Collector on the non appearance of the alleged co-sharer to prove his title as co sharer, he is not entitled to maintain a separate suit for possession on the ground of pre emption (*d*)

(*a*) See *Sambanta* v *Vydinadasami* (1902) 25 Mad 535

(*b*) *Vallabhan* v *Pangunni* (1889) 12 Mad 454

(*c*) *Kamta Prasad* v *Mohan* (1910) 32 All 45, 3 I C 782 *Abdul Ghafur* v *Ghulam* (1913) 35 All 296 18 I C 959

(*d*) *Badri Singh* v *Tulsi Ram* (1923) 45 All 203, 79 I C 8.., (23) A.A 186

89. [S. 310A.] (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,— **O.21, r. 89.**

Application to set aside sale on deposit

(*a*) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Alterations in the rule:—

1 The words, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have been substituted for the words, "any person whose immoveable property has been sold under this Chapter" See notes below, "Who may apply under this rule"

2 The words, "unless he withdraws his application," and the words, "or prosecute," in sub r (2) are new See notes below under the head, "Sub rule (2)"

Immoveable property—This rule applies only to sales of immoveable property A simple mortgage bond is moveable, and not immoveable property The provisions of this rule do not therefore apply to a sale of such a bond in execution of a decree (*e*)

This rule applies to sales under a mortgage-decree—The transfer into this Code (see O 34) of the sections of the Transfer of Property Act relating to decrees in suits on mortgage shows clearly that the provisions of the present rule apply to sales under mortgage decrees as well Hence a mortgagor whose immoveable property has been sold in execution of a decree for the sale of the mortgaged property passed under O 34, r 5, may apply under this rule to set aside the sale (*f*) As to the old section it was

(*e*) *Lal Umrao* v *Lal Singh* (1924) 22 All L J 840 80 I C 890, ('24) A L 796

(*f*) *Girjiban Dass* v *Bisseswar Lal* (1921) 48 Cal 69, 60 I C 406

O. 21, r. 89. doubtful whether its provisions applied to mortgage decrees, the High Court of Calcutta holding that they did not (g), while the other Courts holding that they did (h) The Calcutta decisions are no longer law The present rule applies also to sales under a mortgage decree on the original side of Chartered High Courts (i).

To what other sales does the rule apply?—This rule has been held to apply to a case where an award has been made pursuant to an order of reference in a suit for partition directing the sale of an immoveable property for making certain payments, and a decree is passed on the award, and the property is then sold pursuant to the terms of the decree (j) The High Court of Madras has held that this rule does not apply to a sale by a receiver of partnership property for realising the partnership assets (k)

Who may apply under this rule.—*Under the old section*, the application to set aside a sale could only be made by "any person whose immoveable property has been sold under this Chapter," that is, the Chapter relating to execution Those words, it was held, included—

(1) the judgment debtor,

(2) any person, though not a party to the suit or decree (l), whose interests were affected by the sale

A person whose interests were not affected by the sale could not, it was held, apply under that section (m)

Under the present rule, the application to set aside a sale of immoveable property held in execution of a decree may be made by—

(1) any person owning the property, or

(2) any person holding an interest in such property by virtue of a title acquired before the sale.

"Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale."—Under the old section the application to set aside a sale on deposit could be made by "any person whose immoveable property has been sold" Under the present rule the application may be made by "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" There is no doubt that a judgment debtor whose immoveable property has been sold may apply under this rule as a "person owning such property But what if the judgment debtor has transferred his interest in the property? Now a judgment debtor may transfer his interest in the property before the Court sale or he may do so after the Court sale Is he entitled after a transfer in either case to apply under this rule? Is the transferee from the judgment debtor entitled to apply under this rule? We proceed to consider the decisions on the subject

First, as regards transfer before Court sale—Under the old section there was a conflict of decisions whether, if the judgment debtor had transferred his interest in the property before the Court sale, the *transferee* could apply under that section to have

(g) *Kedar Nath* v *Kali Churn* (1898) 25 Cal 703

(h) *Fuja Ram* v *Chunni Lal* (1897) 19 All 205, *Krishnaji* v *Mahadev* (1901) 25 Bom 104, *Mallikarjunadu* v *Lingamurti* (1902) 25 Mad 244

(i) *Lirpbin Dass* v *Bissessar Lal* (1921) 48 Cal 69, 60 I C 406

(j) *Nirode Nath* v *Amullya* (1922) 27 C W N 466 77 I C 774 (23) A C 582

(k) *Tuljaram* v *Ramchandra* (1921) 41 Mad L J 465, 63 I C 916

(l) *Suchand* v *Balaram* (1911) 38 Cal 1, 6, 6 I C 810

(m) *Ramchandra* v *Rakhmabai* (1899) 23 Bom 450, *Abdul* v *Matiyar* (1903) 30 Cal 425, 428

O. 21, r. 89.

the same set aside In *Srinivasa* v *Ayyathorai* (*n*), for instance, it was held that the transferee could apply, while the contrary was held in *Ramchandra* v *Rakhmabai* (*o*) Under the present rule it is clear that a transferee acquiring title *before* the Court sale is competent to apply to have the sale set aside Further, it was held under the old section that a judgment debtor who had effected a private sale of his property subsequently to the attachment and prior to the Court sale was entitled to apply under that section to set aside the sale (*p*) This ruling, it has been said, is still good law (*pp*)

Next, as regards transfer after Court sale—*A* obtains a decree against *J* In execution of the decree certain immoveable property belonging to *J* is sold to *C* for Rs 166 Subsequently, but before the sale to *C* is confirmed under r 92, *J* sells the property to *P* for Rs 500 It is clear that if *J* could apply under this rule to have the sale set aside on payment of the amount mentioned in the rule, the pecuniary benefit to him would be great for while the property was sold at the Court sale for Rs 166, it realized Rs 500 at the subsequent private sale Is *J*, the judgment debtor, entitled to apply under this rule to have the sale set aside? Is *P*, the purchaser at the private sale, entitled to apply under this rule? It has been held by the Allahabad High Court (*q*) that neither the judgment debtor nor the subsequent purchaser is entitled to apply under this rule The ground of the Allahabad decision is that the present rule gives judgment debtors a last chance of saving the property *for themselves* and that it was no part of the Legislature's intention that the property should be saved for persons to whom it might be privately sold after the Court sale had taken place The Madras High Court held in its earlier decisions that the judgment debtor is not entitled to apply (*r*), but that the subsequent purchaser is entitled to apply (*s*) The ground of those decisions was that the judgment debtor having parted with his interest in the property before the application under this rule and so *having no interest* in the property *at the date of the application*, he was not entitled to apply under this rule, unless the sale to the subsequent purchaser was by an unregistered document in which case the judgment debtor would continue to be the owner of the property and could as such owner apply under this rule (*t*) On the other hand the High Court of Bombay held that the judgment debtor is entitled to apply under this rule, but that the subsequent purchaser is not so entitled (*u*) The ground of the Bombay decision is that the sale to the auction purchaser not being still confirmed the judgment debtor remains the owner of the property, and that he is therefore entitled to apply as a "person owning the property" within the meaning of this rule As regards the Allahabad decision, the Bombay Court said that the object of the present rule was not only to preserve the property in the hands of the judgment debtor but also to save the judgment debtor from monetary loss that might be occasioned to him if the property was sold at the auction sale at an inadequate price As regards the reasoning of the Madras High Court in its earlier decisions, the Bombay Court observes that it was not necessary for the purposes of this rule that the judgment debtor should own or have an interest in the property *at the date of the application* under this rule, and that it was sufficient if he owned the property or had an interest in it *at the date of the Court sale* The High Court of Patna has followed the Bombay decision (*v*) In a recent case a

(*n*) (1898) 21 Mad 416 [mortgagee]
(*o*) (1899) 23 Bom 450 [purchasers]
(*p*) *Maganlal* v *Doshi* (1911) 35 Bom 631
(*pp*) *Sundaram* v *Mausa* (1921) 44 Mad 554 562 63 I C 937
(*q*) *Ishar Das* v *Asaf Ali* (1911) 44 All 155 13 I C 134 See *Lad Ram* v *Sundar Singh* (1923) 45 All 425 74 I C 778 (23) A A 337 I C 211
(*r*) *Subbarayalu* v *Lakshminarasamma* (1913) 38 Mad 7 5, 22 I C 103
(*v*) *Dhaneshwari* v *Sheo Shankar* (1919) 4 Pat L J 341 51 I C 873

O.21, r. 89. Full Bench of the Madras High Court overruled its earlier decisions, and agreeing with the Bombay and Patna decision held that the judgment debtor was entitled to apply, and that the subsequent purchaser was not entitled to apply under this rule (u) The High Court of Calcutta has held that the subsequent purchaser is not entitled to apply under this rule The reason given is that the interest, if any, which he held in the property was not by virtue of a title acquired by him " before ' the execution sale, and consequently he is excluded by the very terms of the rule (x)

Miscellaneous cases —Under the old section it was held that a Mahomedan co heir was not entitled to apply to set side the sale (y) The sale would seem to be the law under the present rule But it was held that a co sharer was entitled to apply (z) It is doubtful whether a co sharer is a person entitled to apply under this rule It was also held under the old section that a durmukaridar was entitled to apply (z2)

A person who has obtained a mortgage of the property before the Court sale may apply under this rule (z3) So also a usufructuary mortgagee in possession (a) But a person who has *merely agreed* to purchase the property cannot apply under this rule, for a mere agreement for sale of immoveable property does not of itself create any interest in the property (b) Similarly a person who is out of possession of the property and is litigating to establish his right thereto, is not entitled to apply under this rule (c)

Unsuccessful application to stop sale.—The mere fact that the applicant had already unsucessfully applied to stop the sale on payment of the decretal amount and had also put in a claim petition under r 58 above does not preclude him for applying under this rule (d)

Deposit without application—An application is necessary before the Court can act under this rule Mere deposit of the required amount is not enough (e) See notes below Limitation

Deposit of five per cent—The deposit of 5 per cent must be made even though the purchaser may be the decree holder The 5 per cent is intended as a compensation to the purchaser for his trouble and disappointment for the loss of that which was, perhaps a good bargain (f)

Mistake in calculating amount to be deposited—No sale will be set aside under this rule unless the whole amount specified in sub r (1) is deposited by the applicant *within thirty days* from the date of sale If the full amount is not deposited within the aforesaid period, though it may be owing to a mistake on the part of an officer of the Court in calculating the amount, the sale cannot be set aside under this rule unless the officer was charged by the Court to make the calculation and to inform the parties as to the amount to be deposited (g) See notes below, Limitation'

Less amount " received " by decree-holder—The term " received ' contemplates an actual *receipt* of the amount by the decree holder A mere *payment into Court* of the sale proceeds does not constitute *receipt* within the meaning of this rule (h)

(w) *S ndaram* v *Mausa* (1921) 44 Mad 5̣4 63 I C 937 *Gopala* v *Visvanatha* (1920) 39 Mad L J 84 58 I C 856 [mortgage]

(x) *Saroda* v *Harendra* (19??) 49 Cal 454 68 I C 239

(y) See *Abdul* v *Maliyar* (1903) 30 Cal 42̣

(z) *Tulsi Ram* v *Izzat Ali* (1908) 30 All 192 19̣-196

L J 325 72 I C 33̣ (23) A M 487

(g) *Chundi Charan* v *Banke Behary Lal* (1899) 26 Cal 449 distinguishing *Makbool* v *Ba le Sabhan* (1898) 25 Cal 609 *Ugrah Lall* v

In determining what amount has been "received" by the decree holder, the Court should not give credit to the judgment debtor for any amount paid by a co judgment debtor who has not joined in the application under this rule (i)

Failure to deposit full amount.—Where a judgment debtor brought into Court not the amount for the recovery of which the sale was ordered, but only the amount realized by the sale, *plus* five per cent, with an undertaking to pay the balance, it was held that he had not complied with the provisions of this rule, and the Court refused to set aside the sale (j)

Conditional deposit.—A deposit under this rule, in order that it may be a valid deposit, must be unconditional (k)

"For payment to the decree-holder"—Rateable distribution.—The expression "decree holder" in sub sec (1) (b) refers to that person alone for satisfaction of whose decree the sale has been ordered It does not include other decree holders who would have a right to claim rateable distribution out of the sale proceeds under sec 73. It is therefore enough if the judgment debtor deposits such amount as is sufficient to satisfy the claim of the decree holder at whose instance the property was sold. It is not necessary that the amount deposited by him should be sufficient to satisfy decrees held against him by other decree holders also (l) Further, when a judgment debtor deposits in Court a sum sufficient to satisfy the claim of the person for satisfaction of whose decree the property was ordered to be sold, the other decree holders are not entitled to a rateable distribution thereof under s 73 (m)

Sub rule (2).—Where a judgment debtor applies to set aside a sale under this rule, and subsequently applies under r 90 also, he is not entitled to prosecute the application made by him under this rule (n) But the Court should in such a case put the judgment debtor to his election whether he would withdraw the application under r 90, and if he refuses to do so, it should dismiss the application made under this rule (o). An application, though purporting to be made under r 90, may not really be one under that rule, but one under s 47, the provisions of sub r (2) do not apply to such a case (p)

"Court."—The word 'Court' in this rule means the Civil Court, and not, in the case of decrees transferred to the Collector for execution, the Collector (q) Hence an application under this rule must be made to the Court and not to the Collector If the judgment debtor applies to the Collector, he cannot stop limitation running against him It is the duty, however, of the Collector in such a case to return the application to the applicant and tell him that the application should be made to the Court (r) See notes, "Limitation" below

Sale of property by separate lots.—Where property is sold in separate lots in execution of a decree, it is not open to the judgment debtor to apply under this rule to set aside the sale of some only of such lots The application must be to set aside the sale of all the lots (s)

(i) [illegible]

(j) [illegible]

(n) *[illegible] v [illegible] Ratan* (1896) 23 Cal [illegible]

(r) *Tipangarda v Ramangarda* (19[illegible]0) 44 Bom 50 54 I C 670 *Shanmukh v Narayan* (1921) 45 Bom 1132 62 I C 221 See also *[illegible]gappa v Shi[illegible]ppa* (1924) 48 Bom 63[illegible] 8[illegible] I C 15[illegible] (2[illegible]) A [illegible] 49[illegible]

(s) *Kripanath v Ram Lakshmi* (189[illegible]) 2 C W N 703

O. 21, r. 89. **Necessary parties.**—The auction purchaser as well as the decree holder are necessary parties to an application under this rule (t) See the proviso to r 92, sub r (2)

Limitation.—The application under this rule must be made within 30 days *from the date of sale* [Limitation Act, 1908, Sch. I, art 166] The Court has no power to extend the time under s 148 (u) The words "date of sale' mean the date on which the property is put up for sale and knocked down to the highest bidder, and not the date on which the sale is confirmed by the Court [r 92] (v) At the same time it is to be remembered that if for any reason the final bid remains unaccepted for some days by the sale officer, the period of 30 days does not begin to run until such bid is accepted by him (w)

The words "may apply to have the sale set aside *on* his depositing in Court," etc, show that not only the application, but also the deposit, should be made within 30 days from the date of sale It is not enough to make the application within 30 days (x) Nor is it enough to make the deposit within 30 days (y) Both the application and the deposit must be made within 30 days from the date of sale

The law does not impose any period of limitation for the issue to the parties of *notice* of the deposit (z)

Appeal.—The law as regards appeal from an *order setting aside or refusing to set aside a sale* passed on an application under the present rule is quite different from what it was under the Code of 1882 Such an order under the Code of 1882 [s 310 A] was not appealable *as an order*, for it was not included in the list of appealable orders given in s 588 of that Code [now O 43, r 1] But the order being one made in proceeding in execution (a), it was appealable *as a decree*, if the question as to whether the sale should be set aside or not was one between "the parties to the suit or their representatives' within the meaning of s. 244 [now s. 47] (b), and in such a case a *second appeal* also lay from the order passed in first appeal And it was held that if the question was one between the judgment debtor and the decree holder, in other words, between the parties to the suit, it did not cease to be so merely because the auction purchaser (not a party to the suit) was interested in the result (c) But where the question was one between a party to the suit on the one hand and the auction purchaser on the other, there was a conflict of opinion as to whether an appeal lay from the order (d) In those cases, however, in which it was held that no appeal lay from the order, it was held that the party aggrieved might apply to the High Court for a *revision* of the order (e) Under the present Code, however, an *order setting aside or refusing to set aside a sale* [r 92], passed on an application under this rule [r 89], is appealable *as an order*, for it is included in the list of appealable orders given in O 43, r 1 [see cl (j)] The result is that under the

(t) See *Mussammat Bibi* v *Paras Nath* (1923) 2 Pat 800 75 I C 430 ('23) A P 37
(u) *Chaudhry Kameshwar* v *Chaudhry Sureshwar* (1917) 2 Pat L J 164 39 I C 664
(v) *Chowdhry Kesri* v *Giani Roy* (1907) 29 Cal 626 631
(w) *Munshi Lal* v *Ram Narain* (1913) 35 All 65 17 I C 783
(x) *Mahomed Akbar* v *Sukhdeo* (1911) 13 Cal L J 467 10 I C 51 *Munna Lal* v *Radha Kishan* (1915) 37 All 591 30 I C 186 See O 21 r 92 ( )
(y) *Lnoji* v *Banslal* (1919) 43 Bom 735 53 I C 135
( ) *Musammat Bibi* v *Parasnath* (1923) 2 Pat 800 75 I C 430 ('24) A P 37
(a) *Pita* v *Chunilal* (1907) 31 Bom 207 214
(b) *Murlidhar* v *Anantrao* (1901) 25 Bom 418,

(c) *Pita* v *Chunilal* (1907) 31 Bom 207 *Harihar Kanta* v *Rama Kantu* (1909) 33 Bom 694 4 I C 253

present Code *only one appeal* lies from such an order (*f*) [see s 104 sub s. (1) (i) and sub s (2)] An auction purchaser al o can now appeal from an order und r this rule Only one appeal is allowed in his case also (*g*)

Dismissal of application for default—Where an application under this rule is dismissed for default of appearance and the Court refus s to restore it to the file, no appeal lies from the order refusing to restore the application (*h*)

Revision—It has been held by the High Courts of Patna (*i*) and Madras (*j*), that the High Court can interfere in revision if an application under this rule has been dismissed on the ground that it was made by a person who was not entitled to apply, the reason given being that the decision in such a case is the very foundation of jurisdiction and that the action of the lower Court in refusing to deal with the application in such a case amounts to a refusal to exercise jurisdiction w thin the meaning of s 115 On the other hand it has been held by the Allahabad High Court that no revision lies in such a case, the reason given being that the Court has jurisd ct on to decide whether or not the applicant was entitled to apply to set aside the sale and a decision arrived at *in the exercise of* jurisdiction, though wrong is no ground for interference in revision (*k*)

No revis on lies from a decision that an application under this rule was made within time (*l*)

90. [S. 311.] (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it

Application to set a ide sale on ground of irr gu larity or fraud

Provided that no such sale be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud

Alterations in the rule:—

1 The words or any person entitled to share in a rateable distribution have been added to give effect to decisions under the old section. See notes below, Who may apply under this rule

2 The words any person whose interests are affected by the sale have been substituted for the words any person whose immoveable property has been sold under this chapter The expression now substituted is what the Courts held in several cases was the meaning of the expression any person whose immoveable property has been sold. See notes below Who may apply under this rule

(*f*) *Is nath v S ndari* (1911) 38 Cal 339 10 I C 345

(*g*) *Kach i v Tr n bak* (1920) 44 Bom 4[illegible] 56 I C 507 See also *Ca l g ppa v S[illegible] appa* (19 4) 48 Bom 638 85 I C 155 (–4) A B 405

(*h*) *Cha [illegible] Abd l Samad* (1907) 29 All 596

(*i*) *Dhan vanti v Sheo Shankar* (1919) 4 Pat L J 340 51 I C 873 *Abd [illegible] v Abd l* (19 3) 2 Pat 715 74 I C 102 (23) A I 490

(*j*) *S nd ram v Ma [illegible]* (1921) 44 Mad 554 63 I C 937 [F B]

(*k*) *Lal Ram v S nd r Singh* (19 3) 45 All 4[illegible]5 74 I C 78 (3) A A 9[illegible] [F B]

(*l*) *Mussammat B [illegible] v Paras Nath* (19 3) 2 Pat 800 75 I C 430 (4) A P 3

O. 21, r. 90.

3 The words "or fraud have been added after the word "irregularity" The addition of these words affects the *right of appeal* as will be seen from the notes below under the head "Fraud in publishing or conducting sale"

4 The words, 'unless upon the facts proved the Court is satisfied,' have been substituted for the words "unless the applicant proves to the satisfaction of the Court This alteration has been made with a view to set at rest the doubts raised under the old section as to the *evidence* upon which the Court could act See notes below, "Unless upon the facts proved the Court is satisfied, etc

Who may apply under this rule—The only persons that may apply under this rule are—

(1) the decree holder
(2) any person entitled to share in a rateable distribution of assets under s 73
(3) any person whose interests are affected by the sale—an expression obviously of a wider import than the expression 'a person holding an interest in the property sold' used in r 89 above (m)

The words 'any person entitled to share in a rateable distribution of assets did not occur in the old section but it was held that the expression, "decree holder' included such person (n)

The expression any person whose interests are affected by the sale,' has been substituted for the expression any person whose immoveable property has been sold," which occurred in the old section. The latter expression was construed as meaning "any person whose interests are affected by the sale in the Full Bench case of *Asmutunnissa Begum* v *Ashruff Ali* (o) and this interpretation has now been substituted for the original expression Where an application, therefore, is made by a a person other than a decree holder or one entitled to share in a rateable distribution of assets, that person must be one *whose interests are affected by the sale* It cannot be said of a person claiming by title paramount to the judgment debtor that his interests would be affected by the sale, inasmuch as his title to the property cannot be effected by the sale, whether it were regular or irregular Hence a person who claims to be a purchaser of immoveable property from the judgment debtor prior to the attachment cannot apply under this rule, for the sale being prior to the attachment, his interest cannot be legally affected by the sale (p) It has similarly been held that where joint family property is sold in execution of a decree against a member of the joint family, another member claiming the whole property on the death of the judgment debtor by survivorship is not entitled to apply under this rule (q) A co sharer cannot apply under this rule, for his share does not pass under the sale (r) But a reversioner entitled to succeed on the death of a Hindu widow has been held to be entitled to apply under this rule (s) A person who claims to be the purchaser of a *tenure* prior to attachment from the judgment debtor whose interest in the tenure has been sold in execution of a decree *for its own arrears of rent* is entitled to apply under this rule, for his interests are affected by the sale (t) Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to apply

[illegible]
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(o) (1888) 15 Cal 488 492
(p) *Asmutunnissa Begum* v *Ashruff Ali* (1888) 15 Cal 488 491 492
(q) *Subbarayalu* v *Yeddu Subbanna* (1893) 16 Mad 476
(r) *Pisheshar Kuar* v *Hari Singh* (1883) 5 All [illegible]
(s) [illegible]
(t) [illegible]

under this rule (u), unless his right to the property is in dispute and a suit by him for a declaration of his right is still pending at the date of the application (v)

It has been recently held by the High Court of Calcutta that the expression "persons whose interests are affected by the sale" is not limited to persons whose *proprietary* or *possessory* title is affected by the sale, and that it includes persons whose *pecuniary interest* is affected by the sale Hence it has been held that a decree holder who has attached the property of the judgment debtor *in execution of his decree* has such interest as would entitle him to apply under this rule to set aside a sale of the property held in execution of a decree obtained by another creditor (w) But a plaintiff who has obtained an attachment *before judgment* is not entitled to apply under this rule (x)

In a case under s 311 of the Code of 1882, their Lordships of the Privy Council held that an auction purchaser was not entitled to apply under that section as he was not "a person whose immoveable property has been sold within the meaning of that section (y) There is a conflict of opinion whether an auction purchaser is entitled to apply to have a sale set aside under the present rule He is so entitled if he is a "person whose interests are affected by the sale" within the meaning of this rule The High Court of Madras has held that he is entitled to apply under this rule The Court said "If an auction purchaser's interests are affected by an order setting aside the sale, it is difficult to see why his interests are not also 'affected by the sale'" (z) The High Court of Patna has dissented from this view, and held that an auction purchaser is not entitled to apply under this rule In the view taken by that Court the expression "interests affected by the sale' means "interests in the property existing *before the sale*" (a) The Allahabad High Court has declined to follow the Patna decisions, and has held that an auction purchaser is entitled to apply under this rule The Court said In the ordinary use of the word ["interests '] in the English language it is a term covering every sort of interest recognized by law, such as, in the case of an auction purchaser, liability to pay the money, liability to complete and take a transfer of the property and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered If the expression were 'interests in the property, it would of course be confined to an interest in the property sold *antecedent to the sale* If the word were merely interest without the plural and without the words in the property it might be possible to hold that the word 'interest' was confined to interest in the thing itself at the time of the sale But that is not the expression (b)

It is expressly provided by this rule that a person entitled to share in a rateable distribution of assets under s 73 is entitled to apply under this rule Hence a person who is not entitled to a rateable distribution, as where the application for execution is not made *until after* the receipt of assets by the Court, cannot come in under this rule as a "person whose interests are affected by the sale (c)

(u) *Abdul Gani* v *Dunne* (1893) 20 Cal 418, [illegible]

8 19 I A 154

(z) *Gopalakrishnayya* v *Sanjeeva* (1920) 39 Mad L J 2[illegible]4 55 I C 333

(a) [illegible]

(b) [illegible]

(c) *Kathiresan* v *Ramasami* (1914) 27 Mad L J 302, 26 I C 93

O. 21, r. 90.

Conditions of applicability of the rule—A sale held in execution of a decree can be set aside under this rule only if the following conditions concur —

1 There must be a *material irregularity or fraud*

2 The material irregularity or fraud must be in *publishing or conducting the sal*

3 The applicant must have sustained *substantial injury*

4 Such injury must have been caused *by reason of* the material irregularity or fraud

Material irregularity in publishing or conducting sale—The following are instances of material irregularity in publishing or conducting a sale in execution —

1 Service of notice under O 21, r 22, upon a wrong person as legal representative, see notes to O 21, r 22, 'Notice to wrong person as legal representative' on pp 625 626 above

1A Omission to specify in the proclamation of sale the extent of the property to be sold, or the revenue assessed on it (*d*), or the amount of income derived from it, or the incumbrances to which the property is subject (*e*) But it has been held that where a sale is held at an earlier hour than that stated in the proclamation (*f*), or at a place different from that specified in the proclamation (*g*) the case is not merely one of material irregularity within the meaning of this rule, but the sale is void altogether See r 66 of this Order

2 Misstatement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead intending bidders (*h*) See r 66 of this Order

3 Omission to affix a copy of the sale proclamation as required by r 67 of this Order (*i*)

4 Omission to have a drum beaten as required by r 67 of this Order read with r 54 (*j*)

5 Holding a sale of immoveable property before the expiration of 30 days from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale (*k*) See r 68 of this Order

6 Non specification of the hour to which a sale is adjourned (*l*) See r 69 of this Order

6A Holding a sale on a day other than the one to which it is adjourned (*m*) See r 69 of this Order

7 Omission to issue a fresh proclamation where a sale is adjourned (*n*) unless the proclamation has been waived (*o*) Where sale proclamation had

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(*d*) *Athappa* v *Ramakrishna* (1898) 21 Mad 51 *Mad[illegible]* v *[illegible]alaniappa* (1900) [illegible]3 Mad 6[illegible]3 *B[illegible]l ram* v *Seth Narsinglas* (19[illegible]3) 45 Mad L J 403 75 I C 546 ([illegible] 3) A I C 93 [I L]

(*e*) *Moti Lal* v *Bhawani* (190[illegible]) 6 C W N 836

[illegible] (18[illegible]6) [illegible] W R 44 3 I A [illegible] *[illegible]madi* v *Sri [illegible]aja [illegible]el[illegible]* (1915) 38 Mad 387 [illegible]1 I C 389

(*i*) *Nana K[illegible]mar* v *Golam Ch[illegible]der* (1891) 18 Cal 422

(*j*) *Trimbak* v *Nana* (1886) 10 Bom 504 *Gopi Chand* v *Benarsi Das* (1919) 1 Lah L J 197 199 200

[illegible]

(*m*) *Hari Sadhan* v *Shib Gopal* (192[illegible]) 35 Cal [illegible]

[illegible]

(*o*) *B[illegible]pin Behari Mitri* v *Jal[illegible]ndranath* (1910) 37 Cal 897 6 I C 813

been issued at the instance of the judgment debtor six times, and a fresh proclamation was subsequently issued notifying that "in the absence of any order of postponement, the sale would be held at the monthly sales commencing on 13th July 1903 at Monghyr," but the monthly sales did not begin until 17th July owing to the absence of the presiding officer from the station, and the sale in question was held on 20th July *in the course of the monthly sales*, without a fresh proclamation, their Lordships of the Privy Council expressed the opinion that in holding the sale on 20th July, the Court did not act in contravention of the provisions of the Code, and that there was no irregularity in publishing the sale, and held that assuming there was irregularity, there was no evidence of substantial injury, and that the sale was therefore valid (*p*) See r 69 of this Order

8 Default in payment of the deposit of 25 per cent as required by r 84 of this Order (*q*) See notes to r 84

8A Extending time for payment of purchase money (*r*) See notes to r 85

9 Omission on the part of the plaintiff to have a *guardian ad litem* appointed of a defendant, where *after* decree, but before sale, the defendant has been adjudged to be of unsound mind (*s*) See O 32, r 15

10 Where property belonging to a judgment debtor was attached, and the judgment debtor died pending the attachment leaving a widow and a minor son, but no notice of the subsequent proceedings in attachment was served on any person representing the minor, further, though the property consisted of 109 mouzahs, the proclamation of sale was read out without beat of drum in one only of the mouzahs, and affixed to a tree in that village, and further, the proclamation did not specify the encumbrances to which the property was liable, but stated merely the annual profit income and the value of the property, and the property was sold at a gross under valuation, their Lordships of the Privy Council *held that the above irregularities* were all material irregularities and they accordingly set aside the sale (*t*)

It is to be noted in this connection that if the act or omission complained of amounts to a *material irregularity*, the sale is not void but voidable Being voidable, it is liable to be set aside under this rule on the application of any of the persons mentioned in the rule, but it cannot be set aside *unless* it is proved that *substantial injury* has resulted from the irregularity see the proviso to the rule But where the act or omission complained of amounts to an *illegality* it renders the sale void *ab initio*, and no proof of *injury* is required In cases (3) (5) (8) and (9) above, it was contended that the omission complained of amounted to an *illegality* and that the sale was therefore *void ab initio*, and that it should therefore be declared void without proof of substantial injury But it was held that the omission amounted to a *material irregularity* only, and that the sale was not void but voidable only, and it could not therefore be set aside unless *substantial injury* was proved. For instances of sales void *ab initio*, see notes to s 65, 'Sale when void and when voidable, p 191 See also notes to s 47, p 129, case (4), and notes to O 21, r 22, Omission to give notice, p 625, and "Notice to wrong person as legal representative,' p 625

[illegible]

(*s*) [illegible]

(*t*) [illegible]

O. 21, r. 90. **Publishing or conducting the sale.**—Where property not covered by the decree has been proclaimed and sold, the case is one of material irregularity in publishing and conducting the sale within the meaning of this rule (*u*) So is an irregular preparation of the proclamation of sale (*v*)

The expression conducting the sale' refers only to the action of the officer who makes the sale Anything done antecedent to the order of sale has nothing to do with " conducting the sale (*w*)

Omission to attach property before sale—The question whether an irregularity in *attaching* the property, as where the attachment is not properly notified, affects the sale or is merely an irregularity in "conducting the sale within the meaning of this rule was left open by the Judicial Committee in the undermentioned case (*x*) In *Mahadeo* v *Bhola Nath* (*y*), a full Bench of the High Court of Allahabad held that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and when there has been no such attachment the sale is not merely voidable but void In a later case (*z*), however, the same High Court held that the omission to attach immoveable property prior to sale amounted to a material irregularity in conducting the sale within the meaning of this rule " An attachment it was said, is a step towards the *sale* of the judgment debtor s property " As to *Mahadeo s case* the Court said that it could no longer be treated as good law since the decision of the Privy Council in *Tasadduk* v *Ahmad* (*a*) where it was held, with reference to a proclamation of sale issued in violation of the provisions of O 21, r 68, that it was nothing more than a material irregularity and did not *ipso facto* vitiate the sale On the other hand, in a case decided under the Code of 1859, the High Court of Bengal expressed the opinion that an attachment is not an essential preliminary in sales in execution of decrees it is merely a measure for the protection of the decree holder and the purchaser of the property, and the absence of attachment is not, therefore, an objection which the judgment debtor is competent to raise (*b*) This view was adopted by the same High Court in later cases where it was held that after a sale had been confirmed, the sale was not to be considered a nullity merely by reason of the absence of attachment (c) But it has been held by the same High Court that where an objection that the property proclaimed for sale has not been attached is taken *before* the sale, it is the duty of the Court not to proceed with the sale and to direct an attachment (*d*) In the more recent case of *Panchanan* v *Kunja* (*e*), decided in 1917, the High Court of Calcutta held that the Court had no jurisdiction to sell property in execution which had not been duly attached and that omission to attach rendered the sale void *ipso facto* This decision it is submitted, is not good law In a Bombay case where the property was sold without previous attachment, the sale was set aside, the case being treated as one under s 47 (*f*) The High Court of Rangoon has held that though the absence of attachment is an irregularity, it does not render the sale absolutely void, but merely voidable and further, that the objection as to the absence of attachment does not come within this rule but within s 47, the substantial question involved being one of notice

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[illegible] (1899) 21 All 311
(*a*) (1894) 21 Cal 66, 20 I A 176

(*b*) *Sharoda Moyee* v *Wooma Moyee* (1867) 8 W R. 9 10
(*c*) *Kishory Mohun* v *Mahomed* (1891) 18 Cal 188, *Tincouri* v *Shib Chandra* (1894) 21 Cal 639, *Sasirama* v *Meherban* (1911) 13 Cal L J 243 9 I C 918
(*d*) *Sasirama* v *Meherban* (1911) 13 Cal L J 243 249-250 9 I C 918
(*e*) (1917) 42, I C 259
(*f*) *Sorabji* v *Kala* (1912) 36 Bom 156 12 I C 911 See also *Vaikunt* v *Manjunath* (1920) 44 Bom 860, 869 58 I C 217

to the judgment debtor (*g*) The High Court of Patna has taken the same view as was taken in the earlier Calcutta decisions and refused to follow the decision in *Pacchanan's* case In the Patna case the application to set aside the rule was made *before* the sale was confirmed, while in the Calcutta cases the application was made after the sale was confirmed As to this the Patna Court said that it did not make any difference " because if the sale was in fact a nullity by reason of the absence of attachment, its subsequent confirmation could not make it valid (*h*)

Fraud in publishing or conducting sale.—The words " or fraud " are new The present rule requires that an application to set aside a sale on the ground of *fraud* in publishing or conducting the sale must be made *under this rule* In the absence of these words in the corresponding s 311 of the Code of 1882, it was held that an application to set aside a sale on the ground of fraud could only be made under s 244 [now s 47] Had it not been for the newly added words " or fraud " in this rule, such applications would have to be made under s 47 of this Code The result would then have been as under the Code of 1882, that a *second appeal* would lie from an order made on such applications, for an order made under s 47 has the force of a decree (s 2), and every decree is open to second appeal, subject, of course, to the provisions of ss 100 102 (*i*) The effect of adding the words " or fraud " into the present rule is to transfer applications setting up fraud in publishing or conducting the sale from s 47 to the present rule The result is that *no second appeal will now lie* from an order made on such application whether the order be one setting aside the sale or refusing to set aside the sale, for the order is no longer one under s 47, but one under r 92 and only one appeal lies from an order made under r 92 (*j*) [see O 43, r 1, cl (j), and s 104 sub s (2)] It will thus be seen that the object of the Legislature in requiring applications to set aside a sale on the ground of fraud in publishing or conducting the sale to be made under the present rule instead of under s 47, is to exclude the right of second appeal from orders made on such applications with a view to bring proceedings on such applications to a speedy termination But though only one appeal is allowed, an appeal now lies in every case from an order made under this rule and r 92 even at the instance of an auction purchaser though he may not be a party to the suit in which the sale was held See notes to s 47 " Execution purchaser, " ill (a) p 137

It may here be observed that in a large majority of reported cases in which applications were made to set aside a sale on the ground of fraud in publishing or conducting the sale, the applicant was the judgment debtor and the fraud alleged was that the decree holder had fraudulently kept him in the dark by omitting to serve him with the writ of attachment (r 54), and that no copy of the proclamation of sale was affixed on the property so as to inform him of the execution proceeding In all these cases it was further alleged that the fraud first became known to the judgment debtor when the auction purchaser instituted proceedings to recover possession of the property In some of these cases, again the auction purchaser was charged with collusion with the decree

(*g*) *Ma I wa* v *Mahomed* (1923) 1 Rang 533 77 I C 368 ('24) A R 124

(*h*) *Raja Wazir* v *Bihari Ram* (1923) 2 Pat 207 68 I C 363 ('23) A P 45

(*i*) *Nemai Chand* v *Deno Nath* (1898) 2 C W N 691 *Bhubon Mohan Lal* v *Nunda Lal* (1899) 26 Cal 324 *Hira Lal Ghose* v *Chandra Kanto Ghose* (1899) 26 Cal 539 In all these cases it was held that a second appeal would lie

(*j*) *Sheikh Maula Bux* v *Raghubar* (1918) 3 Pat L J 645 48 I C 560 *Sheo Prasad* v *Premna Kunwar* (1918) 40 All 122 43 I C 522 *Jagan Nath* v *Daud* (1923) 4 Lah 243, 75 I C 103 ('23) A L 59

O. 21, r. 90. holder in perpetrating the fraud upon the judgment debtor (*k*) The observations of their Lordships of the Privy Council in *Lalla Bunseedhur v Koonwar Bindeseree* (*l*) have a material bearing on the question now under consideration (*m*) In that case their Lordships said that where a sale is impeached on the ground of fraud a difference must be made between an innocent purchaser and one tainted by the fraud which has brought about *the execution sale The question is in the former case which of two innocent* parties shall suffer in the latter whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong doing A Court exercising equitable juris diction may withhold its hand in the one case and yet set a side the sale with or without terms in the other

A charge against a decree holder that he and those who acted in concert with him have acted in such a manner as to prevent the best price from being obtained *does not of itself* amount to a charge of fraud within the meaning of this rule *A* obtains a decree against *B* and obtains leave to bid at the auction sale *A* then enters into an agree ment with a third person that if that person would not bid at the sale *A* would sell the property to him if *A* should become the purchaser The property is put up for sale and purchased by *A* The agreement does not constitute a fraud within the meaning of this rule though it may have discouraged competition at the auction (*n*) In a recent case Sir Lawrence Jenkins C J said The word fraud is very loosely used in this class of cases that is cases under r 90 any irregularity is taken to be fraud with the consequences that such a finding involves But a finding of fraud should be reserved for that which is dishonest and morally wrong and it is not sufficient to come to a *vague* finding of fraud actual fraud must be established (*o*) The Patna High Court has recently held that where after the publ cation of the sale proclamation the decree-holder agrees with the judgment debtor not to hold the sale if payment was made within a speci fied time and he then proceeds to sell the property in contravention of the agreement it amounts to fraud in the matter of the conduct of the sale within the meaning of this rule (*p*)

In a recent case (*q*) their Lordships of the Privy Council said Charges of fraud and collusion—must no doubt be proved by those who make them—proved by estab lished facts or inferences legitimately drawn from those facts taken together as a whole Suspicions and surmises and conjecture are not permissible subsitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before the verdict can be properly found against him. If this were not so many a clever and dexterous knave would escape

Substantial injury —Material irregularity or fraud standing by itself is no ground for setting aside a sale There must be *substantial injury occasioned by the* irregularity or fraud If the Court fails to find *both* irregularity and injury occasioned

(*k*) *Golam Ahad v Judhister* (1903) 30 Cal 14? 153 *Durga Charan v Kal Prasanna* (1899) 26 Cal 727 73? *Wahid-un n ssa v C r dhari* (1905) 27 All 70? 703 (application to set aside sale on ground of fraud *after confirmat on* of sale) *Nemai Chand v Deno* (190?) 24 All 239 *Durga Kunwar v Bal want* (1901) 23 All 478 (cases raising ques tion of a *regular suit* to set aside sale on ground of fraud)

(*l*) (1866) 10 M I A 454 473-474

(*m*) *Paresh Nath v Hari Charan* (1911) 38 Cal 622 6?6 10 I C 361

(*n*) *Mahomed M ra Ravuther v Savari V jaya Raghunatha* (1900) 23 Mad 227 27 I A 17

(*o*) *Paresh Nath v Hari Charan* (1911) 38 Cal 622 6?6 10 I C 361

(*p*) *Sheik Maula Bux v Raghubar* (1918) 3 Pat L J 645 48 I C 560

(*q*) *Bon Behari v Satish Kantha* (19?4) 39 Cal L J 165 171 73 I C 391 (?23) A I C 73

O. 21, r. 90.

thereby, it is bound to dismiss the application In other words, if there be marterial irregularity or fraud in publishing or conducting the sale, but no substantial loss occasioned by the irregularity or fraud, the applicant is not entitled to have the sale set aside (r) The substantial injury alleged by the applicant must be *proved*, it cannot be *assumed* from the mere fact that there was a material irregularity or fraud in publishing or conducting the sale The mere fact that there was a material irregularity or fraud in publishing or conducting the sale, will not justify the Court in assuming that substantial injury has thereby been caused Hence although an applicant under this rule may prove material irregularity, such as non specification of Government revenue in the proclamation of sale (s), or inadequate description of the property sold (t), or the holding of the sale before the expiry of the period prescribed by r 68 above (u), the sale will not be set aside, unless it is *proved* that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale The same rule applies where the sale is impeached on the ground of fraud in publishing or conducting the sale

"Unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."— These words form part of the proviso to the rule The language of the proviso to this rule differs from the language of the proviso to the corresponding section 311 of the Code of 1882, which ran as follows —

> "But no sale shall be set aside on the ground of irregularity *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity"

The words "unless upon the facts proved the Court is satisfied" have been substituted for the words "unless the applicant proves to the satisfaction of the Court" We proceed to note the object and effect of the alteration in the language of the proviso

Suppose that an applicant under this rule proves '*material irregularity*" or "*fraud*" Suppose, further, that he proves gross inadequacy of price realised at the sale, in other words, he proves '*substantial injury* Is this sufficient to entitle him to succeed under this rule? The answer is that it is not he must further prove that the inadequacy of the sale price has been caused '*by reason of* the material irregularity or fraud. Now there are two possible modes in which this may be proved, namely —

(a) by *direct* evidence, that is, by evidence connecting the material irregularity or fraud with the inadequacy of price as cause and effect or

(b) by *circumstantial* evidence, that is, by evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price was the result of the irregularity or fraud complained of

In *Tasadduk* v *Ahmad* (v), where a sale was sought to be set aside under the corresponding s 311 of the Code of 1882 on the ground that it was held before the expiration of 30 days from the date of the proclamation [r 68], their Lordships of the Privy Council, after referring to that section, said —

"In the application of that section [that is, s 311] it was incumbent on the [applicants] to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non compliance with the strict letter of s 290 [now r 68] Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is

(r) *Harbans Lal* v *Kundan Lal* (1899) 21 All 140

(s) *Macnaghten* v *Mahabir Pershad* (1883) 9 Cal 658, 10 I A 25

(t) *Arunachellam* v *Arunachellam* (1889) 12 Mad 19, 15 I A 171

(u) *Tasadduk* v *Ahmad* (1894) 21 Cal 66, 20 I A. 176.

(v) (1894) 21 Cal 66, 20 I A 176

O. 21, r. 90. to be inferred from the mere fact that a sale was held without full compliance with the provisions of s 290 [now r 68] The section [that is, s 311] clearly contemplates *direct evidence* on the subject "

Relying on the above passage, it was held by the High Court of Allahabad that to succeed under that section the applicant must prove a grossly inadequate sale price resulting from a material irregularity, and that the co existence of an irregularity and an inadequacy however gross in the sale price was not sufficient in the absence of *direct evidence* to establish a causal connection between the irregularity and the inadequacy In other words, the applicant must connect the irregularity with the inadequacy of price as cause and effect *by means of direct evidence* (w) On the other hand, it was held by the High Courts of Madras (x) and Calcutta (y) that the fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of might be established *either* by direct evidence *or* it might be inferred when such inference was reasonable from the *nature* of the irregularity and the extent *of the inadequacy* of price As regards the words direct evidence ' in the passage cited above, it was observed by the High Court of Calcutta that what their Lordships intended to say by using those words was that there must be evidence showing that substantial injury was the *necessary* result of the irregularity complained of (z)

The distinction between the Allahabad decisions on the one hand and the Madras and Calcutta decisions on the other may be explained by an illustration In execution of a decree obtained by *A* against *B*, *B*'s one fourth share in certain property is sold for Rs 200 *B* seeks to set aside the sale alleging that the property was sold at an adjourned sale, that no hour was fixed for the sale as required by r 69 that consequently there were only three bidders at the sale, and that owing to that circumstance the property fetched the grossly inadequate price of Rs 200 It is proved that the hour to which the sale was adjourned was not fixed, in other words, *material irregularity* is proved *Substantial injury* is also proved by evidence of the sale of a share smaller than one fourth of the same property for Rs 4 000 The fact that there were only three bidders is also proved In such a case, the High Courts of Madras and Calcutta would, under the old section set aside the sale on the ground that the paucity of bidders *could reasonably be* ascribed to the non specification of the hour, and the low price *could reasonably be inferred* from the fact of the paucity of bidders (a) The High Court of Allahabad, however, would not set aside the sale on a mere *inference* such as the above That Court would require *direct evidence* to show that the paucity of bidders was due to the non specification of the hour, and that the inadequacy of price was due to paucity of bidders

The words unless upon the facts proved the Court is satisfied " have been substituted in the proviso to give effect to the Madras and Calcutta decisions What is necessary under the proviso is that the Court should be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of, and the Court should be satisfied *upon the facts proved* before it that the substantial injury was due to the material irregularity or fraud It is no longer necessary to connect the irregularity or fraud with the inadequacy of price as cause and effect by means of *direct evidence* The result is that a sale will be set aside under the present rule if there be either direct evidence connecting the irregularity with the inadequacy of price or evidence of circum

(w) *Jagan Nath* v *Makund* (1896) 18 All 37 *Shiran* v *Agha Ali Khan* (1896) 18 All 141

(x) *Venkatasubbarayn* v *Zemindar of Karvetinagar* (1897) 20 Mad 159

(y) *Sheoratton* v *Net Lall* (1903) 30 Cal 1 *Mahabir Pershad* v *Dhanukdhari* (1904) 31 Cal 815

(z) *Surno Moyee* v *Dakhina* (1897) 24 Cal 291

(a) *Surno Moyee* v *Dakhina* (1897) 24 Cal 291, *Venkatasubbarayn* v *Zamindar of Karvetinagar* (1897) 20 Mad 159 see also *Mahabir Pershad* v *Dhanukdhari* (1904) 31 Cal 815

stances which will warrant the necessary or at least reasonable inference that the inadequacy was the result of the irregularity complained of If there be no such evidence the sale must be confirmed (*b*)

The mere fact that the property realised at the auction sale only one half of the value entered in the proclamation of sale is no ground for setting aside the sale under this rule (*c*)

Necessary parties —The decree holder is a necessary party to an application under this rule (*d*) Under the Code of 1882 there was a conflict of opinion whether an auction purchaser was a necessary party to an application under the corresponding s 311 (*e*) Under the present Code he is clearly a necessary party, see the proviso to r 92, sub r (2) Where property is bought at a Court sale by *A* in the name of *B*, *A*, the beneficial owner is not a necessary party to an application under this rule Hence if an order is made setting aside the sale in a proceeding to which *B* was a party, it will bind *A*, though *A* was not joined as a party to the proceeding (*f*)

Bona-fide purchaser for value without notice —If the conditions of this rule are satisfied, the sale will be set aside though the purchaser may be a *bona fide* purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale (*g*)

Waiver and estoppel —If the judgment-debtor lies by, and knowing of an irregularity or fraud allows the sale to proceed without objection, he will be estopped from impeaching the sale on the ground of irregularity or fraud though substantial injury has been caused In *Arunachellam* v *Arunachellam* (*h*) their Lordships of the Privy Council said It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which they knew well but of which the execution creditor or decree holder might be perfectly ignorant that they should take no notice of that allow the sale to proceed and then come forward and say the whole proceedings were vitiated In *Girdhari Singh* v *Hurdeo Narain* (*i*), the notification of sale had stated the Government revenue to be Rs 3 146 instead of Rs 8 146 the sale being fixed for the 5th of August 1872 The judgment debtor applied for a postponement of sale and stated that he wished to raise money to pay off the decree holder and in his petition he added Under such circumstances it is prayed that a postponement of one month be granted *the attachment and the notification of sale being maintained* ' Upon that petition the sale was postponed for one month *without the issue of a second notification* The decretal amount not having been paid the property was put up for sale The judgment debtor applied to set aside the sale on the ground that the Government revenue was not correctly stated and that the property therefore fetched a very low price Upon these facts their Lordships of the Privy Council held that though the misstatement of the Government revenue amounted to a material irregularity in publishing the sale,

(*b*) *Mahabir Pershad* v *Dhan Adhari* (1904) 31 [illegible]

(*g*) [illegible]

(*h*) [illegible]

(*i*) (1876) 3 I A 230

O. 21, r. 90. the judgment debtor was not entitled to have the sale set aside as the petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead But it is different where an application for a postponement of sale does not contain any such admission, and, moreover, it is refused In such a case there is no estoppel (j) The objection as to irregularity in publishing or conducting the sale cannot be taken for the first time in the Court of appeal (k)

Where no application is made under this rule—If no application is made to set aside a sale under the present rule, an order will be made confirming the sale, see r 92 below

Questions outside the scope of this rule—The question whether the decree in execution whereof the property was sold was obtained without service of summons on the judgment debtor (l) or whether the decree was obtained by fraud (m) or whether the Court had jurisdiction to sell the property (n) or whether the sale was brought about by the fraud of the decree holder, the auction purchaser and other persons (o) is outside the scope of this rule

Objections not taken in application—The Court should not under this rule consider objections not expressly taken in the application (p)

Compromise of proceedings under this rule—It has been held by the Patna High Court that a proceeding to set aside a sale under this rule is not a proceeding in execution within the meaning of O 23 r 4 but that it is a proceeding in the suit itself A compromise therefore of proceedings under this rule may be recorded under O 23 r 3 (q) But this decision is of doubtful authority

Whether O 9 applies to applications under this rule—The provisions of O 9 do not apply to proceedings in execution See notes to O 9, r 9 and O 9, r 13 'Whether this rule applies to proceedings in execution on p 502 and p 512b respectively See also notes below, 'Appeal'

Suit to set aside sale on ground of material irregularity—Where an application made by a judgment debtor under this rule to set aside a sale on the ground of material irregularity in publishing or conducting the sale is disallowed and the sale is confirmed under r 92 (1) he is precluded by virtue of the provisions of r 92 (3) from bringing a suit to set aside the sale on the same grounds (r)

Limitation—An application under this rule must be made within 30 days from the date of sale [Limitation Act, 1908, Sch I, art 166] But where the irregularity affecting the sale has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor, he is entitled to apply under this rule whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him (s)

The point of distinction as regards limitation between the old law and the new law is this, that while under the Code of 1882 the application to set aside a sale on the ground

(j) *Thakor v Leelanund* (1891) 7 Cal 613 *Raman v Kunhayan* (1894) 17 Mad 304

(k) *Olpherts v Mahabir Pershad* (1883) 10 I A 25 30 9 Cal 656 661 *Mahadeo v Dhobi* (1923) 2 Pat 916 918 74 I C 833 (23) A I 283

(l) *Net Lall v Sheikh Kareem* (1896) 23 Cal 686 689

(m) *Khagendra v Pran Nath* (1902) 29 Cal 395 29 I A 99

(n) *Shirin v Agha Ali* (1896) 18 All 141 145

(o) *Bhagwan Dass v Suraj Prasad* (1924) 47 All 217 81 I C 1031 (25) A A 146

(p) *Harbans v Kundan* (1899) 21 All 140 *Gopichand v Benarsi Das* (1919) 1 Lah L J 197

(q) *Choudhary v Choudhary* (1921) 6 Pat L J 253 62 I C 608

(r) *Brahmayya v Appayya* (1921) 44 Mad 351 62 I C 203

(s)

of *fraud* in publishing or conducting a sale had to be made under s 244 [now s 47], and the period of limitation for the application was 3 years from the date of sale (*t*), such application must now be made under the present rule, and the period of limitation is 30 days from the date of sale See notes below, " Application to set aside sale on other grounds "

Application to set aside sale on other grounds.—When the auction purchaser is the decree holder himself and when an application is made to set aside the sale on a ground other than that covered by the present rule and there is no application made under r. 89, the case falls within s 47, and hence there is a second appeal (*u*) Similarly where a judgment debtor applies to have a sale set aside not only on the ground of material irregularity in publishing and conducting the sale, but also on the ground that no notice of the application for attachment and sale was given as required by O 21, r 22, the case falls within s 47, and hence there is a second appeal (*v*) Neither this rule nor s 92 applies to such cases It must, however, be noted that where an application really comes under the present rule, the mere fact that in the application s 47 is mentioned will not bring the application within s 47 for the purposes either of an appeal or of limitation (*w*)

Whether sale can be challenged by way of defence in a suit for possession.—See notes to r 92 below under the same head

Appeal —An appeal lies from an order under this rule and rule 92 setting aside or refusing to set aside a sale [O 43, r 1, cl (j)] But no second appeal lies from the order of the first appellate Court (*x*) See s 104, sub sec (2), and notes above, " Fraud in publishing or conducting sale " Nor does an appeal lie under the Letters Patent from the order of the first appellate Court (*y*) See notes above," Application to set aside sale on other grounds "

It has been held by the High Court of Calcutta that an appeal lies from an order dismissing an application under this rule for default, the reason given being that the effect of such an order is to confirm the sale under r 92 (*z*) *A fortiori* it is so if the order dismissing the application for restoring the original application on the file also confirms the sale (*a*)

Revision.—*No revision lies from an order dismissing an application under this* rule for default (*b*) See notes above ' Appeal "

Appeal to the Privy Council.—See notes to r 92 under the same head.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest

C 765 (26) A C 108

(*x*) *Mahadeo* v *Dhobi* (1923) 2 Pat 916, 74 I C 838, (23) A P 283, *Jaggan Nath* v *Daud* (1923) 4 Lah 243, 75 I C 103, (23) A L 592 *Jiwan Singh* v *Sawan Mal* (1920) 2 Lah L J 41 54 I C 941

O. 21, rr. 91, 92.

Application to set aside sale.—This rule enables the auction purchaser to proceed by an *application* to set aside the sale where the judgment debtor had no *saleable* interest in the property. It does not apply where a sale is sought to be set aside by an auction purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (*c*). The remedy of the purchaser in such a case is by a regular suit. As to return of purchase money when a sale is set aside on the ground that the judgment debtor had no saleable interest, see r. 93 below.

No saleable interest.—This rule applies only where a judgment debtor has no saleable interest *at all*. Hence the rule does not apply if the judgment debtor has even a partial interest in the property sold (*d*), however small that interest may be. In other words a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment debtor had a saleable interest in a very small portion of the property, and had no saleable interest in a *major* portion of the property (*e*).

For the purposes of this rule, a mortgagor has a saleable interest in the mortgaged property even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (*f*), and although the amount due under the mortgage may exceed the value of the property (*g*).

Necessary parties.—See the proviso to r. 92, sub r. (2).

Limitation.—The application under this rule must be made within 30 days from the date of sale. Limitation Act, 1908, sch. 1, art. 166.

Appeal.—An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O. 43, r. 1, cl. (j)].

Withdrawal of purchase-money by auction-purchaser from Court.—See notes to s. 151, case *bb*).

Compensation for loss of part of property bought at a Court sale.—A purchaser who is deprived of a part of the property bought at a Court sale is not entitled to compensation as against the judgment debtor for the loss of that part. The principle is that apart from the case provided for by this rule and apart from fraud a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment debtor in the property. The Court which sells the property does not guarantee the title and the maxim *Caveat emptor* applies. It does not make any difference that the property was sold in execution of a mortgage decree and the mortgagee himself is the purchaser (*h*). See notes to r. 94 below, "What passes at a Court sale.

Sale when to become absolute or be set aside.

92. [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(*c*) Sonaram v. Mohiram (1901) 28 Cal. 235 [illegible]

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale : O.21, r.9

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

Alterations in the rule :—

1. The corresponding s 312 of the Code of 1882 applied only to application referred to in r 90 The present rule applies also to applications referred to in rr 89 and 91 [Code of 1882, ss 310A and 313] see sub r (1)
2. In sub r (1), the words, " as regards the parties to the suit," which occurred in s 312 after the words " confirming the sale," have been omitted
3. In sub rule (3), the words " on the ground of such irregularity," which occurred in the old section after the words " no suit to set aside," have been omitted

No suit will lie to set aside an order made under this rule.— No suit will lie to set aside an order made under this rule by any person against whom such order is made The only remedy of the party against whom the order is made is to appeal from the order under O 43, r 1, cl (j) Now an order under this rule may be—

(1) either an order confirming the sale, or

(2) an order setting aside the sale

Order confirming the sale —An order confirming the sale may be made—

(i) either where no application is made at all to set aside the sale, or

(ii) where an application is made and disallowed

No suit will lie in either case to set aside an order confirming the sale (i).

Order setting aside the sale —The language of sub rule (3) makes it clear that no suit will lie to set aside an order *setting aside* a sale made on an application under rule 89, 90 or 91 (j) The party against whom the order is made has a remedy by way of appeal under O 43, r 1, cl (j)

It is to be noted that the only class of suits barred by sub rule (3) are suits to set aside (1) an order confirming a sale under sub rule (1), and (2) an order setting aside a sale under sub rule (2) Suits by an auction purchaser for a return of the purchase-money on the ground that the judgment debtor had no saleable interest in the property sold fall under this class see notes to r 93, " Suit for a return of purchase money where no saleable interest " Sub rule (3) is no bar to any suit except the suits mentioned above Thus a person claiming title to a property attached and sold by the Insolvency Court as belonging to an insolvent is entitled to bring a suit to establish his title to the property, though his claim has been disallowed by the Insolvency Court The present rule is no bar to such a suit (k) For other suits not barred by this rule, see notes to s. 47.

(i) *Bhim Singh* v *Sarwan* (1889) 16 Cal 33, 40, *Damodar* v *Vinayak* (1902) 26 Bom 40 *Gajrajmati Teorain* v *Akbar Husain* (1907) 29 All 196 34 I A 37, *Brahmaeyya* v *Appajya* (1921) 44 Mad 351, 62 I C 203 [Material irregularity], *Agha Husain* v *Qasim* *Ali* (19..) 23 All [illegible]

O. 21., rr. 92, 93.

Whether an execution-sale can be challenged by way of defence in a suit for possession—Where a judgment-debtor does not question the validity of a sale under r 90 above, and a suit is brought by the auction purchaser against him for possession, it is not competent to him to challenge the sale in that suit "The penalty imposed upon a negligent judgment debtor is set out in r 92, and it is that the Court shall make an order confirming the sale and thereupon the sale shall become absolute This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned" (*l*) But it has been held that the dismissal of an application made by a judgment debtor under r 90, does not preclude him, in a suit for possession by the auction purchaser, from pleading by way of defence that the property sold in execution of a mortgage decree passed against him and bought by the purchaser was not included in the mortgage suit or decree, but was fraudulently inserted in the sale certificate (*m*)

"Court—The word "Court means the Civil Court and not, in the case of decrees transferred to the Collector for execution, the Collector (*n*)

Plea of bar of limitation after confirmation.—No application can be entertained after confirmation of a sale to set aside a sale on the ground that the application for attachment and sale was barred by limitation (*o*)

Appeal.—An appeal lies from an order under this rule setting aside or refusing to set aside a sale [O 43 r 1, cl (j)] But no second appeal lies from the order passed on first appeal (*p*) [see s 104 (2)]

Appeal to the Privy Council—An appeal lies to His Majesty in Council from an order passed under this rule and r 90 (*q*)

93. [S 315] Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Return of purchase-money in certain cases

Section 315 of the Code of 1882—The corresponding s 315 of the Code of 1882 ran as follows —

"When a sale of immoveable property is set aside under s 310A [O 21, r 89], 312 or 313 [O 21 r 91]

or when it is found that the judgment debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it

the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid

The repayment of the said purchase money and of the interest (if any) allowed by the Court *may be enforced* against such person under the rules provided for by this Code for the execution of a decree for money"

The second and fourth paragraphs of s 315 have been omitted in the present section Further, the words "shall be entitled to an *order* for repayment," have been

(*l*) *Jugneswar v Kailash* (1923) 28 C W N 621, 74 I C 176 ('23) A C 81
(*m*) *Munshi v Munishi* (1921) 41 Mad L J 281, 70 I C 303
(*n*) *Fazal v Mansur* (1918) 40 All 425 45 I C 773
(*o*) *Lakhu Pai v Maharaja Kesho Prasad* (1917) 2 Pat L J 157 38 I C 876
(*p*) *Jiwan Singh v Sawan Mal* (1910) Punj Rec. no 168 p 446 54 I C 941 *Jagan Nath v Daud* (1923) 4 Lah 243, 75 I C 103 ('23) A L 592
(*q*) *Krishna Pershad v Motichand* (1913) 40 Cal 635, 40 I A 140 19 I C 296

ubstituted for the words, " shall be entitled to receive back," which occurred in the third paragraph

No saleable interest.—An auction purchaser may under r 91 apply to set aside he sale on the ground that the judgment debtor had no saleable interest in the property old If the sale is set aside, he may apply under this rule for an order for repayment of us purchase money But no sale can be set aside under r 91 nor can any repayment be ordered under this rule if it is found that the judgment debtor had some saleable nterest in the property The reason is that in the case of a sale under a decree of the Court there is no warranty of title either by the decree holder or by the Court as there is n the case of private sales The purchaser must be taken to pay for the property with all risks and all defects in the judgment debtor s title Such being the case, the purchaser is not entitled to any refund, if the judgment debtor has no saleable interest at all Rules 91 and 93, however, confer upon him a statutory right to a return of the purchase money in such cases (*r*)

Suit for return of purchase-money where no saleable interest.—The Code of 1859 did not contain any express provision for a return of the purchase money to the auction purchaser if it turned out that the judgment debtor had no saleable interest in the property at all Hence it was held that the auction purchaser was not entitled to a return of the purchase money where the judgment debtor had no saleable interest (*s*) The right to a return of the purchase money was first given by s 315 of the Code of 1877. That section was in terms similar to s 315 of the Code of 1882 Under the Code of *1882 it was held by all the High Courts* (*t*), *following* a *Full Bench ruling* of the Allahabad High Court (*u*), that a purchaser at a sale in execution of a decree *could maintain a suit* against a decree holder for recovery of the purchase-money, if it turned out that the judgment debtor had no saleable interest in the property sold, and that he was not limited to the special procedure in the execution department mentioned in that section This view was based principally upon the words " *may* be enforced " which occurred in the last paragraph of s 315 It was also held under that section that whether he proceeded by an application for execution under that section or by a regular suit he was not entitled to receive back his purchase money unless the judgment debtor had *no saleable interest at all*, if the judgment debtor had *some* saleable interest in the property, however small, he could not by *suit*, any more than by *application*, obtain a refund of the purchase money in proportion to the extent to which the judgment debtor had no interest (*t*) It was further held, having regard to the words, " and the purchaser is for that reason *deprived* of it which occurred in the second paragraph of s 315, that the cause of action did not arise and the period of limitation for a suit under that section did not commence until the purchaser was deprived of the property sold to him (*w*) It was also held that the purchaser was entitled to

(*r*) *Kunhamed* v *Chattu* (1886) 9 Mad 437 *Shanto Chander* v *Nain Sukh* (1901) 23 All 355 356 357 *Muhammad* v *Bachcho* (1905) 27 All 537, 539

(*s*) *Sowdamini* v *Krishna* (1869) 4 Beng L R 11 *Hira Lal* v *Karim un Nisa* (1880) 2 All 780, *Ram Narain* v *Mahtab* (1880) 2 All 828

(*t*) *Kishun Lal* v *Muhammad* (1891) 13 All 383, *Sidheswari* v *Goshain* (1913) 35 All 419 19 I C 986, *Muhammad* v *Jai Narain* (1914) 36 All 5[illegible] 26 I C 59 *Girdhar Das* [illegible] 11 Mad 269, *Nilakanta* v *Imamsahib* (1893) 16 Mad 361, *Mohideen* v *Mahomed* (1912) 23 Mad L J 487 17 I C 437 *Tirumalaisami* v *Subramanian* (1917) 40 Mad 1009, 45 I C 109

(*u*) *Munna Singh* v *Gajadhar Singh* (1883) 5 All 577

(*w*) [illegible]

O. 21, r. 93. proceed by way of suit even after rateable distribution against those among whom the purchase money was distributed (*x*) It was further held that a suit would lie even *after confirmation* of the sale if the purchaser was after confirmation deprived of the property as the result of a separate suit by the lawful owner (*y*)

The second and fourth paragraphs of s 315 of the Code of 1882 have now been omitted The words *may* be enforced which occurred in s 315 are not reproduced in the present rule The present rule says that if an application is made by the auction purchaser under r 91 to set aside the sale—and such application must be made within 30 days from the date of sale—and the sale is set aside under r 92 the purchaser is entitled to an *order* for a return of the purchase money The result therefore, under the present Code is that if the purchaser does not apply under r 91 to set aside the sale, or if an application is made but it is disallowed the Court shall make an order confirming the sale under r 92 (1) If an order is made confirming the sale, the purchaser is precluded by r 92 (3) from bringing a suit to set aside the order confirming the sale And it has been held by all the High Courts (*z*) that under the present Code an auction purchaser is *not* entitled as he was under the Code of 1882 to bring a regular suit for a return of the purchase money in cases where the judgment debtor has no saleable interest in the property The result of these decisions is that if in ignorance of the true facts the purchaser fails to make the application to set aside the sale under r 91 within the period of limitation he must take the consequences and the judgment debtor is entitled to take credit for the price of property not belonging to him This may seem inequitable at first sight, but the reason of the rulings is that while in a private sale there is in the absence of a contract to the contrary, an implied covenant for title by the vendor, there is no such covenant either by the decree holder or by the Court in the case of a sale in execution of a decree, and the doctrine of *caveat emptor* applies to such a sale The right of the purchaser being the creation of the statute the remedy to enforce that right must be confined to that prescribed by the statute That remedy is to apply under r 91 to set aside the sale, and if the sale is set aside to apply for a return of the purchase money under r 93 If the Court passes an order refusing to set aside the sale, he may appeal from the order under O 43, r 1 (j), the order being one made under r 92 The judgment of the appellate Court is final, there being only one appeal from such order He cannot, as stated above, bring a regular suit to set aside the sale and for repayment of the purchase money as he could under the Code of 1882 (*a*)

But it is otherwise where the auction purchaser has bought the property in execution of a mortgage decree and *the decree as well as the sale* is set aside in a separate suit brought by parties interested in the mortgaged property In such a case, it has been held that the auction purchaser is entitled to a return of the purchase money, his remedy being by an application under s 47 above (*b*)

Where a sale took place and was confirmed by the Court before the present Code came into force it was held by the High Court of Calcutta that the rights of the

(*x*) *Kishun Lal* v *Muhammad* (1891) 13 All 383 *Girdhar Das* v *Sidheswari* (1918) 40 All 411 44 I C 697

(*Rustomji* v *Vinayak* (1911) 35 Bom [illegible]

purchaser must be determined with reference to the provisions of the Code of 1882, and that the purchaser was therefore entitled to maintain a regular suit for a return of the purchase money if the judgment debtor had no saleable interest in the property (c)

Suit for return of purchase-money where sale set aside on ground of material irregularity —Where a sale is set aside on the ground of material irregularity under rr 90 and 92, the auction purchaser may bring a *suit* for a refund of the purchase money Such right exists independently of the Code, the mere use of the expression ' order ' in this rule has not the effect of taking away that right (d)

Interest —The Court has power by the express terms of this rule to award interest on the purchase money (e)

Limitation —The period of limitation for an application under this rule is 3 years from the accrual of the right under art 181 of the Limitation Act, 1908 (f) The period of limitation for a regular suit, in cases governed by the Code of 1882, to recover back the purchase money is 6 years from the accrual of the right under art 120 of that Act (g)

" Be entitled to an order."—Where an order is made under this rule, it may be executed in the manner prescribed for the execution of decrees See s 36 above

Certificate to purchaser

94 [S. 316] Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Old section —This rule corresponds with the first part of s 316 of the Code of 1882 The second part of that section, relating to the vesting of title, has been reproduced in s 65 of this Code with an important alteration as regards the time when the property vests in the purchaser

Purchaser's title —See s 65 and notes thereto.

The Court shall grant a certificate —The provisions of this rule are mandatory (h)

Certificate of sale —A sale certificate does not transfer the title It is evidence of the transfer (i)

Certificate to legal representative.—Where the purchaser is dead, the certificate may be granted to his legal representative (j) See s 146 above.

What passes at a Court-sale —As regards private sales, there is in the absence of a contract to the contrary, an implied covenant for title by the vendor as provided by the Transfer of Property Act, 1882, s 55, sub s (2) But as regards sales under a decree of the Court, there is no warranty of title either by the decree holder or

(c) *Makar Ali v Sarfuddin* (1923) 50 Cal 115, 70 I C 606 (23) A C 85

(f) *Girdhari v Sital* (1889) 11 All 372

(g) *Nilheswari v Gosain* (1913) 35 All 419 19 I C 986 *Makar Ali v Sarfuddin* (1923) 50 Cal 115 70 I C 606 (23) A C 85

(h) *Baikunth v Narinda* (1916) 1 Pat L J 446 35 I C 861

(i) [illegible]

(j) *Vinayak Narayan, In re* (1900) 24 Bom 120.

O. 21, r. 94. by the Court Rule 13 of this Order shows that the decree holder, when applying for execution, has only to specify the judgment debtor's share or interest in the property "to the best of his belief," and "so far as he has been able to ascertain the same" Rule 66 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment debtor s interest therein "as fairly and accurately as possible ' Hence what passes to a purcha er at a Court sale is the ' right, title and interest" of the judgment-debtor, whatever that interest may be In other words, a purchaser at a Court sale buys the property with all risks and all defects in the judgment debtor s title except where it is found that the judgment-debtor had no saleable interest at all (*k*) In the latter case, the purchaser may apply to have the sale set aside under r 91 of this Order and he may then apply under r 93 for a return of the purchase money. If the purchase money has been distributed amongst the creditors of the judgment debtor under s 73, he may follow the money in their hands (*l*) But,—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment debtor,—the sale will not be set aside, if the judgment debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase money to the extent to which the judgment debtor had no interest, unless the case be one of fraud (*m*) On the same principle a purchaser in execution of a money decree is bound by the estoppel which binds the judgment debtor whose interest he has purchased (*n*) The Madras High Court has held that he is not bound in all cases (*nn*)

It has been stated above that what passes to a purchaser at a Court sale in execution of a money decree is the right, title and interest of the judgment debtor in the property sold To determine the nature and extent of the judgment debtor s right, title and interest in the property sold, the test is as stated by Lord Watson in the course of the argument in *Pettachi Chettiar* v *Chinnathambiar* (*o*), what did the Court intend to sell, and what did the purchaser understand that he bought ? These are questions of fact, or rather of mixed law and fact, and must be determined according to the evidence in the particular case (*p*) This test was applied in *Balvant* v *Hirachand* (*q*), cited in the next following paragraph, and in *Abdul Aziz* v *Appayasami* (*r*) cited in the notes below

Where a purchaser at a Court sale in execution of a decree against a member of a joint Hindu family buys 4 specific properties *A*, *B*, *C* and *D*, alleged to belong to him, and subsequently there is a partition decree by which properties *A*, *B*, *X* and *Y* are allotted to that member, the purchaser is entitled only to such of the properties as are common to the sale certificate and the share of that member under the decree, namely, properties *A* and *B* He is not entitled to have the equivalent of properties *C* and *D* out of properties *X* and *Y* (*s*)

A is entitled to 10 annas share in a village Out of this share he mortgages 6 annas to *B* In execution of a simple money decree obtained by *C* against *A*, a 4 annas

Cal 265, *Nandi Lal* v *Jogendra* (1923) 28 C W N 403, 82 I C 294 (24) A C 881 Contrast *Ganesh* v *Purshottam* (1900) 33 Bom

share is attached and sold The presumption is, in the absence of specific indications to the contrary, that the share sold was the share which was not mortgaged (*t*)

Sale in execution of a mortgage decree —Where mortgaged property is sold in execution of a *mortgage decree* obtained by the mortgagee against the mortgagor, the interest both of the mortgagor and mortgagee, passes to the purchaser (*u*)

Variance between proclamation of sale and sale-certificate —It is provided by O 21, r 66, that where property is ordered to be sold in execution of a decree, the proclamation of sale should specify as fairly and accurately as possible the property to be sold By the present rule it is provided that where property is sold and the sale becomes absolute the Court shall grant a certificate specifying the property sold It sometimes happens that the property as described in the certificate of sale is different from that described in the proclamation of sale In such a case the description of the property in the proclamation of sale is *conclusive* as to what was the subject matter of the sale As stated by their Lordships of the Privy Council in *Thakur Barmha* v *Jiban Ram* (*v*) ' that which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is *conclusively* described in and by the schedule to which the attachment refers that is, the schedule of the attached property in the proclamation of sale Thus where a judgment debtor owned a mahal of which a 10 annas share was mortgaged and the proclamation of sale stated that what was to be sold was a 6 annas share in the mahal included in the mortgage but the purchaser obtained a certificate of sale in which the property described was a 6 annas share in the mahal not included in the mortgage, it was held that the sale certificate should be set aside The Court has no power to grant a certificate in which the property described is different from that specified in the proclamation of sale (*w*) Similarly where the proclamation of sale stated that the whole interest of five brothers in a mortgaged property was to be sold, and by a mistake on the part of the officer in charge of the sale, the certificate of sale omitted to mention the names of four of them, it was held that what was sold to the purchaser was the property as described in the proclamation of sale and not the property as erroneously described in the sale certificate (*x*) The real question in such case under the present Code of Civil Procedure, seems therefore to be what was the sale, *i e*, what was bargained and paid for and that must depend not on *erroneous statements* of what was offered for sale but on what was *actually* offered for sale and bid for What [is actually] offered for sale [is] determined by the order of the Court and the proclamation (*y*)

Effect of new interpretation of law on sale —*A* purchased at a Court sale the right, title and interest of *B* in an impartible zamindari By the law as then interpreted, the holder of such a zamindari was only entitled to a life interest in the zamindari. [*A* must therefore be deemed to have purchased only the *life-interest of B*] *Subsequently this interpretation of the law was reversed by the Judicial Committee* which decided that the holder of an impartible zamindari is entitled to an absolute interest in it, and that such interest is alienable The new interpretation does not entitle *A* to claim that what he purchased at the sale was the *absolute* interest of *B* (*z*)

Amendment of sale-certificate.—A purchaser at a Court sale may apply to the Court for amendent of the sale certificate where the description of the property in the certificate differs from that in the proclamation The Court may allow or refuse the amendment, but no appeal lies from the order in either case Such an order is not

(*t*) *Sheo Narain* v *Noor Muhammad* (1907) 29 All 463

(*u*) *Maganlal* v *Shakra* (1898) 22 Bom 945

(*v*) (1914) 41 Cal 590 41 I.A 38 21 I C 936

(*w*) *Thakur Barmha* v *Jiban Ram* (1914) 41 Cal 590 41 I A 38 21 I C 936 *Uma Churn* v *Gobind Chunder* (1878) I C L R 460, *Rama chandra* v *Haji Kasim* (1893) 16 Mad 207

(*x*) *Balvant* v *Hirachand* (1903) 27 Bom 334 *Christian* v *Prasad* (1925) 4 Pat 760 90 I C 501 (25) A I 615

(*y*) (1903) 27 Bom 334 341 *supra*

(*z*) *Abdul Aziz* v *Appayasami* (1904) 27 Mad 131, 31 I A 1

O. 21, rr. 94, 95.

appealable under s 104 Nor is it appealable as a decree under s 47, for the question cannot be regarded as one relating to the " execution, discharge or satisfaction ' of the decree, *the decree being fully executed* The only question in such a case is whether the certificate given to the auction purchaser gives a right description of the property sold (*a*)

Limitation —The provisions of the Limitation Act do not apply to applications for a sale certificate The reason is that it is the duty of the Court on the sale becoming absolute to issue a sale certificate and there is no duty imposed on the purchaser to *apply* for such a certificate The action of the Court in granting the certificate is ministerial and not judicial The Limitation Act does not apply to applications to the Court to do what it has no discretion to refuse nor to applications for exercise of functions of a ministerial character Hence if the Court fails to issue a sale certificate, and the purchaser has thereupon to apply to the Court for a grant of the certificate, the application may be made *at any time* (*c*)

Effect of sale-certificate on irregularities —All irregularities, though material, are cured by the certificate of sale (*d*)

Delivery of property in occupancy of judgment debtor

95 [S 318] Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser *or any person whom he may appoint to* receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same

Delivery of possession to purchaser —The possession contemplated by this rule is khas or actual possession *See notes to r 35 of this Order. For the form* of the order for delivery, see App E, form No 39

Separate suit for delivery of possession.—See notes to s. 47, " Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other on p 138 above

Appeal —See notes to s 47, ' Questions between the auction purchaser on the one hand and etc on p 138 above

Purchaser of undivided share —A purchaser of an undivided share cannot apply under this rule He must bring a regular suit for partition and for delivery *of what may be allotted as the share of the undivided member* (*e*)

(*a*) *Bhuj Pogy v Ram Kumar* (1899) 26 Cal 5 9 *Sadio v Lana* (1901) 23 All 478 *Man mad v Locke* (1837) 2 Mad 487, see also *Nanda Lal v Jogendra* (1923) 28 C W N 403 82 I C 291, (24) A C [illegible]
(*c*) *Kylasa v Ponnusam* (1882) 4 Mad 172 *Vithal v Vithoprao* (1892) 6 Bom 586
(*d*) *Balkrishna v Masuma* (1883) 5 All 157 157 9 I A 182, *Nagar v Bhaskar* (1898) 10 Bom 444
(*e*) *Velumalai v Srinivasa* (1906) 29 Mad 291

Limitation.—The period of limitation for an *application* for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act 1908, sch I, art 181] The period of limitation for a *suit* for delivery of possession is twelve years from the date when the sale becomes absolute [*ib* , art 138]

Procedure under this rule —If the Court finds on inquiry that the property is in the occupancy (1) of the judgment debtor (2) or of some person on his behalf (3) or of some person claiming title under him the Court shall order delivery to be made by putting the purchaser in possession of the property If however the Court finds that the person in possession of the property is holding the property *on his own account*, there is no option to the Court but to dismiss the application under this rule (*f*)

It may be observed that a purchaser at a Court sale is not bound to *apply* for possession under this rule He may at his option bring a regular suit for possession th period of limitation for the suit being 12 years as stated above The remedy by way of application and that by way of suit are concurrent (*g*) Further the fact that an application has been made under this rule, and it is rejected as being time barred (*h*) or on other ground (*i*) is no bar to a regular suit for possession

96. [S. 319] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser

Delivery of property in occupancy of tenant

Delivery of possession to purchaser —The possession contemplated by this rule is *symbolical* possession See notes to r 35 of this Order

Limitation —See notes to r 95 above

Resistance to delivery of possession to decree-holder or purchaser

97. [Ss. 328, 334] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

Resistance or obstruction to possession of immoveable property

(*f*) *Sobha v. Tursi* (19 4) 46 All 693 696 83 I C 9 3 (24) A A 495

(*g*) *Kishori v. Chunder* (188) 14 Cal 644

(*h*) *Sheo Narain v. Nur Muhammad* (1907) 29 All 463

(*i*) *Neru v. Bhagolan* (1883) 9 Cal 602.

O. 21, rr. 97, 98.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Rules 97, 98 and 99.—These rules are to be read together

When rule applies.—This rule does not apply unless the auction purchaser has made an attempt to obtain possession of the property either through Court or out of Court, and he is resisted or obstructed in obtaining possession (j)

Regular suit.—The decree holder may either resort to the summary remedy provided by this rule or he may bring a regular suit Failure on the part of the decree-holder to avail himself of the remedy under this rule does not deprive him of the right of bringing a regular suit against the party obstructing execution of the decree (k) But if he applies under this rule and fails, the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r 103 below Such a suit must be brought within one year from the date of the order (l) See Limitation Act, 1908, sch I, art 11 A

Limitation.—The period of limitation for an *application* complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree is 30 days from the date of the resistance or obstruction (Limitation Act, 1908 sch I, art 167)

Fresh application for delivery of possession.—Under the present Code a holder of a decree for possession of immoveable property has to apply for possession under O 21, r 35 while an auction purchaser has to apply for possession under O. 21, r. 95 The present rule deals with *obstruction or resistance* in obtaining possession An important question that arises in this connection is whether if a decree holder or auction-purchaser who is obstructed or resisted in obtaining possession omits to apply under this rule within 30 days from the date of obstruction or resistance, the only other remedy open to him is to proceed by a regular suit or whether he is entitled to a fresh writ of possession. It has been held by the High Courts of Madras (m) and Patna (n), that he is entitled to make a fresh application for delivery of possession and to a fresh warrant for possession On the other hand, it has been held by the High Courts of Bombay (o) and Allahabad (p), that he is not so entitled and that his only remedy is by a regular suit

Resistance or obstruction by judgment-debtor

98. [*Ss.* 329, 330.] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

(j) *Sobha* v. *Turn* (1924) 46 All. 693, 696 83 I C 923 (24) A A 495

(k) *Balvant* v. *Babaji* (1884) 8 Bom 602

(l) *Sobha* v. *Turn* (1924) 46 All 693 699, 83 I C 923 (24) A A 495

(m) *Mullia* v. *Appasami* (1890) 13 Mad. 504

(n) *Raghunandan* v. *Ram Charan* (1919) 4 Pat L. J 94, 49 I C 150

(o) *Vinayakrav* v. *Devrao* (1887) 11 Bom 473, but see *Balvant* v. *Babaji* (1884) 8 Bom 602

(p) *Kesri* v. *Abdul Hasan* (1904) 26 All 365.

O. 21, rr. 98, 99.

When this rule applies.—This rule deals with two cases, namely, where the obstruction is occasioned without just cause (1) by the judgment debtor, or (2) by some other person at his instigation No order can be made under this rule if the obstruction is caused by a person other than the judgment debtor, unless the Court is satisfied that the person was acting at the instigation of the judgment debtor (*q*)

Purchaser from a judgment debtor pending attachment.—It has been held by the High Court of Madras that proceedings can be instituted under this rule against a purchaser from a judgment debtor pending attachment, though such a purchaser is not expressly mentioned in the rule The reasons given are (1) that this rule is to be read with r 95 which expressly provides for the institution of proceedings against such a purchaser under that rule, and (2) that such a purchaser is a ' representative ' of the judgment debtor within the meaning of s 146, so that just as proceedings could be instituted against a judgment debtor under this rule, so they could be instituted against such a purchaser by virtue of the provisions of that section (*r*)

Presidency Small Cause Court.—This rule applies to proceedings under Chapter 7 of the Presidency Small Cause Courts Act, 1882, relating to recovery of possession of immoveable property, by virtue of s 48 of that Act (*s*)

Appeal —See notes to s 47, " Questions between the auction purchaser on the one hand,' etc , on p 138 above See also notes to r 101 below under the head ' Appeal " It is submitted that r 103 excludes an appeal from an order under this rule

Resistance or obstruction by *bona fide* claimant

99. [*Cf* Ss. 331, 335] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment debtor, the Court shall make an order dismissing the application

When this rule applies —The present rule deals with two cases of claimants in good faith, namely, (1) persons claiming on their own account and (2) persons claiming on account of some person other than the judgment debtor

Person other than judgment-debtor claiming to be in possession on his own account —The word possession as used in this rule is not limited to actual *physical* possession It includes also *constructive* possession, such as possession through tenants or servants Hence a landlord who is in possession of a property through his tenant is a " person in possession of the property *on his own account* ' within the meaning of this rule (*t*)

Where in a suit brought by a plaintiff against two defendants, a decree is passed, *by consent against one of them only, the other defendant is not* a judgment debtor He is a " person other than the judgment debtor " within the meaning of this rule (*u*)

Sub-tenants.—*A* lets his house to *B* *B* sub lets the house to *C* *A* files a suit against *B* for possession and obtains a decree against *B* *C* is not joined as a

(*q*) *Ezra* v *Gubbay* (1920) 47 Cal 907 911 912 60 I C 969 *Mancharam* v *Fakir Chand* (1901) 25 Bom 478 486
(*r*) *Kuppana* v *Kumara* (1911) 34 Mad 450, 7 I C 418
(*s*) *Daroga* v *Mohideen* (1923) 45 Mad L J 66 73 I C 935 (24) A M 74
(*t*) See *Mancharam* v *Fakirchand* (1901) 25 Bom 478
(*u*) *Jatharedun* v. *Kunchu* (1907) 30 Mad 72

O. 21, rr. 99, 100.

party to the suit *C* obstructs *A* in obtaining possession of the property Can *C* be said to be in possession on "his own account" within the meaning of this rule? It has been held by the High Court of Calcutta (*v*), that the words 'any person claiming to be in possession on his own account" means "any person claiming to be in possession *as a matter of fact* on his own account,' and that a sub tenant is such a person On the other hand, it has been held by the High Court of Bombay (*w*), that the words "any person claiming to be in possession on his own account" means 'any person claiming to be in possession *on his own title*, and that a sub tenant is not such a person. According to the former view, *A* is entitled to an order for possession against *C* According to the latter view, he is not

The Bombay High Court has also held that *C* is not entitled to claim the benefit of the Bombay Rent Act against *A*, there being no privity of contract between him and *A* (*x*)

Transferee pendente lite.—See r 102 below

Appeal.—See notes to rr 98 and 101 under the head, "Appeal"

100 [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by decree holder or purchaser

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Rules 100 and 101.—These rules are to be read together

When this rule applies.—This rule contemplates a case where a person has been dispossessed by an auction purchaser who has taken possession of the property through the Court. He then complains to the Court of such dispossession and the Court, after making a summary investigation, if it holds that the applicant was in possession of the property on his own account and not on account of the judgment debtor directs under r 101 that possession be given back to the applicant The party against whom the order is made may then institute a suit under r 103 to establish the right which he claims to the present possession of the property (*y*)

"**Any person other than the judgment-debtor.**"—See notes to s. 47 "Representative on p 135 above, and cases (9) and (10), on p 136 above

"**Is dispossessed.**"—Where mere symbolical possession is delivered to the decree holder or purchaser under r 96, the person in possession cannot be said to be 'dispossessed within the meaning of this rule so as to entitle him to apply under this rule (*z*) It is the delivery of actual possession alone (r 95) that can constitute dispossession *within the meaning of this rule* *A person who is in possession through his tenant*

(*v*) *Hira v Gubbay* (1920) 47 Cal 907 60 I C 969

(*w*) *Jairam v Nowroji* (1921) 23 Bom L R 1316 65 I C 212 (1922) A I R 419

(*x*) *Jafferji v Miyadin* (19..) 46 Bom 526 64 I C 692 (2.) A I R 273

(*y*) *Ambica v Ram Prasad* (19..) 30 C W N 163 166 90 I C 575 (..6) A I C 377

(*z*) *Ibrahim v Lamjadu* (1903) 30 Cal 710

will be said to be dispossessed within the meaning of this rule if the tenant is ousted from the property by the delivery of actual possession to the decree holder or purchaser (a)

Dispossession under order of Collector—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred he should apply to the Collector and not to the Court complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (b)

Limitation—The application under this rule must be made within 30 days from the date of the dispossession Limitation Act 1908 sch I art 165

Dismissal of application for default—It was held by the Patna High Court in the undermentioned case (c) *that where an application made under this rule by a* person not bound by the decree is dismissed for default the order may be set aside under O 9, r 9 and the application may then be reheard But this decision was disapproved by a Special Bench of the same Court in a later case (d) See notes to O 9 r 9 Whether this rule applies to proceedings in execution on p 501 above

101 [Ss 332, 335] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment debtor, it shall direct that the applicant be put into possession of the property

Bona fide claimant to be restored to possession

"Was in possession on his own account"—A member of a joint Hindu family cannot be said to be in possession of any particular portion of the joint property *on his own account* His possession is the possession of the family (e)

Ex-parte order for delivery of possession—Where an order is made under rule 101 even though it be *ex parte* the remedy of the other party is by way of suit under rule 103 and not by proceedings under O 9 r 13 O 9 r 13 does not apply to execution proceedings in any event not to proceedings under rules 100 and 101 of the present Order (f) See notes to O 9 r 13 Whether this rule applies to execution proceedings on p 512b above

Appeal—The Chief Court of the Punjab has held that no appeal lies from an order made under this rule (g) On the other hand it has been held by the High Court of Madras that where an application under r 100 is fought out between persons who were parties to the suit or representatives of parties the case falls within s 47 and an appeal lies from the order (h) The Madras decision assumes that questions as to possession under r 100 are questions relating to the execution discharge and satisfaction of the decree within the meaning of s 47 Upon this point there is a conflict of decisions The matter is discussed fully in the notes to s 47 Questions between the auction

(a) *Irajabala* v *Gurudas* (1906) 33 Cal 437
(b) *Ragho* v *Hanmati* (1913) 37 Bom 488 19 I C 903
(c) *Satya Narayan* v *Govind* (1918) 3 Pat L J 250 43 I C 951

O. 21, rr. 101-103.

purchaser on the one hand and,' etc, on p 138 above It is submitted that r 103 excludes an appeal from the order

Rules not applicable to transferee *pendente lite*

102. [S. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person

Orders conclusive subject to regular suit

103 [Ss 332, fourth para.; S. 335, second para] Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any), the order shall be conclusive

Suit to establish right to present possession—The suit must be brought within one year from the date of the order Limitation Act 1908, sch I, art. 11A If no suit is brought within the aforesaid period the order will be conclusive (i)

This rule does not apply *unless there is an order made* under r 98, r 99 or r 101 Therefore where an application is made under r 97 or r 100, but the Court declines to pass any order upon the application thinking it best that the applicant should be referred to a separate suit the present rule does not apply and any suit which the applicant may subsequently institute for possession is not a suit under this rule, and it is not therefore governed by art 11A of the Limitation Act (j) Not only is it necessary that there should be an actual order made but the order must be one *made after investigation* as contemplated by r 97, sub r (2) and r 100, sub r (2) An order dismissing an application for default of prosecution is not an order made after investigation. The present rule, therefore, does not apply to such an order (k)

Scope of suit under this rule—It is erroneous to think that a suit under this rule is concerned only with the question of actual possession at the date of the order The suit is to establish the right which the plaintiff claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the order against him (l)

Suit by auction-purchaser for possession upon a different cause of auction—An auction purchaser against whom an order is made under r 99 or r 101 may bring a suit under this rule to establish the right which he claims to the present possession of the property Where a suit is brought by him under this rule, the suit is one *for possession under his auction purchase*, and *the cause of action* in the suit is the adverse decision under r 99 or r 100 A suit under the present rule does not concern itself with *any other cause of action* which such person *apart from his character as auction purchaser* may have against the opposite party It is, therefore, competent to the auction purchaser to

(i) *Chail Behari* v *Kidar Nath* (1919) 1 Lah L J 24

(j) *Meerud n* v *Pakkia* (1904) 27 Mad 25

(k) *Sarat Chandra* v *Tarini Prasad* (1907) 34 Cal 491

(l) *Unni* v *Pocker* (1921) 44 Mad 227 60 I C 109

abandon all his right in the auction-sale including the right to bring a suit under this rule as auction purchaser, and to bring a suit against the opposite party for possession *upon a different title altogether* To such a suit the provisions of the present rule do not apply, and the suit need not be brought within one year from the date of the order as required by art 11 A of the Limitation Act (*m*)

Order dismissing application under rule 101.—*A* makes an application under r 100 The application is dismissed under r 101 *A* is a 'party against whom an order is made under r 101,' within the meaning of the present rule, though there is no express provision for *dismissal* of an application under r 101 (*n*)

Order dismissing an application, under r. 95—An order dismissing an application under r 95 cannot be treated as an order under r 99 so as to attract the applicability of the present rule (*o*)

ORDER XXII.

Death, Marriage and Insolvency of Parties.

No abatement by party's death if right to sue survives

1. [S. 361.] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Application of Order to appeals.—The provisions of this order apply to appeals See s 107, sub s (2), and r 11 below

Application of Order to execution proceedings.—The provisions of this order apply to execution proceedings except rr 3, 4 and 8 See r 12 below

"Right to sue"—The right to sue means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death (*p*)

In what cases the right to sue survives and in what cases it does not.—To answer this question, we may turn to the provisions of—

I the Indian Contract Act 9 of 1872 s 37 and

II the Indian Succession Act 39 of 1925, s 306

I *Contract Act, s* 37 —Section 37 of the Contract Act runs as follows "Promises bind the representatives of the promisors in case of the death of such promisors before performance *unless a contrary intention appears from the contract*" Expanding the italicized words, we may say that contracts involving the exercise of special skill or involving special personal confidence are not binding on the representatives of the promisors. *A* promises to paint a picture for *B* by a certain day at a certain price *A* dies before the day *The contract cannot be enforced either by A s representatives* against *B* or by *B* against *A* s representatives The reason is that the right to sue does not survive to or against the representatives of *A*

II. *Indian Succession Act 39 of 1925, s 306.*—Section 306 of the Succession Act is as follows "All demands whatsoever, and all rights to prosecute or demand any action or special proceeding existing *in favour of or against* a person at the time of

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(*m*) *Ambica v Ram Prosad* (1925) 30 C W N 163 90 I C 575 ('26) A C 877

(*n*) *Zipru v Hari* (1919) 42 Bom 10 42 I C 73

(*o*) *Sobha v Tursi* (1924) 46 All 693 83 I C 953, ('24) A A 495

(*p*) *Sarat Chandra v Nani Mohan* (1909) 36 Cal 799 801 3 I C 995

O. 22, r. 1. his decease, survive *to and against* his executors or administrators, except causes of *action for defamation assault as defined in the Indian Penal Code, or other personal* injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory

Analysing the above section, we may say that the right to sue does not survive in the following cases —

(i) Suits for defamation, assault or other personal injuries not causing the death of the party [Where death *is caused* by a personal injury, the legal representative of the deceased *may sue* the wrong doer for damages, see Act 13 of 1855]

(ii) Cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory

Illustrations

1 *A* sues *B* to recover possession of his minor daughter illegally detained by *B* *B* dies before decree The cause of action does not survive against *B*s representative and the suit abates *Sharifa* v *Munekhan* (1901) 25 Bom 574

2 *A* claiming to be the nearest reversionary heir of a deceased Hindu, brings *a suit to set aside alienations made by the widow of the deceased. A dies before decree* It has been held by the High Court of Madras that the suit abates, and that it cannot be continued by the next reversioner *Salyahani* v *Bhaiani* (1904) 27 Mad 588, *China* v *Lakshminarasamma* (1912) 37 Mad 406, 15 I C 213 But this, it would seem, is no longer law *Venkatanarayana* v *Subbammal* (1915) 38 Mad 406 411 414, 42 I A 125, 129 132, 29 I C 298

3 *A* applies to be appointed guardian of the person of *X* The application is opposed by *B* who claims that he has been *appointed guardian by the will* of *X*s father *B* dies *B*s representative is not entitled to prosecute the proceedings 'A claim based *on a personal trust* does not survive to the claimant s representative' *Gangabai* v *Khashabai* (1899) 23 Bom. 719 It is different, however, where the claim is not based on a personal trust In such a case the legal representative of the deceased is entitled to prosecute the application, and to contend that the applicant is not a proper person to be appoint d guardian *Palamandi* v *Adaikalam* (1924) 47 Mad. 459, 84 I C. 613, ('24) A M 484

4 *A* sues *B* to establish his right to the office of *Mahant* *A* dies before decree The suit abates, for the right claimed is a personal right to an office *Sham Chand* v *Bhayaram* (1895) 22 Cal 92

5 The right of an unmarried Hindu daughter to claim the property left by her father to the exclusion of her married sister is not a personal right If a suit is brought to establish such a right, and the plaintiff dies pending the suit, the suit does not abate. *Jadubansi* v *Mahpal Singh* (1915) 38 All. 111, 32 I C 104, dissenting from *Balak Puri* v. *Durga* (1908) 30 All 49

6 *A* as the sole executor and residuary legatee under the will of *X*, applies for probate of the will *B* files a caveat, and the proceedings are thereupon converted into a suit Pending the hearing *A* dies. Thereupon *C*, *A*'s widow, applies to have her name substituted for that of *A*, and to have the petition amended by asking for letters of administration with the will annexed instead of probate The application must be rejected, for *A*s right to apply for probate became extinguished on his death *Sarat Chandra* v *Nani Mohan* (1909) 36 Cal 799, 3 I C. 995, *Haribhusan* v *Manmatha Nath* (1918) 45 Cal 862, 51 I C 76

7 *A* sues *B* for an injunction to restrain him from preventing *A* from enjoying the honour of standing at a particular place in temple *B* dies pending the suit The suit abates *Josiam* v *Swami* (1910) 34 Mad 76, 5 I C. 937

8 *A*, a Sunni Mahomedan, sues *B* for pre emption *A* dies pending the suit It is not settled whether the right to sue is extinguished, or whether it survives to his heirs or legal representatives *Muhammad* v *Niamat un Nissa* (1897) 20 All 88, *Sayyad Jiaul* v *Sitaram* (1912) 36 Bom 144, 12 I C 720

9 An action to recover damages for breach of contract of marriage abates on the death of the plaintiff *Balubhai* v *Nanalal* (1920) 44 Bom 446, 55 I C 624

10 *A* sues *B* for damages for malicious prosecution *A* dies pending the suit Does the right to sue survive? The Calcutta High Court has held that it does and that *A*'s legal representative is entitled to continue the suit (*q*) On the other hand, it has been held by the High Courts of Bombay (*r*), Patna (*s*), and Madras (*t*), that the right to sue does not survive and that the suit abates on *A* s death

11 The right to sue for damages for breach of contract, the right to sue on a pro missory note, the right to sue for a debt, the right to sue on a mortgage, the right to sue for wrong done to property, are all instances of rights tha are not extinguished on the death of the plaintiff or defendant In all these cases the suit does not abate on the death of the plaintiff or defendant An agreement referring matters in dispute to arbitra tion is not in this country revoked by the death of any of the parties thereto before the award is made Hence the question whether the legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a purely personal nature or is one which survives to the legal representative (*u*)

Death of either party pending appeal—Where a *decree* has been passed for the plaintiff in a suit in which the right to sue would not have survived had the plaintiff died before decree, and either party dies pending an appeal preferred by the defendant from the decree, the appeal does not abate (*v*) But if the plaintiff s suit is *dismissed*, and the plaintiff has appealed from the decree and either party dies pending the appeal, the appeal will abate (*w*)

Illustrations

1 *A* sues *B* for damages for defamation, and obtains a decree for Rs 5 000 *B* appeals from the decree *A* dies pending the appeal The appeal does not abate, and *B* may continue the appeal against *A* s representatives If *B* dies pending the appeal *B* s representative may continue the appeal against *A*

2 *A* sues *B* for damages for defamation, but the suit is *dismissed* *A* appeals from the decree Pending the appeal *A* dies *A* s representative is not entitled to prosecute the appeal The reason is that the decree in the original suit being against *A*, what is sought to be enforced in appeal is *A* s *right to sue* But the right to sue in a suit for defamation does not survive to the legal representative, hence the appeal abates Similarly if *B* dies pending the appeal, *A* is not entitled to continue the appeal against *B* s representative, not even if *A* s suit was dismissed *with costs* (*x*)

(*q*) *Krishna* v *Corporation of Calcutta* (1904) 31 Cal 993 See *Paramen* v *Sundararaja* (1903) 26 Mad 499

(*r*) *Haridas* v *Ramdas* (1889) 13 Bom 677

(*s*) *Punjab Singh* v *Ramautar* (1919) 4 Pat L J 676 52 I C 348

(*t*) *Rustomji* v *Nurse* (1921) 44 Mad 357 62 I C 260 (F B) *Murugappa* v *Ponnusami* (1921) 44 Mad 828, 62 I C 757

(*u*) *Perumalla* v *Perumalla* (1904) 27 Mad 112 *Dilla* v *Khedi* (1911) 33 All 645 11 I C 935

(*v*) *Muhammad* v *Khushalo* (1887) 9 All 131 *Gopal* v *Ramchandra* (1902) 26 Bom 597 *Paramen* v *Sundararaja* (1903) 26 Mad 499 *Murugappa* v *Ponnusami* (1921) 44 Mad 828 62 I C 757

(*w*) *Gopal* v *Ramchandra* (1902) 26 Bom 597 at p 601 lines 33-35 *Satyabhama* v *Bharani* (1904) 27 Mad 588

(*x*) *Jonam* v *Sawmi* (1910) 34 Mad 76 5 I C 937 *Saklat* v *Bella* (1924) 2 Rang 91, 80 I C 744 (24) A R 217

O. 22, rr. 2, 3.

2. [S 362.] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

Procedure where one of several plaintiffs or defendants dies and right to sue survives

Executors and trustees.—Where a suit is brought *by* executors or trustees the right to sue on the death of one of them survives to the surviving plaintiffs alone Where a suit is brought *against* executors or trustees the right to sue survives against the surviving defendants alone

Joint Hindu family—See notes to r 3, Joint Hindu Family and legal representative on p 735 below

3. [Ss 363, 365, 366] (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit

Procedure in case of death of one of several plaintiffs or of sole plaintiff

(2) Where within the time limited by law no application is made under sub rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Alterations in the rule.—

1 The words so far as the deceased plaintiff is concerned in sub rule (2) are new See notes below, The suit shall abate so far as the deceased plaintiff is concerned.

2 The words the suit shall abate in sub rule (2) have been substituted for the words the Court may *pass an order* that the suit shall abate which occurred in s. 366 of the Code of 1882 The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable The High Courts of Bombay (y) and Madras (z) held that such an order was a decree and was therefore appealable The Allahabad High Court (a) held that the order was not appealable No such question

(y) *Bhikaji v Purshotam* (1886) 10 Bom 220
(z) *Subbayya v Saminadayyar* (1895) 18 Mad 496
(a) *Hamida Bibi v Ali Husain* (1895) 17 All 1[illegible]

can arise under the present rule, for it is no longer necessary to make an *order* that the suit shall abate The suit abates *ipso facto*, if no application is made under sub rule (1) within the time limited by law This view was taken by the High Court of Lahore (*b*), and in one case by the High Court of Allahabad (*c*) In a recent case, however, the Allahabad Court held that a formal order declaring that a suit or appeal has abated is necessary before an application can be made to set aside the abatement under r 9 (2) below (*d*) The correctness of this decision is open to question.

Limitation.—The application under this rule must be made within 90 days from the date of the death of the deceased plaintiff or appellant Limitation Act, 1908, sch. I, art 176

"The suit shall abate"—See notes above, ' Alterations in the rule," No 2

The suit shall abate "so far as the deceased plaintiff is concerned'—Where one of two or more plaintiffs dies and the right to sue *survives* to the surviving plaintiffs or plaintiff *alone*, the surviving plaintiff or plaintiffs may proceed with the suit. This case has been dealt with in r 2 above The present rule provides *inter alia* that where one of two or more plaintiffs dies and the right to sue *does not survive* to the surviving plaintiffs alone, the legal representative of the deceased plaintiff ought to be made a party to the suit For this purpose an application should be made to the Court and such application must be made within 90 days from the date of the death of the deceased plaintiff Sub rule (2) provides that where no such application is made the suit shall abate *so far as the deceased plaintiff is concerned* The words italicized above mean that the suit shall *primarily* abate so far as the deceased plaintiff is concerned, but they do not mean that the suit shall in no case abate *as a whole* If the suit is of such a nature that it can proceed in the absence of the legal representative of the deceased plaintiff, it will abate so far only as the deceased plaintiff is concerned A suit by the partners of a firm to recover a partnership debt is a suit of this nature so that if one of the partners dies pending the suit and his legal representative is not brought on the record the suit will abate *only so far as the deceased partner is concerned* (*e*) But if it is of such a character that it cannot proceed in the absence of the legal representative it will abate as a whole A suit by some of the partners of a firm against the other partners for accounts and for winding up the affairs of the partnership is a suit of this character, so that if one of the plaintiffs (or defendants) dies, and his legal representative is not brought on the record, the suit will abate *as a whole* (*f*) See notes above, Alterations in the rlue, No 1

This rule applies to appeals.—The provisions of this rule apply not only to the case of a deceased plaintiff, but to the case of a deceased appellant [see s 107 and r 11 below] Therefore, where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant alone, the legal representative of the deceased appellant ought to be brought on the record. If this is not done, the appeal will abate *so far as the deceased appellant is concerned* But the appeal will abate *as a whole*, if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant There is particularly one class of cases in which an appeal cannot abate as a whole, but abates only so far as the deceased appellant is concerned, and they are cases which come within O 41, r 4, corresponding

(*b*) See *Ram Gopal* v *Hari Kishan* (1925) 7 Lah L J 517 519 88 I C 478 ('25) A L 598

(*c*) *Lachmi* v *Muhammad* (1920) 42 All 540 59 I C 903

(*d*) *Gujati* v *Sitai* (1922) 44 All 459 66 I C 554, ('22) A A 209

(*e*) *Sarju* v *Ram Sarap* (1921) 19 All L. J 266, 60 I C 755

(*f*) *Rajuchunder* v *Ramgati* (1904) 31 Cal 487, 31 I A 71

O. 22, r. 3. with s 544 of the Code of 1882 O 41, r 4, provides that where there are two or more plaintiffs or defendants in a suit, and the decree appealed from proceeds on any ground *common* to all the plaintiffs or to all the defendants, *any one* of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of *all* the plaintiffs or *all* the defendants, as the case may be Where several plaintiffs or defendants jointly appeal from a decree in a case *to which O 41, r 4 of the Code applies, the death of one of such appellants, if no* legal representative of the deceased appellant is brought on the record within the period of limitation, can only have the effect of causing the appeal to abate so far only as the deceased appellant is concerned it cannot have the effect of causing the appeal to abate as a whole *A* and *B* sue *C* *D* and *E* for possession of certain lands, alleging that they have been unlawfully dispossessed by the defendants The defence is that the land belongs to *C*, *D* and *E* The Court finds that the land belongs to the plaintiffs, and a decree is passed in favour of the plaintiffs *C*, *D* and *E* appeal from the decree *E* dies pending the appeal, but his legal representative is not brought on the record within the period of limitation *A* and *B* (respondents) contend that the appellate Court should not proceed with the appeal on the ground that the appeal abated as a whole Does the *appeal abate as a whole?* No *it abates only so far as the deceased appellant is concerned* and the appeal should therefore be proceeded with The reason is that the ground of appeal being *common* to all the appellants, *viz*, that they were the lawful owners of the land, *any one* of them might have appealed from the whole decree under O 41, r 4 if so, the death of one of the appellants could not affect the right of the other appellants to proceed with the appeal (*g*)

Legal representative of deceased plaintiff.—The expression legal representative is defined in s 2 (11) On the death of a Hindu widow pending a suit to recover property belonging to her deceased husband, the reversionary heirs of the husband are her legal representatives within the meaning of this rule (*h*) On the death of a Hindu female to recover her father's property from strangers, the next heirs of the father are her legal representatives *within* the meaning of this rule (*i*) On the death of a reversioner pending a suit for a declaration against a Hindu widow that an alleged adoption is invalid, the next reversioner is the legal representative, and he is entitled to be brought on the record as such (*j*)

It has been held by the High Court of Madras that where a suit is brought by a minor Hindu for partition and the minor dies pending the suit, his legal representatives are not entitled to continue the suit, the reason given being that the rule that the mere institution of a suit for partition effects a severance of the joint estate is not applicable to a suit by a minor, it being for the Court to determine in such a suit whether a decree for partition will be beneficial to the minor (*k*)

A suit brought by the head of a mutt on behalf of the mutt may be continued on his removal by his successor in office The successor is not a legal representative, but a person on whom the interest in the trust property devolves within the meaning of *r.* 10 below Hence r 10 and not the present rule, applies to such a case (*l*)

(*g*) *Chandarsang* v *Khimabhai* (1898) 22 Bom 718 *Ram Sewak* v *Lambar* (1903) 25 All 27 *Chintaman* v *Gangabai* (1903) 27 Bom 284 *Somasundaram* v *Vaithilinga* (1917) 40 Mad 846 868 41 I C 546, *Mehd Singh* v *Kabir un nissa* (1914) Punj Rec no 63 3-3 26 I C 446 *Pyare Lal* v *Churamani* (1918) Punj Rec no 84 p 279 46 I C 50, *Maung Byaung* v *Maung Shwe* (1924) 2 Rang 456 84 I C 170 (24) A R 376 (joint owners and joint mortgagees)

(*h*) *Prenmoyi* v *Preonath* (1896) 23 Cal 636, *Tribhuwan* v *Sri Narain* (1898) 20 All 341 *Lakhai Rai* v *Sheo Pujan Singh* (1910) 33 All 15 7 I C 97

(*i*) *Ramaswami* v *Pedamunayya* (1916) 39 Mad 382 27 I C 1001, *Jadubans* v *Mahpal Singh* (1916) 38 All 111 32 I C 104

(*j*) *Venkatanarayana* v *Subbamma* (1915) 38 Mad 406 42 I A 125 29 I C 238

(*k*) *Chelimi* v *Subbammal* (1918) 41 Mad 442 42 I C 860

(*l*) *Ratnam* v *Natarajа* (1921) 46 Mad L J 341, 84 I C 200, (25) A M 615

Two or more legal representatives.—We next proceed to consider the question whether, if there are two are more legal representatives, they should *all* be made parties? A Mahomedan plaintiff dies pending a suit brought by him, leaving three sons, *A*, *B* and *C*. *A* alone applies to be brought on the record in place of the deceased, and he is brought on the record as plaintiff. No application is made to bring *B* and *C* on the record within the period of limitation. Does the suit abate? It does, according to the Allahabad High Court (*m*). According to that Court, the words "legal representative" must, when there are two or more legal representatives, be read in the plural. It has accordingly been held by that Court that all the legal representatives must be brought on the record as plaintiffs, and if any one of them refuses to be joined as a plaintiff, he should be joined as a defendant. The same view has been taken by the High Court of Madras (*n*), except that according to that Court if any of legal representatives *refuses* to be joined as a plaintiff, he may be brought on the record even after the period of limitation, and the suit does not abate if he is so brought on the record. In Bombay it has been held that an application by *one* of several legal representatives is sufficient, and that the suit does not abate if others are not brought on the record (*o*). The same principles apply to appeals.

Wrong person as legal representative.—See notes to r. 4 below under the same head.

Joint Hindu family and legal representative.—The High Court of Patna has held that this rule is to be applied even if the plaintiffs are members of a joint Hindu family, and that r. 4 is to be applied even if the defendants are members of a joint family. According to that Court, the legal representatives of a deceased coparcener within the meaning of s. 2 (11) are the surviving coparceners, and the latter must be brought on the record in their representative character though they may be already on the record in their own capacity (*p*). On the other hand, it has been held by the Calcutta High Court that the case of members of a joint Hindu family is governed by r. 2 above, that is, the right to sue survives to or against the surviving coparceners alone, and if they are already on the record it is not necessary to bring them on record also in their representative capacity (*q*).

Legal representative already on record in another character.—The mere fact that the alleged legal representative of a deceased plaintiff or defendant is already a party to the suit, does not dispense with the provisions of this or the next rule (*r*). As to joint Hindu family, see notes above.

A, *B* and *C* sue *D* and *E* for partition. *A* dies pending the suit leaving *B* and *C* as his heirs. No application is made by *B* and *C* to bring them on record as the legal representatives of *A*. *Held* by the Rangoon High Court that the suit abates only as to *A*, and not as a whole, the reason given being that the surviving plaintiffs themselves are the sole legal representatives of the deceased plaintiffs (*s*).

Determination of question as to legal representative.—The present rule presupposes that the party claiming to represent the deceased plaintiff is his legal representative. If there is a dispute as to whether any person is or is not the legal representative of the deceased plaintiff, it should be determined by the Court under r. 5 below (*t*).

(*m*) *Chaman Lal* v. *Amir Begam* (1894) 16 All. 211; *Haidar Husain* v. *Abdul Ahad* (1908) 30 All. 117.
(*n*) *Muzala* v. *Ramayya* (1900) 23 Mad. 125; *Abdul Rahman* v. *Shahab-ud-Din* (1920) 1 Lah. 481, 55 I. C. 883.
(*o*) *Bhikaji* v. *Purshotam* (1886) 10 Bom. 220.
(*p*) *Lilo* v. *Jaghru* (1924) 3 Pat. 633, 85 I. C. 25, ('25) A. P. 123.
(*q*) *Chowdhry Sitamanund* v. *Rajnarain* (1906) 11 C. W. N. 186.
(*r*) *Gurditta Mal* v. *Muhammad* (1925) 7 Lah. L. J. 544, 91 I. C. 41, ('26) A. L. 37.
(*s*) *Maung Po* v. *Ma Shwe Ma* (1924) 2 Rang. 445, 84 I. C. 992, ('25) A. R. 95.
(*t*) *Oulu* v. *Beepathee* (1894) 17 Mad. 200.

O. 22, r. 3. **What pleas may be taken by a legal representative.**—The legal representative of a deceased plaintiff can only prosecute the cause of action as originally framed (u). Likewise the defendant can raise no defence against the legal representative other than what he could have raised against the deceased plaintiff himself (v). But it is otherwise where the real defendant is an institution such as a temple which may be represented at different stages by different trustees. In such a case if the original suit is against the trustee who created a debt agreeing to pay it out of the temple funds, and that trustee is removed, it is open to his successor to raise the plea not taken by the first trustee, namely, that the temple funds were not liable for the debt. The devolution of interest in such a case is the one contemplated by r. 10 below and not r. 4 (w).

A Hindu son sues his father and the purchaser from the father of ancestral property to set aside a sale made by the father, alleging that the sale was without legal necessity. *A* dies pending the suit. The father is not the proper legal representative of the son in such a case, as it is the sale *by the father* that is impeached, but some other member of the family who may be interested in setting aside the sale (x).

Minor applicant.—A minor is as much entitled to be made a party as the legal representative of a deceased plaintiff as an adult. But he must apply through a next friend (y).

Death of plaintiff after perliminary and before final decree.—This rule applies where a plaintiff dies after the preliminary and before the final decree is passed *as in a suit on a mortgage*. *The reason is that proceedings after the preliminary decree* are no proceedings in execution under the new Code. The suit continues until the final decree is passed (z).

Death after final decree.—The provisions of this Order do not apply where a party dies after the final decree is passed. Thus if *A* sues *B* but the suit is dismissed and *A* dies thereafter, his legal representative may file an appeal from the decree without making any application under this rule to be brought on the record in place of the deceased (a). See also r. 12 below.

Death of pauper applicant.—Where there is only an *application* for leave to sue in forma pauperis and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive to his legal representative. *But* the legal representative may present a *fresh* application for leave to sue *in forma pauperis*, or he may institute a suit for the same relief that the deceased claimed, if the right to sue survives (b).

Effect of abatement on rights of parties.—Where a suit has abated, and the abatement has not been set aside under r. 9 below, the defendant is entitled as long as he continues in possession of the suit property, to plead against the plaintiff and those claiming under him that the order of abatement is conclusive of the rights to the property. In such a case the order of abatement operates as a judgment in favour of the defendant to the same extent as a judgment on the merits (c).

Suit under section 92 and abatement.—*See notes to s. 92*, "Death of one of the plaintiffs pending suit," on p. 294 above.

(u) *Khamchand v. Bhaygram* (1895) 2? Cal. 92.
(v) *Subbarayd v. Manika* (1896) 19 Mad. 345; *Gulli v. Sawan* (1923) 4 Lah. 7? 74 I. C. 146, ('24) A. L. 45.
(w) *Sundaramm v. Venernada* (19?2) 45 Mad. 793, 72 I. C. 103, ('2?) A. M. 40?.
(x) *Gulli v. Sawan* (1923) 4 Lah. 72, 74 I. C. 146, ('24) A. L. 45.
(y) *Lackmani v. Veeraswami* (19?1) 47 Mad. L. J. 270, 80 I. C. 91?, ('24) A. M. 813.
(z) *Lakshmi v. Subbarama* (1916) 39 Mad. 493, 29 I. C. 142; *Subbarayadu v. Ramadum* (1922) 45 Mad. 872, 68 I. C. 94?, ('23) A. M. 237; *Natesa v. Kannammal* (19?1) 46 Mad. L. J. 191, 78 I. C. 61, ('24) A. M. 756; see also *Hemendra v. Fakir* (19?3) 50 Cal. 6?0, 74 I. C. 9?3, ('23) A. C. 6?? [death after final decree].
(a) *Ramanada v. Minakshi* (1891) 3 Mad. 236.
(b) *Lalit v. Satish* (1906) 33 Cal. 1163.
(c) *Rahim v. Srinivasa* (1920) 38 Mad. L. J. 266, 56 I. C. 565.

Suit under O 1, r 8, and abatement—See notes to O 1, r 8, "Abatement of suit," and "Abatement of appeal," on p 386 above.

Execution proceedings—This rule does not apply to proceedings in execution: see r 12 below

Revision—When the legal representative of a deceased plaintiff applies within the prescribed period to have his name entered on the record, the Court is bound under this rule to enter his name If the Court fails to do so, it amounts to a failure to exercise jurisdiction vested in it by law under this rule and the High Court may interfere in revision under s 115 (*d*)

Appeal—The decisions on the question of appeal are not uniform In some cases to be presently considered the alteration introduced in the present rule, namely, the substitution of the words ' the suit *shall abate* for the words the Court may *pass an order* that the suit shall abate , which occurred in the corresponding s 366 of the Code of 1882 has not been noticed, see notes ' Alterations in the rule', No 2, on p 732 above We proceed to consider the decisions of each High Court separately

Madras Cases—The Madras High Court has held that where on the death of a plaintiff two rival claimants apply to the Court to be brought upon the record as the legal representative of the deceased plaintiff, and the Court decides in favour of one of them and against the other, the party against whom the decision is given is not entitled to appeal, the reason given being that there is no abatement of the suit in such a case as the suit can be proceeded with by the other claimant (*e*) But it has been held that if a sole plaintiff dies, and only one person claims to be the legal representative of the deceased plaintiff, and his application to be brought upon the record is dismissed on the ground that he is not the legal representative, the order rejecting the application amounts to a decree dismissing the suit within the meaning of s 2 (2), and it is appealable as such, provided the applicant is already a party to the suit in another character, the reason given being that the dismissal negatives the applicant s right to the relief which the original plaintiff had sought in the suit (*f*) But if the applicant is a stranger, that is, not a party to the suit, the order cannot operate as a decree, a decree being an adjudication of the rights of *parties* to a suit, and no appeal will lie from the order (*g*)

Allahabad Cases—It has been held by the High Court of Allahabad that no appeal lies from an adjudication that a suit (*h*) or an appeal (*i*) has abated, whether the abatement is due to the fact that no application was made to bring the legal representative of the deceased plaintiff on the record (*j*), or the abatement follows on the dismissal of the application made by a person to be brought upon the record as the legal representative of the deceased plaintiff (*k*), the reason given being that such an adjudication does not amount to a decree In a recent case where *A* had obtained an ex parte decree against *B*, and *B* had applied to set aside the decree, and thereafter *B* died, and on *B* s death his son applied to continue the application, and the application was granted notwithstanding opposition on *A* s part, it was held that the case did not fall either under r 3 or r 4 of this order and that no appeal lay from the order (*l*) See s 146 above

Lahore Cases—In a case where a person applied to be brought on the record as the legal representative of a deceased plaintiff, and the Court refused the application on the

(*f*) *Ayya Mudali* v *Veerayee* (1920) 43 Mad 812, 58 I C 498
(*g*) *Rukmani* v *Veeraswami* (1921) 47 Mad L J 370 80 I C 912 (24) A M 813
(*h*) *Hamida Bibi* v *Ali Husen* (1895) 17 All 172,
Walayat v *Ramlal* (1914) 12 All L J 1113, 25 I C 643
(*i*) *Muhammad* v *Manohar* (1922) 20 All L J 214, 64 I C 838
(*j*) See (1914) 12 All L J 1113 25 I C 643, *supra*
(*k*) See (1895) 17 All 172 *supra*
(*l*) *Moti Lal* v *Bishambhar* (1925) 47 All. 741, 89 I C 95, ('25) A A 431

O. 22, r. 3.

What pleas may be taken by a legal representative.—The legal representative of a deceased plaintiff can only prosecute the cause of action as originally framed (*u*). Likewise the defendant can raise no defence against the legal representative other than what he could have raised against the deceased plaintiff himself (*v*). But it is otherwise where the real defendant is an institution such as a temple which may be represented at different stages by different trustees. In such a case if the original suit is against the trustee who created a debt agreeing to pay it out of the temple funds, and that trustee is removed, it is open to his successor to raise the plea not taken by the first trustee, namely, that the temple funds were not liable for the debt. The devolution of interest in such a case is the one contemplated by r. 10 below and not r. 4 (*w*).

A Hindu son sues his father and the purchaser from the father of ancestral property to set aside a sale made by the father, alleging that the sale was without legal necessity. *A* dies pending the suit. The father is not the proper legal representative of the son in such a case, as it is the sale *by the father* that is impeached, but some other member of the family who may be interested in setting aside the sale (*x*).

Minor applicant.—A minor is as much entitled to be made a party as the legal representative of a deceased plaintiff as an adult. But he must apply through a next friend (*y*).

Death of plaintiff after perliminary and before final decree.—This rule applies where a plaintiff dies after the preliminary and before the final decree is passed as in a suit on a mortgage. The reason is that proceedings after the preliminary decree are not proceedings in execution under the new Code. The suit continues until the final decree is passed (*z*).

Death after final decree.—The provisions of this Order do not apply where a party dies after the final decree is passed. Thus if *A* sues *B*, but the suit is dismissed, and *A* dies thereafter, his legal representative may file an appeal from the decree without making any application under this rule to be brought on the record in place of the deceased (*a*). See also r. 12 below.

Death of pauper applicant.—Where there is only an application for leave to sue in forma pauperis and the applicant dies before the leave is granted, the right to sue as a pauper being a personal right cannot survive to his legal representative. But the legal representative may present a *fresh* application for leave to sue *in forma pauperis*, or he may institute a suit for the same relief that the deceased claimed, if the right to sue survives (*b*).

Effect of abatement on rights of parties.—Where a suit has abated, and the abatement has not been set aside under r. 9 below, the defendant is entitled as long as he continues in possession of the suit property, to plead against the plaintiff and those claiming under him that the order of abatement is conclusive of the rights to the property. In such a case the order of abatement operates as a judgment in favour of the defendant to the same extent as a judgment on the merits (*c*).

Suit under section 92 and abatement.—See notes to s. 92, "Death of one of the plaintiffs pending suit" on p. 254 above.

(*u*) *Shamchand* v. *Bhayaram* (1895) 22 Cal. 92.

(*v*) *Subbaraya* v. *Manika* (1896) 19 Mad. 345; *Cullu* v. *Sawan* (1923) 4 Lah. 72, 74 I. C. 146, ('24) A. L. 45.

(*w*) *Sundaresan* v. *Viswanadu* (1922) 45 Mad. 701, 72 I. C. 103, ('22) A. M. 402.

(*x*) *Cullu* v. *Sawan* (1923) 4 Lah. 72, 74 I. C. 146, ('24) A. L. 45.

(*y*) *Rukmani* v. *Veeraswami* (1921) 47 Mad. L. J. 2?? 80 I. C. 912, ('21) A. M. 812.

(*z*) *Lakshmi* v. *Subbarama* (1916) 39 Mad. 433, 492, 29 I. C. 142; *Subbarayudu* v. *Ramadass* (1922) 45 Mad. 872, 69 I. C. 91? ('23) A. M. (19?4) 46 Mad. 237; *Valesa* v. *Annammal* (19?4) 46 Mad. L. J. 381, 78 I. C. 61, ('24) A. M. 348. See also *Hemendra* v. *Fakir* (1923) 50 Cal. 650, 74 I. C. 923, ('23) A. C. 620 [death after final decree].

(*a*) *Ramanada* v. *Minatchi* (1891) 3 Mad. 236.

(*b*) *Lala* v. *Sadish* (1906) 33 Cal. 1163.

(*c*) *Rahim* v. *Srinivasa* (19?0) 39 Mad. L. J. 208, 64 I. C. 563.

Suit under O 1, r 8, and abatement —See notes to O 1, r 8, "Abatement of suit," and "Abatement of appeal," on p 386 above

Execution proceedings —This rule does not apply to proceedings in execution: see r 12 below

Revision —When the legal representative of a deceased plaintiff applies within the prescribed period to have his name entered on the record the Court is bound under this rule to enter his name If the Court fails to do so, it amounts to a failure to exercise jurisdiction vested in it by law under this rule, and the High Court may interfere in revision under s 115 (*d*)

Appeal —The decisions on the question of appeal are not uniform In some cases to be presently considered the alteration introduced in the present rule, namely, the substitution of the words the suit *shall abate*' for the words 'the Court may *pass an order* that the suit shall abate ", which occurred in the corresponding s 366 of the Code of 1882, has not been noticed, see notes "Alterations in the rule', No 2, on p 732 above We proceed to consider the decisions of each High Court separately

Madras Cases —The Madras High Court has held that where on the death of a plaintiff two rival claimants apply to the Court to be brought upon the record as the legal representative of the deceased plaintiff, and the Court decides in favour of one of them and against the other, the party against whom the decision is given is not entitled to appeal, the reason given being that there is no abatement of the suit in such a case as the suit can be proceeded with by the other claimant (*e*) But it has been held that if a sole plaintiff dies, and only one person claims to be the legal representative of the deceased plaintiff, and his application to be brought upon the record is dismissed on the ground that he is not the legal representative, the order rejecting the application amounts to a decree dismissing the suit within the meaning of s. 2 (2), and it is appealable as such, provided the applicant is already a party to the suit in another character, the reason given being that the dismissal negatives the applicant s right to the relief which the original plaintiff had sought in the suit (*f*) But if the applicant is a stranger, that is, not a party to the suit, the order cannot operate as a decree, a decree being an adjudication of the rights of *parties* to a suit, and no appeal will lie from the order (*g*)

Allahabad Cases —It has been held by the High Court of Allahabad that no appeal lies from an adjudication that a suit (*h*) or an appeal (*i*) has abated whether the abatement is due to the fact that no application was made to bring the legal representative of the deceased plaintiff on the record (*j*), or the abatement follows on the dismissal of the application made by a person to be brought upon the record as the legal representative of the deceased plaintiff (*k*), the reason given being that such an adjudication does not amount to a decree In a recent case where *A* had obtained an ex parte decree against *B*, and *B* had applied to set aside the decree, and thereafter *B* died, and on *B* s death his son applied to continue the application, and the application was granted notwithstanding opposition on *A* s part, it was held that the case did not fall either under r 3 or r 4 of this order and that no appeal lay from the order (*l*) See s 146 above

Lahore Cases —In a case where a person applied to be brought on the record as the legal representative of a deceased plaintiff, and the Court refused the application on the

(*d*) *Janardhan* v *Ramchandra* (1902) 26 Bom 317
(*e*) *Lakshmi* v *Subbarama* (1916) 39 Mad 488 29 I C 142 *Venkata* v *Gunnesvara* (1924) 46 Mad L J 129 79 I C 860 (24) A M 622
(*f*) *Ayya Mudali* v *Veerayee* (1920) 43 Mad 812, 58 I C 498
(*g*) *Rukmani* v *Veerasami* (1924) 47 Mad L J 370 80 I C 942 (24) A M 813
(*h*) *Hamidi Bibi* v *Ali Husen* (1895) 17 All 172, 24
Walayat v *Ramlal* (1914) 12 All L J 1113, 25 I C 643
(*i*) *Muhammad* v *Manohar* (1922) 20 All L J 214, 64 I C 838
(*j*) See (1914) 12 All L J 1113 25 I C 643, *supra*
(*k*) See (1895) 17 All 172 *supra*
(*l*) *Moti Lal* v *Bishambhar* (1925) 47 All 741, 88 I C 95, (25) A A 431

O. 22, rr. 3, 4.

ground that he was not the legal representative, *and also* made a separate order recording that the suit had abated inasmuch as no application by any legal representative had been made, it was held by the High Court of Lahore that the *order dismissing the application* was not appealable under the Code as it was really a matter collateral to the suit As to the *order recording the abatement* the Court said it would amount to a decree and be appealable as such if the applicant was already a party to the suit in another character (*m*) In another case (*n*) where an appeal was declared to have abated as a whole, it was held, following a Full Bench ruling of the same High Court (*o*) that whether the final decision was called an abatement or a dismissal, it came within the definition of "decree" and was appealable as such, the applicants having been parties to the suit

4. [S 368] (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or *defendants alone, or a sole defendant or sole* surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant *to be made a party and shall proceed with the suit.*

Procedure in case of death of one of several defendants or of sole defendant

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant

(3) Where within the time limited by law no application is made under sub rule (1), the suit shall abate as against the deceased defendant

Alterations in the rule —

1 Sub rule (2) is new

2 The words "as against the deceased defendant" in sub rule (3) are new See notes below, *"The suit shall abate as against the deceased defendant"*

Suit.—The word "suit" in this rule includes an appeal, and the word "defendant" a respondent see r 11 below

Limitation—The application under this rule must be made within 90 days from "the date of the death of the deceased defendant *or respondent*" Limitation Act, 1908 sch I, art 177 The alteration in the language of art 177 as it stood in the Limitation Act, 1877 art 175 C, clearly shows that the word "respondent" in the present article is not confined to a respondent only in first appeal as was *held by* the High Court of Madras under the old article (*p*), but that it includes a respondent also in second appeal as was *held* by the High Courts of Calcutta and Allahabad (*q*) See also r 11 below.

(*m*) *Ram Sarup* v *Moti Ram* (1920) 1 Lah 493 57 I C 137
(*n*) *Ladmi* v *Hira* (1920) 1 Lah 532, 60 I C 111
(*o*) *Niranjan* v *M al* (1916) Punj Rec No 129, p 330, 33 I C 7
(*p*) *Sunya Pillai* v *Aiyalannu Pillai* (1906) 29 Mad 523
(*q*) *Upendra Kumar* v *Sham Lal* (1907) 34 Cal 1020 *Madhuban Das* v *Narain Das* (1907) 29 All 535

Where no application made within the period of limitation—The application to bring the legal representative of the deceased defendant on the record should, as stated above, be made within 90 days from the date of the death of the deceased defendant. If no such application is made within the aforesaid period, the suit abates as against the deceased defendant [sub rule (3)], though the plaintiff was ignorant of the death of the deceased (r) *After* abatement, the only course open to the plaintiff is to make an application under r 9, sub r (2), to have the abatement set aside Such an application should be made within 60 days from the date of the abatement [Limitation Act, 1908, sch I, art 171] but the Court may entertain the application even after 60 days if sufficient cause is shown (s) [see r 9, sub r 3, and Limitation Act, 1908, s 5] As to the inherent power of the Court to bring the legal representative of a deceased defendant on the record after abatement, see notes below It may be stated that where a defendant dies pending a suit, it is open to his legal representative to apply to be brought on the record notwithstanding the plaintiff's omission to implead him (t)

"The suit shall abate."—See notes to r. 3, "Alterations in the rule," No 2, on p 732 above

The suit shall abate "as against the deceased defendant."—Where one of two or more defendants dies, and the right to sue *survives* against the surviving defendant or defendants *alone*, the suit should be proceeded with as against the surviving defendant or defendants This case has been dealt with in r 2 above The present rule provides *inter alia* that where one of two or more defendants dies, and the right to sue *does not survive* against the surviving defendant or defendants *alone*, the legal representative of the deceased defendant ought to be made a party to the suit For this purpose an application should be made to the Court, and such application must be made within 90 days from the date of the death of the deceased defendant. Sub rule (3) provides that where no such application is made, the suit shall abate *as against the deceased defendants* The words, "as against the deceased defendants" are new In the absence of these words in the corresponding section 368 of the Code of 1882, it was contended in a large number of cases governed by that section that where no application was made to bring the legal representative of a deceased defendant or respondent on the record within the period of limitation, the suit or appeal abated not only as against the deceased defendant or respondent, but as a whole But this contention was overruled, and the Courts held that a distinction ought to be made between cases in which a suit or appeal could proceed in the absence of the legal representative and those in which it could not In the former case it was held that the suit or appeal abated only as against the deceased defendant or respondent in the latter case, that it abated as a whole Sub r (3) of the present rule makes it clear that where no application is made to bring the legal representative on the record within the time limited by law, the suit or appeal abates primarily as against the deceased defendant or respondent only, and that it does not abate necessarily as a whole That sub rule gives legislative recognition to the rulings under the Code of 1882 The result is that as under the Code of 1882, so under the present Code, if a case is of such a nature that the suit or appeal can proceed without bringing upon the record the legal representative of the deceased defendant or respondent

(r) *Sayad Mir Nawab* v *Hardeo* (1911) Punj Rec no 60, p 235, 12 I C 871, *Hadu* v *Lala* (1915) Punj Rec no 41, p 197, 21 I C. 951, *Jamna* v *Sarjit* (1919) Punj Rec no 67, p 166, 52 I C 510 Ignorance of death may, however, be a good ground for setting aside the abatement *Daya Singh* v *Bula Singh* (1916) Punj Rec no. 118, p 369, 33 I C 7

(s) *Secretary of State* v *Jawahir Lall* (1914) 36 All 235, 23 I C 48

(t) *Kuppuswami* v *Singaravelu* (1923) 45 Mad. L J. 233, 75 I C 849, ('23) A. M. 679

O. 22, r. 4. the suit or appeal abates as against the deceased defendant or respondent (*u*). A suit on a joint and several promissory note against the promissors, is a suit of this nature. But if a case is of such a nature that the suit or appeal cannot proceed in the absence of the legal representative, the suit or appeal will abate as a whole (*t*). A suit by a partner against his co partners for dissolution of partnership and for accounts is a suit of this nature [see ill (2) under the head "II Cases in which suit or appeal held to abate as a whole," on p 741 below].

The High Court of Bombay has taken a peculiar view of the matter. To understand exactly the point of view of the Bombay High Court we shall first state the view taken by the High Court of Calcutta in cases where a suit is brought for possession of property by persons claiming to be the *joint* owners thereof. According to the view taken by the Calcutta Court where the plaintiffs are joint owners, and a decree is passed for them for possession, and the defendant appeals from the decree joining the joint owners as respondents, and one of the joint owners dies pending the appeal, the appeal abates *as a whole*, the reason given being that the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result of allowing the appeal as against the remaining joint owners, and not disturbing the decree of the lower Court as against the deceased joint owner (*w*). According to the Bombay rulings, the appeal abates against the deceased joint owner *only*, and it should be heard on the merits against the other joint owners. After the appeal is heard on the merits, the Court may pass such decree as the case may require (*x*). The view taken by the Bombay High Court has not been taken by any other Court (*y*).

I Cases in which suit or appeal held to abate as against deceased defendant or respondent only.—(1) *A* mortgages certain property to *B*. *C* stands surety for repayment of the mortgage debt. *B* sues *A* and *C*, praying as against *A* for a sale

(*u*) *Chandrasanj* v. *Khowal Lal* (1898) 22 Bom 718 [suit for possession against trespassers—appeal]; *Bai Full* v. *Adesang* (1902) 26 Bom 203 [suit for possession against trespassers appeal]; *Joy Gobind* v. *Monmotha* (1906) 33 Cal 580 [suit for rent]; *Upendra Kumar* v. *Sham Lal* (1907) 34 Cal 1020 [suit for rent—appeal]; *Mehdi Hussain* v. *Sughra Begam* (1903) 25 All 206 [suit against mortgagor and surety]; *Penga* v. *Gnanapragasa* (1906) 30 Mad 67 [suit on a mortgage appeal]; *Abdul Aziz* v. *Basdeo Singh* (1912) 34 All 604, 17 I C 89 [suit for rent]; *Zinnah Bibi* v. *Rohila* (1917) Punj Rec no 23 p 90, 33 I C 277 [appeal]; *Shankerbhai* v. *Motilal* (1925) 49 Bom 118, 85 I C 197 ('25) A B [illegible] [appeal suit by joint owners for possession following 22 Bom 718, *supra*]; *Jai* [illegible] *Nath* v. *Kailas Singh* (1925) 4 Pat [illegible] 38 I C [illegible] ('25) A P 480 [suit for rent]; [illegible] (1925) 6 Lah 233 [illegible] [suit against transferees from a Hindu widow]; *Devi Das* v. *Muhammad* (1919) 1 Lah L J [illegible] [appeal suit by tenants-in common for declaration of their interest in certain lands]; *Lajja Ram* v. *Shambhu Nath* (1923) 5 Lah L J 24, 79 I C 402, ('23) A L [illegible] [appeal—suit by tenants-in common under a declaration that defendant entitled to life interest only]; *Santoo Singh* v. *Ranjit Singh* (1923) 5 Lah L J. 203, 69 I C. 495 ('24) A L 93, [appeal—suit for a declaration that plaintiffs entitled to succeed in preference to defendants]; *Mahant Darshan* v. *Bikramajit* (1925) 23 All L J 938, 89 I C 953 ('26) A A 938 [appeal—suit by Mahant against alienees from his predecessor, each alienee having a fixed share in the property].

(*t*) *Lal Chunder* v. *Ganga Das* (1904) 31 Cal 487, 31 I A. 71 [appeal—partnership suit]; *Him Kunwar* v. *Amba Prasad* (1900) 22 All 430 [appeal—suit for joint possession]; *Imam ud Din* v. *Sadarath Lal* (1910) 32 All 301, 5 I C 897 [appeal—suit for pre emption]; *Dharanjit* v. *Chandeshwar* (1907) 11 C W N 504 [appeal—suit to set aside sale of land]; *Khuda Bakhsh* v. *Mathra Das* (1913) Punj Rec no 62 p 234, 18 I C 152 [appeal—suit for joint possession]; *Sardari Lal* v. *Ram Lal* (1920) 1 Lah 225, 57 I C 199 [appeal—suit by heirs of mortgagee]; *Ma Zan* v. *Maung Kyaw* (1923) 1 Rang 139, 74 I C 102 ('23) A R 238 [appeal—suit for partition]; *Wajid Ali* v. *Puran Singh* (1924) 47 All 100, 85 I C 66, ('25) A A 108 [appeal—suit for pre emption]; *Kali Dayal* v. *Nagendra Nath* (1919) 24 C W N 44, 54 I C 822 [appeal—suit for declaration of ownership]; *Sundar Mal* v. *Kashi Ram* (1921) 3 Lah L J 81 [appeal—suit against co-heirs]; *Bhagwan Singh* v. *Jamal* (1921) 3 Lah L J [illegible] [appeal—suit for redemption against several joint mortgagees]; *Nanak Chand* v. *Ram Chand* (1922) 4 Lah L J 189, 77 I C 146 ('22) A L 201 [appeal—suit for redemption by second mortgagee against prior mortgagee and mortgagor]; *Shabbar* v. *Abbas* (1925) All 23 L J 935, 90 I C 321 ('25) A A 152 [appeal—suit for pre-emption].

(*w*) *Dharanjit* v. *Chandeshwar* (1907) 11 C W N 504, *Kali Dayal* v. *Nagendra Nath* (1919) 24 C W N 44, 54 I C 822.

(*x*) *Shankerbhai* v. *Motilal* (1925) 49 Bom 118, 85 I C 197, ('25) A B 122, *Chandarsing* v. *Khimabhai* (1894) 22 Bom 718, *Bai Ful* v. *Adesang* (1902) 26 Bom 203.

(*y*) See *Niranjan* v. *Afzal* (1916) Punj Rec no 123, p 395 at p 403, 34 I C 822 and *Wajid Ali* v. *Puran Singh* (1924) 47 All 100, 85 I C 66, ('25) A A 108.

of the mortgaged property, and as against *C* for a decree for the payment of the mortgage debt. *C* dies pending the suit No application is made by *B* to make the legal representative of *C* a party to the suit within 6 months [now 90 days] from the date of *C*'s death The suit abates as against *C* only, and not as a whole *Mehdi Husain* v *Sugra Begam* (1902) 25 All 206 [In this case it is clear that *B* could have abandoned his claim against *C*, and sued *A* alone on the mortgage]

(2) *A* lets certain lands to *B* and *C* *A* then sues *B* and *C* for arrears of rent, but the suit is dismissed *A* files an appeal from the decree against *B* and *C* *C* dies pending the appeal No application is made by *A* to substitute *C*'s legal representative in *C*'s place within 6 months [now 90 days] from the date of *C*'s death The appeal does not abate as a whole, but against *C* only *Joy Gobind* v *Monmotha* (1906) 33 Cal 680, *Abdul Aziz* v *Basdeo Singh* (1912) 34 All 604, 17 I C 89 *Rai Kashi Nath* v *Kailas Singh* (1925) 4 Pat 53, 89 I C 236, ('25) A P 480 [In this case it is clear that *A* could have sued *B* alone without joining *C* as a party defendant see Contract Act, 1872, s 43]

II. Cases in which suit or appeal held to abate as a whole.— (1) *A*, *B* and *C* are *joint* owners of certain property The property is sold for arrears of Government revenue and purchased by *D* *A*, *B*, and *C* sued *D* to set aside the sale on the ground of fraud and irregularities, and a decree is passed in their favour *D* files an appeal from the decree against *A*, *B*, and *C* *C* dies pending the appeal, but no application is made by *D* to bring *C*'s legal representative on the record within the period of limitation The appeal abates not only as against *C*, but as a whole In this case it is clear that *A*, *B*, and *C* being *joint* owners, the suit would have been bad if *C* were not joined as a party to the suit Further, suppose that the appellate Court heard the appeal in the absence of *C*'s legal representative and it came to the conclusion that the decree of the lower Court should be reversed, the decree could then be reversed only as to *A* and *B*, but it could not be reversed as to *C*, for *C*'s representative is not on the record This conclusion is preposterous, for the case is one in which the decree, if it is set aside, must be set aside as to the sale of the *entire* estate Under no circumstances could it be reversed as to the *unascertained* shares of some *joint holders* [that is, *A* and *B*], and confirmed as to the *unascertained* share of other joint holders [that is, in this case, *C*] The case therefore is one in which the appeal could not proceed in the absence of *C*'s legal representative The appeal therefore must abate as a whole *Dharanjit* v *Chandeshwar* (1907) 11 Cal W N 504 *Kali Dayal* v *Nagendra Nath* (1919) 24 C W N. 44, 54 I C 822, *Bejoy Gopal* v *Umesh Chandra* (1901) 6 C W N 196, *Hadu* v *Lala* (1916) Punj Rec no 41, p 197, 21 I C 951, *Jamna* v *Sarjit* (1919) Punj Rec no 67, p 166, 52 I C 510 According to the Bombay rulings, the appeal abates as against *C* only, and it should be heard on the merits against *A* and *B* The Court may after hearing the appeal on the merits pass such a decree as the case may require *Shankerbhai* v *Motilal* (1925) 49 Bom 118, 85 I C 197, ('25) A B 122, *Chandarsang* v *Khimabhai* (1897) 22 Bom 718

(2) *A* sues his partners *B*, *C*, *D* and *F* for dissolution and for accounts of the partnership A decree is passed in the suit by which it is ordered that a sum of Rs 9 000 should be *contributed by A, B and C, and that out of that sum Rs 1,740 should* be paid to *D* and the rest to *F* *A* appeals from the decree making *B*, *C*, *D* and *F* party respondents *B* and *C* also appeal from the decree making *A*, *D* and *F* party respondents. Pending the appeal *D* dies No application is made by the appellants in either appeal to bring on the record the legal representative of *D* within the period of limitation. The appeal abates as a whole, for it is not a case in which the appeals could proceed in the absence of the legal representative of *D*, the suit being one for partnership accounts; *Raj Chunder* v *Gunga Das* (1904) 31 Cal 487, 31 I A 71, *Moti Lal* v *Ram Narain* (1917) 39 All. 551, 40 I. C. 1006, *Jamnadas* v. *Sorabji* (1891) 16 Bom. 27.

O. 22, r. 4

Inherent power to add legal representative as a party after abatement.—Notwithstanding the abatement of a suit, the Court has the power, in a proper case, to bring on the record the representative of a deceased defendant under s 151 and O 1, r 10 *A* sues *B* and *C* for partition of joint family property A preliminary decree is passed and a commissioner is appointed to make a partition according to the rights declared in the decree *B* then dies, but no application is made to bring his legal representative on the record within the period of limitation. Though the suit abates as regards *B*, the Court may add *B*'s representative as a defendant (z) But no such order can be made if no preliminary decree has been passed (a)

Legal representative of deceased defendant—See s 2 (11), and notes to r 3, "Legal representative of deceased plaintiff on p 734 above

Two or more legal representatives—It is sufficient for the plaintiff in a suit, if defendant dies, to bring one of the heirs on the record as his legal representative, who will then represent the estate of the deceased for the purpose of the suit It is for the other heirs to come in if they wish to be represented in the suit (b) The same rule applies when a respondent dies pending an appeal leaving two or more heirs (c)

Indian Succession Act and legal representative—In the case of a person subject to the Indian Succession Act his legal representatives within the meaning of s 2 (11) of the Code are his executors or administrators and not his heirs (d)

Joint Hindu family and legal representative—See notes to r 3 under the same head on p 735 above

Legal representative already on record in another character—See notes under the same head to r 3 on p 735 above

Effect of decree against legal representative—Where a defendant in a suit dies and the plaintiff under this rule brings a person on the record whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purposes of the suit, and, in the absence of fraud or collusion, the decree passed in the suit as well as the sale in execution thereof will bind the estate of the deceased (e)

Wrong person as legal representative—An application to bring upon the record as legal representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in favour of the person who really is the legal representative (f)

What pleas may be taken by a legal representative—See sub r (2) and notes under the same head to r 3, on p 736 above

Rehearing of suit or appeal—A plaintiff whose suit is heard and dismissed is not entitled to a rehearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal

(z) *Lalmichand* v *Kachubhai* (1911) 35 Bom 337 11 I C 539 *Chandarsing* v *Khimabhai*

(c) *Shib Dutta* v *Sheikh Karim* (1925) 4 Pat 320, 89 I C 290 (25) A P 551

(d) *Barnett Brothers* v *Fowle* (1925) 3 Rang 4 85 I C 325 (25) A R 186 *Framji* v *Adarji* (1894) 18 Bom 337

(e) *Kadir* v *Muthukrishna* (1903) 26 Mad 230, *Jehrabi* v *Bismillabi* (1924) 26 Bom L R 375 80 I C 758 (24) A B 420 *Inp Narain* v *Lachman* (1925) 47 All 466, 87 I C 792, (25) A A 479

(f) *Muhammad* v *Aula* (1920) 42 All 497 61 I C 947 But see *Mallapragada* v *Lingham* (1910) 20 Mad L J 393 5 I C 514 commented upon in *Lakhu* v *Venni* (1923) 44 Mad L J 60 69 I C 529 (23) A M 267

representative of the deceased defendant on the record The right to have the suit re-heard is the right of the legal representative [which he would not care to exercise, the suit being dismissed], and not the right of the unsuccessful plaintiff The same rule applies to appeals (g)

Pro forma defendant.—Omission to bring on record the legal representative of defendant against whom no relief is claimed does not cause the suit to abate (h)

Death of defendant after preliminary and before final decree.—This rule applies where a defendant dies after the preliminary and before the final decree as in a suit for dissolution of partnership and for accounts or a suit on a mortgage (i) See notes to r 3, 'Death of plaintiff after preliminary and before final decree,' on p 736 above

Decree for or against a dead person.—A decree against a person who was dead *at the date of the institution of the suit* is a nullity (j) Similarly a decree passed against a defendant who died *pending the suit* without bringing his legal representative on the record, is a nullity and it cannot be executed against the legal representative (k) A decree passed against a respondent in ignorance of the fact of his death is a nullity (l) A decree in a suit for pre emption passed *against* the defendants respondents in ignorance of the death of one of them, and without bringing his legal representative on the record, is a nullity, as the right to sue in such a case does not survive against the surviving defendants alone (m) Conversely it has been held that a decree passed in a suit for pre emption *in favour of* three plaintiffs who jointly claimed the right of pre emption, in ignorance of the death one of them, and without bringing his legal representative on the record, is a nullity (n) But it has been held that a decree passed by the Privy Council against the respondents in ignorance of the death of one of them is not a nullity, though the legal representative of the deceased was not brought on the record, the decree being an order of the sovereign (o)

O 41, r. 20, and abatement.—O 41, r 20, does not override the provisions of O 22 of the Code (p)

Sub rule (2): Defence appropriate to his character as legal representative.—See notes to r 3 "What pleas may be taken by a legal representative," on p 736 above

O 1, r 8, and abatement.—See notes on p 386 above

Appellate Court and abatement of suit.—An appellate Court has no power under this rule to declare that a *suit*, as distinct from an *appeal*, has abated in a case in which there has been a decree already passed before the death in consequence of which the suit is alleged to have abated took place (q) See r 11 below

Execution proceedings.—This rule does not apply to proceedings in execution of a decree , see r 12 below

(g) *Vellayam v Jothi* (1915) 28 Mad L J 133, 28 I C 83

(h) *Brij Indar Singh v Kanshi Ram* (1917) 44 I A 218 228 45 Cal 94 110 42 I C 43 (1917) Punj Rec No 104 p 393 at p 407 *Alla Baksh v Madho Ram* (1901) 23 All 22 24 *Abdulla v Muhammad* (1920) 2 Lah L. J 601 *Ram Labhaya v Kartar Singh* (1925) 7 Lah L J 466, 92 I C 261, (25) A L. 631

(i) [illegible]

(j) *Mohun v Azeem* (1869) 12 W R 45 *Veerappa v Tindal* (1908) 31 Mad 86, *Rampratab v Gavrishankar* (1923) 25 Bom L. R 7, 11, 85 I C 464 (24) A B 109

(k) *Radha Prasad v Lal Saheb* (1891) 13 All 53 17 I A 150 *Jungli Lall v Laddu Ram* (1919) 4 Pat L. J 240 50 I C 529, *Seshamma v Venkata* (1924) 47 Mad L. J 235 80 I C 397 (24) A M 713

(l) *Narain v Kalu Ram* (1920) 2 Lah L J 144

(m) *Imam-ud Din v Sadarath* (1910) 32 All. 301, 5 I C 897

(n) *Ambika Prasad v Jhinak Singh* (1923) 45 All 286 71 I C 321, (23) A A 211

(o) *Deonandan v Janki Singh* (1920) 5 Pat L J 314, 319 56 I C 322

(p) *Manindra v Bhagabati* (1925) 30 C W N 45 48-49 90 I C. 956 (26) A C. 333

(q) *Sundar v Musammat Kumari* (1919) 41 All. 283, 50 I C 935

O. 22, rr 4, 5

Appeal—It has been held by the High Court of Lahore that an adjudication that an appeal has abated as a whole amounts to a decree and is appealable as such (r) See notes to r 3, "Appeal" on p 737 above

Determination of question as to legal representative

5. [S 367] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Alterations in the rule:—

1 The words where a question arises as to *whether any person is or is not the legal representative*, have been substituted for the words "if any dispute arises as to *who is the legal representative*" The object is to make it clear that this rule applies not only where two or more persons claim to be the legal representatives of a deceased party but where there is only one claimant and his representative character is denied This is in accordance with the interpretation put upon the words of the old section in the undermentioned cases (s)

2 Under the old section where a question arose as to whether any person was or was not the legal representative of a deceased party, the Court had the power either to stay the suit until the question was determined in another suit or to determine the question itself Under the present rule the Court is bound to determine the question itself (t)

3 It is provided by rules 3 and 4 of this Order that once the Court determines who the legal representative is, and the legal representative is brought on the record under those rules, the Court *shall* proceed with the suit" No objection therefore as to the representative character of such person can be entertained after he is brought on the record, *though the hearing of the suit has not commenced* Under the old section the objection could be taken at or before the first hearing of the suit" But the words "at or before the first hearing have been omitted in the present rule, the object being that the objection as to whether any person is or is not the legal representative of a deceased party should be taken before such person is made a party under rules 3 and 4 above (u) But if a person alleging himself to be a legal representative is brought on the record as such *without notice to the other side* the other side is entitled to raise the objection at the hearing (v)

"Legal representative"—See s 2, cl (11), and notes to r 3, "Legal representative of deceased plaintiff" on p 731 above

"Shall be determined"—If the Court of first instance fails to determine the question as to who is the legal representative, it is necessary for the appellate Court to determine it (w)

Objection as to representative character, when to be taken—See notes above, "Alterations in the rule," No 3.

(r) *Udmi* v *Hira* (1920) 1 Lab 582 60 I C 111

(s) *Dulx* v *Beepathee* (1894) 17 Mad 209, 210 *Subbaya* v *Saminadayyar* (1895) 18 Mad 496 *Hanwant Singh* v *Ram Gopal* (1908) 30 All 348

(t) *Raoji* v *Anant* (1918) 42 Bom 535 542, 46 I C 750

(u) See *Meenatchi* v *Ananthanarayana* (1903) 26 Mad 224, *Balabai* v *Ganesh* (1903) 27 Bom 162, 187 In both these cases the objection was taken at a late stage of the hearing

(v) *Pakhur* v *Vemi* (1923) 44 Mad. L. J 60, 69 I C 529 ('23) A M 367

(w) *Taja* v *Devi* (1922) 4 Lab L. J 314

Effect of order under this rule.—This rule provides a summary procedure for appointing a person to be the legal representative of the deceased plaintiff *for the purpose of prosecuting the suit* Hence an order admitting a person to be the legal representative for the purpose of prosecuting the suit does not operate as a final determination of the representative character of such person, in other words, it does not operate as *res judicata* (x) This rule, it is conceived, must be read as if it contained the words "for the purposes of rules 3 and 4' after the word 'shall Compare s 47, sub s (3)

Power of Court to correct its order—If an *ex parte* order is made under this rule, and it is found to be a mistaken order, the Court has the power to correct it (y)

Appeal—No appeal lies from an order under this rule (z) But a party aggrieved by the order may object to the order in an appeal from the decree [s 105], provided he was a party to the decree (a) But the order will not be set aside unless it is shown that it has affected the decision of the case (b) See notes to r 3, 'Appeal, on p 737 above

6. [*New.*] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place

No abatement by reason of death after hearing

No abatement by reason of death after hearing.—This rule is new It gives effect to the decisions in the undermentioned cases (c) See notes to s 47, case (4), p 129 above

In a mortgage suit the "judgment ' referred to in this rule is the judgment supporting the final decree and not the judgment supporting the preliminary decree, and the "hearing" referred to in the rule is the hearing of issues upon which judgment is to be delivered determining the plaintiff s right to a final decree The result is that this rule does not apply where a party to a mortgage suit dies before the application for a final decree is made and heard (d) See notes to r 3, "Death of plaintiff after preliminary and before final decree," on p 736 above, and notes to r 4, " Death of defendant after preliminary and before final decree," on p 743 above

7. [S. 369.] (1) The marriage of a female plaintiff or *defendant shall not cause the suit to abate*, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

Suit not abated by marriage of female party

(x) *Parsotam* v *Janki* (1906) 28 All 109
(y) *Vatsalabai* v *Sambhaji* (1919) 43 Bom 163, 47 I C 757
(z) *Dumi Chand* v *Arja* (1915) 37 All 272 28 I C 298 *Ram Sarup* v *Moti Ram* (1920) 1 Lah 493 57 I C 737
(a) *Seo Har Narain* v *Kharag* (1887) 9 All 447 *Sankali* v *Murlidhar* (1890) 12 All 200, *Vithu* v *Bhima* (1890) 15 Bom 145
(b) *Balabhai* v *Ganesh* (1903) 27 Bom 162
(c) *Surendro* v *Doorga Soondery* (1892) 19 Cal 513 538 19 I A 108 *Ramacharya* v *Anantacharya* (1897) 21 Bom 314, *Chelan*

O. 22, rr. 7, 8.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Liability for wife's debts.—See Pollock and Mulla's Indian Contract Act, s. 187, and notes thereto.

When plaintiff's insolvency bars suit

8. [S. 370.] (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise direct) to give security for the costs thereof within such time as the Court may direct.

Procedure where assignee fails to continue suit or give security

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Insolvency of plaintiff—This rule lays down the procedure to be followed when a *plaintiff* becomes insolvent

Insolvency of defendant.—As to the case of the insolvency of a *defendant* in a presidency town it is now *provided by sec 18 of the Presidency Towns Insolvency Act*, 1909, that where a defendant to a suit has been adjudged an insolvent, the Court may, at any time after the making of the order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court It is further provided by the same section that any Court in which proceedings are pending against a debtor may, on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue *on such terms* as it may think just. As to cases governed by the Provincial Insolvency Act, 1920, see sec 29 See also notes to r 10 below "*Insolvency of the defendant* joinder of *Official Assignee*"

"Insolvency"—This rule does not apply to a case where there has been an application to declare the plaintiff an insolvent and a vesting order has been made, but the *proceedings are subsequently annulled*, and the party is not declared an insolvent. Therefore in such a case, where a suit has been dismissed for the non appearance of the

plaintiff or the Official Assignee on the date fixed for the hearing it is O 9, r 9, that applies (e)

Limitation.—There is no limitation provided for the Official Assignee to appear and apply for substitution Again, where the plaintiff's name is struck off and the Official Assignee is substituted for the insolvent plaintiff, and the adjudication is thereafter annulled, there is no limitation for the plaintiff to appear and apply for the restoration of his name on the record (f)

Insolvency of pauper applicant.—In the case of a pauper who has applied for leave to sue as a pauper, the present rule can be applied only after leave to sue is granted, but not before (g)

Costs payable by plaintiff prior to his insolvency.—The general principle is "that a person who comes in by representation, whether it be an assignee in bankruptcy or as an executor or administrator of an original plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid" It has accordingly been held that where a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay (h)

Costs of successful defendant.—Where a suit is continued by the assignee in bankruptcy, and the defendant obtains judgment with costs, the defendant is entitled to be paid all his costs in full, and not merely the costs as from the date of insolvency with liberty to prove for the costs previously incurred (i)

Practice—As to the form of the order under this rule, see the undermentioned case (j)

Execution proceedings.—This rule does not apply to proceedings in execution. See r 12 below.

Cause of action arising after insolvency.—*A*, an undischarged insolvent, sues *B* for brokerage earned by him subsequent to his adjudication. *B* applies for security for costs If the Official Assignee has not intervened, no order should be made for security for costs Even if he has intervened, no order should be made if the amount of the claim exceeds the plaintiff's liability (k)

Effect of abatement or dismissal

9. [Ss. 371, 372A] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is

(e) *Amrita Lal* v *Pakhali* (1900) 27 Cal 217
(f) *Khunni Lal* v *Kameshar* (1921) 43 All 621, 64 I C 52
(g) *Chidambaram* v *Kother* (1925) 48 Mad L J 491, 87 I C 720, (25) A M 791
(h) *Cook* v *Hatheway* (1869) L R 8 Eq Cas. 612
(i) *London Drapery Stores in re* [1898] 2 Ch 634, following *Boynton* v *Boynton* (1879) 4 App Cas 733 (a case of executors). See also *Dadoobhoy* v *Valu* (1899) 1 Bom L R 823
(j) *Lekhraj* v *Shamlal* (1892) 16 Bom 404.
(k) *Murray* v *East Bengal Mahajan Flotilla Co Ld* (1919) 46 Cal 156, 48 I C 622.

O. 22, r 9 proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub rule (2)

Sub rule (1) No fresh suit on the same cause of action —This rule prohibits a fresh suit on the *same* cause of action As to the meaning of Cause of action see notes to s 20, Cause of action p 90 above

A a member of a joint Hindu family sues *B* for redemption of a mortgage of ancestral property executed by *A* to *B* A then dies *A* s heirs are not brought on the record and the suit abates Subsequently *A* s son and grandsons institute another suit against B for redemption of the same mortgage There is no indication that *A* s suit was brought by him in a representative capacity that is, as representing the joint family The second suit is not barred (*l*)

Sub rule (2) Who may apply under this rule —The following persons may apply under sub r (2) namely (1) *the plaintiff* where a suit has abated under r 4 (3) (*m*) (2) *the legal representative of a deceased plaintiff* where a suit has abated under r 3 (2) (3) *the assignee of an insolvent plaintiff* where a suit is dismissed under r 8 (2)

Limitation —An application under this rule for an order to set aside an abatement *must be* made within 60 days from the date of the abatement (Limitation Act, 1908 sch I art 171) Similarly an application for an order to set aside the dismissal of a suit must be made within 60 days from the date of the order of dismissal (*Ib*, Art. 172) If no application is made within 60 days the Court has the power under s 5 of the Limitation Act to admit the application after the expiry of that period if the applicant satisfies the Court that he had sufficient cause for not making the application within 60 days See sub r (3)

Sub rule (2) 'Sufficient cause '—An application to bring upon the record the legal representative of a deceased *plaintiff* must be made within 90 days *from* the date of the death of the deceased (Limitation Act 1908 sch I art 176) An application to bring upon the record the legal representative of a deceased *defendant* must also be made within 90 days from the date of the death of the deceased (*Ib* Art 177) If no application is made within the prescribed period, the suit abates in the case of a deceased plaintiff under r 3 (2) and in the case of a deceased defendant under r 4 (3) But the plaintiff or the person claiming to be the legal representative of a deceased plaintiff as the case may be may apply under r 9 (2) for an order to set aside the abatement The application to set aside the abatement must be made within 60 days from the date of the abatement If no application is made within 60 days the Court may under s 5 of the Limitation Act admit the application if the applicant satisfies the Court that he had sufficient cause for not making the application within 60 days see sub r (3)

(*l*) *Ramchand v Shripatrao* (1916) 40 Bom 248 33 I C 771
(*m*) *Secretary of State v Jawahar Lal* (1914) 36 All 235 23 I C 48 *Brij Indar Singh v Kanshi Ram* (1917) 44 I A 218 227 45 C 94 108-109 (1917) Punj Rec no 104 p 394 42 I C 43

O 22, r. 9.

An abatement ought not to be set aside as a matter of course or lightly The reason is that when a suit abates the setting aside of the abatement, deprives the party in whose favour the abatement operates of a valuable right Under sub r (2) the applicant has to satisfy the Court that he was prevented by some sufficient cause from making the *application to bring the legal representative of the deceased upon the record* within 90 days from the date of the death of the deceased Under sub r (3) the applicant has to satisfy the Court that he had sufficient cause for not making the *application to set aside the abatement* within 60 days from the date of abatement (n) The two sub rules are distinct In dealing with an application under sub r (2) the Court has to decide whether there was sufficient cause for not bringing the legal representative of the deceased upon the record within 90 days from the date of the death of the deceased independently of sub r (3) (o)

Ignorance of the death of the deceased (p), or of the whereabouts of the legal representatives of the deceased (q) may be a sufficient cause for excusing the delay unless the ignorance was due to negligence Where the defendants appealed from a decree passed against them and one of the defendants died pending the appeal, and the legal representative of the deceased was under the impression that the co defendants were prosecuting the appeal and challenging the validity of the entire decree, it was held that it was a sufficient cause for excusing the delay in making the application to bring him on the record in place of the deceased (r)

Sub rule (3)—See notes above, Sub rule (2) Sufficient Cause

Whether formal order of abatement necessary before abatement can be set aside—The words in s 371 of the Code of 1882 were may apply for an order to set aside *the order* for attachment The words set aside the abatement have now been substituted for the words set aside *the order* for abatement ' The reason is that under the present Code a suit or an appeal abates automatically when no application is made within the prescribed time to bring upon the record the legal representative of a deceased plaintiff or appellant It is not necessary to make an *ord r* that the suit shall abate, note the words shall abate in r 3 (2) and r 4 (3) above This is the view taken by the High Court of Lahore (s) and in one case by the High Court of Allahabad (t) In a later case, however, the High Court of Allahabad held that the abatement of a suit or appeal does not take place automatically, but it is necessary that there should be a formal order of the Court declaring the suit or appeal to have abated and that unless there is such an order no application can be entertained under sub r (2) to set aside the abatement (u) In a still later case, however it was assumed by the same High Court that the abatement took place automatically (v) See notes to r 3, "Alterations in the rule No 2, on p 732 above

Substitution without setting aside abatement—The Patna High Court has held that where a sole defendant dies and the suit has abated no order can be made for substituting his legal representative in his place until the abatement has been set aside under this rule (w) The Bombay High Court would treat the omission to set aside the abatement as merely a formal defect (w2)

(n) *Sarat Chandra* v *Mazhar Stone & Lime Co* (19[illegible]) 49 Cal 6[illegible] 67 I C 917 ([illegible]) A C 33[illegible]
(o) *Lachmi* v *Muhammad* (1920) 4 All 540 59 I C 903
(p) [illegible]
(q) *Munshi Ram* v *Radha* (19[illegible]) 6 Lah L J 19[illegible] 80 I C 694 (24) A L 467
(r) *Chandra Kumar* v *Sandhyamani* (1909) 36 Cal 418 2 I C 419
(s) *Ram Gopal* v *Har Kishan* (1925) 7 Lah L J 517 519 88 I C 4 8 (25) A L 598.
(t) *Lachmi* v *Muhammad* (1920) 42 All 540 59 I C 903
(u) *Gujrati* v *Sital* (1922) 44 All 459 66 I C 554 (22) A L 209
(v) *Sadiq Ali* v *Anwar Ali* (1923) 45 All 66 at p 68 70 I C 805 (23) A A 44 last three lines
(w) *Bibi Khatima* v *Official Liquidator* (1923) 2 Pat 164 (23) A P 417
(w2) *Lakshmibai* v *Yeshwant* (1923) 4[illegible] Bom 9[illegible]

O. 22, rr. 9, 10.

Minor and abatement.—Where an application on behalf of a minor to be brought on the record in place of his deceased father who was the plaintiff in the suit was dismissed under r 3 above as being time barred, and the minor then made a second application to be brought on the record and that application was also dismissed, it was held that the lower Court should have in the circumstances of the case treated the second application as one under r 9 to set aside the abatement and that it should have in the circumstances of the case set aside the abatement (x)

Remand.—When the High Court in second appeal declares the first appeal to have abated, it has no power to set aside the abatement but should remand the case to the lower Appellate Court for disposal under this rule (y)

Cause of action in revived suit.—Where an abatement is set aside under this rule the suit is revived No fresh cause of action can be imported into the revived suit, the reason being that the proceedings in the revived suit are a continuation of the proceedings in the original suit (z)

Appeal.—An appeal lies under the Code from an order refusing to set aside the abatement or dismissal of a suit, O 43, r 1 (k) But no appeal lies under the Code from an order *setting aside* an abatement But it has been held that if the order setting aside the abatement is passed without jurisdiction and is really not one under r 9, it is appealable or at least open to revision (a)

Letters Patent Appeal.—The High Court of Allahabad has held that an appeal lies under cl 10 of the Letters Patent of that Court (corresponding with cl 15 of the Letters Patent of the High Court of Calcutta from an order of a single judge of the High Court refusing to set aside the abatement of an appeal The decision proceeds upon two grounds, namely (1) that an order rejecting the application to set aside an abatement would if unappealable, be a *final* order determining once and for all the rights of parties and (2) that an appeal was allowed by the Code to the High Court from an order of a District Judge refusing to set aside an abatement of a suit, and it would be strange if there was permission to appeal, as undoubtedly there was, from the lower appellate Court to the High Court, that there should not also be the right of appeal not merely in a suit but when the question arose in a Court of appeal (b)

The High Court of Calcutta has held that an order *setting aside* the abatement of a suit is a judgment within the meaning of cl. 15 of the Letters Patent, and is appealable as such, the reason given being that when a suit as abated, the setting aside of the abatement deprives the party in whose favour the abatement operates of a valuable right (c)

10 [S 372] (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

Procedure in case of assignment before final order in suit.

(x) *Vijaysing v Shivajirao* (1924) 26 Bom. L R 378 80 I C 76, (24) A B 416

(y) *Amarsangji v Desai* (1925) 27 Bom L R 91, 86 I C 31, (25) A B 236

(z) *Sham Chand v Bhayaram* (1895) 22 Cal 92

(a) *Seshanma v Venkatta* (1924) 47 Mad L J. 235 80 I C 397, (24) A M 713

(b) *Sadiq Ali v Anwar Ali* (1923) 45 All 65, 70 I C 805, ('23) A A 44

(c) *Sarat Chandra v Mathar Stone & Lime Co* (1922) 49 Cal 62 67 I C 917, ('22) A C 335

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1). **O. 22, r. 10**

Alterations in the rule—(1) The words "either in addition to or in substitution for the person from whom it has passed" which occurred in s. 372 of the Code of 1882 after the words "interest has come or devolved" have been omitted. It would seem to follow from some of the observations of their Lordships of the Privy Council in the undermentioned case (*d*), that the effect of the omission of those words was that a transferee *pendente lite* cannot under this Code be *added* as a party but that he may be *substituted* for his transferor. It is not clear whether their Lordships intended to go that length. If they did a difficulty would arise in every case where a mortgagee *pendente lite* applied to be joined as a party.

(2) Sub-rule (2) is new. See notes below under the heading "Sub rule (2)."

Other cases of assignment, creation or devolution of interest—It will be observed that the preceding rules deal with certain specified cases of assignment, creation and devolution of interest. Rule 8 deals with the case of assignment on the insolvency of a plaintiff, rule 7 with the case of creation of an interest in a husband on marriage, and rules 2, 3 and 4 with the case of devolution of interest on the death of a party to a suit. The present rule provides for cases of assignment, creation and devolution of interest *other than* those mentioned above (*e*).

Assignment of interest—This includes a sale, or a mortgage, or a lease (*f*) of the property in suit.

Devolution of interest—The successor to the head of a mutt (*g*) or to the trustee of a temple (*h*) is entitled to continue or defend a suit or appeal under this rule. Where during the pendency of a suit instituted by the manager of an encumbered estate, the estate is released from management and restored to the owners it is open to the owners to apply to be made plaintiffs in place of the manager under this rule (*i*). See ill (7) on p 753

"Interest"—The word "interest" in this rule means interest in the property, the subject matter of the suit (*j*).

Illustrations

1 *A* sues *B* for recovery of possession of certain property. Pending the suit, *A* sells his interest in the property to *C*. *C* may apply under this rule to have his name substituted as plaintiff in *A*'s place.

2 *A* sues the firm of *B C*. to recover Rs 5 000. Pending the suit the firm of *B C*. transfers all its assets and liabilities to the firm of *X Y*. Thereupon *A* applies to the Court under this rule to have the firm of *X Y* joined as a party defendant. The firm of *X*.*Y*. should not be joined as a party, for the assignment cannot be said in any sense to be an assignment of the defendant's interest in the *subject matter of the suit*. *Harish Chandra* v *Chandpore Co*, *Ltd* (1903) 30 Cal 961. [Here the subject matter of the suit is the amount claimed by *A*, namely, Rs 5 000.]

(*d*) *Manindra* v *Famlal* (1922) 49 I A 220 226, 1 Pat 581 588
(*e*) *Bhugwan Das* v *Nilkanta* (1904) 9 C W N 171 173
(*f*) *Ram Kumar Lal* v *Raja Mukund Sahi* (1916) 1 Pat L J 596 39 I C 237
(*g*) *Ratnam* v *Annamalai* (1924) 46 Mad L J

O. 22, r. 10. **Insolvency of defendant: joinder of Official Assignee.**—This section applies to the devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder (*k*)

(*a*) *A* sues *B* for recovery of possession of certain immoveable property The defence is that *B* is the full owner of the property Pending the suit *B* is adjudged an insolvent and his property vests in the Official Assignee This is a case in which the Court may add the Official Assignee as a party defendant under this rule The reason is that the property which forms the *subject matter of the suit* is part of the property which has passed to the Official Assignee under the vesting order see *Panithavelu* v *Bhashyam* (1902) 25 Mad 406 If the Official Assignee refuses to defend the suit, the insolvent is not entitled to defend the suit independently of the Official Assignee *Tribhovandas* v *Abdulally* (1914) 39 Bom 568 28 I C 506 As to the old law on the subject, see the undermentioned case (*l*)

(*b*) *A* sues *B* to recover Rs 5,000 Pending the suit *B* is adjudged an insolvent, and his property vests in the Official Assignee under a vesting order made by the Insolvency Court The Official Assignee should not be added as a party defendant for though the vesting order has the effect of an *assignment* of the estate of the insolvent to the Official Assignee it could not be said when an action purely *in personam* (as distinguished from an action relating to the insolvent's *property*) is brought against the insolvent that any part of the *subject matter of the suit* has been assigned to the Official Assignee see *Miller* v *Birth Sing* (1891) 18 Cal 43 *Channmull* v *Ranee Soondery* (1895) 22 Cal 259 *Panithavelu* v *Bhashyam* (1902) 25 Mad 406, 421 See notes above, "Interest

Note—It will be noted that the above illustrations are confined to the case of an insolvent *defendant* The reason is that the case of an insolvent *plaintiff* is dealt with in r 8, and the present rule deals with cases of assignment *other* than those specified in the preceding rules

"During the pendency of a suit."—These words mean before a *final* decree or order has been passed or made in the suit [see the marginal note to the rule] Hence the provisions of this rule apply if the assignment creation or devolution of interest takes place before a *final* decree or order is passed or made in the suit In the case of an appeal the provisions of this rule apply if the assignment etc takes place before a *final* decree or order is passed or made in the appeal [see r 11 below] Though a suit may be compromised and the terms of the compromise filed in Court, the suit will be deemed to be pending until a decree is passed in terms of the compromise Until the decree is passed a transferee *pendente lite* is entitled to apply under this rule to be joined as a party (*m*) If he is joined as a party he is entitled to object to a decree being passed in terms of the compromise arrived at between his transferor and the opposite party (*n*)

Illustrations

1 A decree is passed in a suit respecting a will that a scheme should be settled Before the scheme is settled and a final order is made, the interest of one of the parties to the suit passes by devolution to *A B* *A B* may be brought on the record under this rule *Gocool Chunder* v *Administrator General* (1880) 5 Cal. 726

2 The devolution of the interest of a party to a suit after an order has been made directing the Commissioner to take accounts but before the passing of the *final* decree is within this rule *Keshub Roy* v *Krishto Mitter* (1903) 30 Cal 609

(*k*) *Panithavelu* v *Bhashyam* (1902) 25 Mad 406 413

(*l*) *Hunt in re* (1864) 1 Bom H C.A C 201

(*m*) *Jalshan* v *Nikunja Moni* (1923) 27 C W.N 755 80 I C 533 ('24) A C 183

(*n*) *Veeraraghava* v *Subba* (1920) 43 Mad. 37 53 I C 423

3. The assignment of the interest of a mortgagee in a suit for sale of the mortgaged property after a preliminary decree for sale but before the passing of the *final* decree, is within this rule. *Chunni Lal* v. *Abdul ... Khan* (19..) 23 All. 331.

4. In a suit by A against B for the recovery of certain immoveable property a decree is passed for A. B appeals from the decree. *Pending* the appeal, A sells the property to C. C may be made a party to the appeal under this rule. *Pi... v. John* (18..) 9 Bom. 1.1; *Pandit Chand* v. *Ram Sarup* (18..) 18 All. 28.

5. A sues B to recover Rs. 5,000, and a decree is passed for him. B appeals from the decree. *Pending* the appeal, A assigns the decree to C. C may be made a party to the appeal under this rule. *Durga ...*, *in the matter of* (1900) 22 All. 231.

6. A sues B for redemption of a mortgage. A preliminary decree for redemption is passed, and a time is fixed within which the mortgage money is to be paid by A into Court. The money is not paid by A within the time fixed by the Court, nor is any application made by B under O. 34, r. 8 (4) for a decree for sale. A then sells the mortgaged property to C. This amounts to an assignment *pending* the suit, so as to entitle C to be brought on the record as a party under this rule. *Muhammad* v. *Jiva* (1917) 37 All. 220, 27 I. C. 771.

7. A sues B for possession of certain land and mesne profits. Pending the suit B lets the land to C and delivers possession to him. A decree is then passed for A for possession and mesne profits. After the decree C at B's request delivers possession of the land to A. A then applies in execution proceedings to join C as a party to the suit so as to compel C to account for profits which he had received from the land. C should not be joined as a party, for it cannot be said that B's liability for mesne profits has devolved from him to C within the meaning of this rule. *Mina... v. Ram Lal* (1922) 49 I. A. 220 ... at 381.

Application under this rule when to be made.—This rule only governs an application to continue a suit. An application by a transferee of the interest of a party made *after the termination* of a suit is not within this rule ( ). But where an appeal is preferred from the decree, an application under this rule can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial Court (*p*).

Illustration

A sues B to establish his right to certain property. Pending the suit B mortgages the property to C. A decree is then passed in favour of A. B does not appeal from the decree. C being desirous of appealing from the decree applies to be made a party to the suit. The suit having terminated, C should not be joined as a party to the suit. He may, however, appeal from the decree under s. 146 as a person claiming under B within the meaning of that section. *S...aramaswami* v. *Lakshmi* (1918) 41 Mad. 510, 48 I. C. 840.

Laches.—An applicant under this rule is not entitled to leave to be joined as a party as a matter of right. The Court has a discretion in the matter, and it may refuse leave on the ground of laches or delay (*q*).

Sub-rule 2.—A obtains a decree against B. B appeals from the decree. *Pending* the appeal C, who holds a decree against A, attaches the decree obtained by A against B. C may be made a party under this rule. See O. 21, r. 53.

O. 22, rr. 10, 11.

No new suit —It is clear from the terms of this rule that when a party is brought on the record under this rule, there is, as regards him, no new suit at all He is brought on the record as a party to a suit that has already been instituted, and that suit is continued by or against him His substitution as a party does not initiate, as regards him, a new proceeding (r) See notes below, "Limitation"

Trial Court can bring assignee on record pending appeal.—The Court of first instance has jurisdiction to bring on record the assignee of a party to the suit, though there may be an appeal pending in the appellate Court from an interlocutory order made by the Court of first instance (s)

Transfer of decree —This rule does not apply to transfers of decrees O 21 r 16, applies to such transfers (t)

Doctrine of lis pendens —In this connection may be noted the provisions of s 52 of the Transfer of Property Act, 1882, which runs as follows "During the active prosecution of a contentious suit or proceeding in which any right to any *immoveable* property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose"

Limitation —The right to apply under this rule accrues from day to day, and is not therefore barred by lapse of time An application therefore to be added or substituted as a party under this rule may be made at any time (u)

Appeal —Under the Code of 1882 an appeal was allowed from an order *giving* leave to be joined as a party, but none from an order refusing such leave (v) Under the present Code an appeal lies from an order *giving* or *refusing* to give leave [O 43, r 1, cl (l)] The High Court of Madras has held that an order purporting to be passed under this rule is appealable though on the facts the order should not have been passed under this rule (w)

Letters Patent Appeal —An order *refusing* leave to be joined as a party is a 'judgment within the meaning of cl 15 of the Letters Patent, and is appealable as such (x)

11 [S. 582, 1st para] In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Application of Order to appeals

(r) *Chunni Lal* v *Abdul Ali* (1901) 23 All 331, 335

(s) *Bhogilal* v *Darasha* (1923) 25 Bom L R 308, 75 I C 743, (23) A B 303

(t) *Musammat Gulab Kuer* v *Syed Mohamed* (1921) 6 Pat L J 358

(u) *Kedarnath* v *Harra Chand* (1882) 8 Cal 420, *Keshub Roy* v *Kristo Mitter* (1903) 30 Cal 609, *Rajani* v *Raja Jyoti* (1922) 27 C W N 710, 75 I C 255, (24) A C 90

(v) *Jamna Bibi* v *Sheikh Jan* (1902) 24 All 532.

(w) *Mutthiah* v *Govinddoss* (1921) 44 Mad 919

(x) *Commercial Bank of India* v *Sabju Saheb* (1901) 24 Mad 252

12. [*New.*] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. O. 22, r. 12.

Application of Order to proceedings.

Execution proceedings.—Rules 3 and 4 relate to the *death* of a party pending a suit or appeal. Rule 8 relates to the insolvency of a plaintiff pending a suit and the insolvency of an appellant pending an appeal. The present rule provides that nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree. It sets at rest the conflict on the question whether the provisions relating to the abatement of suits and appeals apply to proceedings in execution.

Illustrations

(1) *A* sues *B*. The suit is dismissed. After the dismissal *A* dies leaving a will of which *C* is the executor. *C* may appeal from the decree without applying under r. 3 to be substituted for *A*. The reason is that *A* having died *after the termination* of the suit, r. 3 does not apply: see *Ramanada* v. *Minatchi* (1881) 3 Mad. 236.

(2) *A* sues *B*, and obtains a decree against him. *A* then applies for execution of the decree against *B*. *B* dies during the pendency of the execution proceedings. Rule 4 does not apply. *A* should proceed under s. 50 and O. 21, r. 22.

(3) *A* sues *B*, and obtains a decree against him. *A* then applies for execution of the decree against *B*, and an order is made in execution proceedings. *B* appeals from the order. Pending the appeal *B* dies. The appeal being one from an order *in execution proceedings*, r. 4 does not apply, and there can be no abatement of the appeal.: *Mir Khan* v. *Sharfu* (1923) 5 Lah. L. J. 163, 74 I. C. 577, ('23) A. L. 560.

(4) *A* obtains a decree against *B*. After the decree *B* is adjudicated an insolvent. *A* then applies for execution of the decree against the Official Assignee. *A* should proceed under O. 21, r. 22.

Mesne profits.—*A* obtains a decree against *B* for possession and mesne profits. *B* dies pending the inquiry into mesne profits. Under the Code of 1882 an inquiry as to mesne profits was a proceeding in execution, and hence there could be no abatement of the proceeding under that Code: *Kedarnath* v. *Anant Prasad* (1925) 52 I. A. 188, 4 Pat. 507, 88 I. C. 482, ('25) A. PC. 117. Under the present Code an inquiry as to mesne profits is an inquiry *pending* the suit; hence r. 4 applies and *B*'s legal representative should be brought on the record. See notes to O. 20, r. 12, "Inquiry as to mesne profits no longer a proceeding in execution," on p. 576 above.

Death of party after preliminary and before final decree.—See notes to r. 3, on p. 736 above, and notes to r. 4 on p. 743 above.

ORDER XXIII.

Withdrawal and Adjustment of Suits.

1. [S. 73.] (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. O. 23

Withdrawal of suit or abandonment of part of claim.

O. 23, r. 1. suit is a formal defect, and leave may be granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (*h*) But leave should not be granted where the suit is deliberately undervalued to save Court fees and to bring it in a Court of a lower grade (*i*). Leave to withdraw may also be granted where a material document is not properly stamped (*j*), or registered (*k*), for these are in the nature of formal defects Where a plaintiff institutes two suits for rent, and then applies for leave to withdraw the suits with liberty to file a fresh suit consolidating the two claims to avoid the danger of the second suit being held barred under the provisions of O 2, r 2, the case is one of a formal defect, and leave may be granted under sub r (2) (*l*) The institution of a suit in a Court which has no jurisdiction to entertain the suit is a formal defect, or at least a defect analogous to a formal defect so as to bring the case under sub r (2) (b) In such a case, however, the Court should not act under this rule, but return the plaint under O 7, r 10, to the plaintiff to be presented to the proper Court (*m*) But O 7, r 10, does not apply to Chartered High Courts In the case, therefore, of a Chartered High Court, the Court may, it seems, act under this rule

"Other sufficient grounds".—Sec 97 of the Code of 1859 ran as follows —

> "If the plaintiff at any time before final judgment satisfies the Court that there are *sufficient grounds* for permitting him to withdraw from the suit with liberty to bring a fresh suit for the same matter, it shall be competent to the Court to grant such permission on such terms as to costs or otherwise as it may deem proper"

It is to be noted that sec 97 of the Code of 1859 did not contain the words "some formal defect which occur in the present Code In *Watson* v *Collector of Rajshaye* (*n*) the plaintiff sued the defendant to set aside an auction sale of a putnee Taluk for arrears of rent A preliminary issue was framed whether the plaintiff was in a position to sue A commission was issued for the examination of witnesses, but it was returned unexecuted as the witnesses had not been presented for examination Upon this the Court finding no excuse for the plaintiff's neglect dismissed the suit for want of evidence, but with a reservation that the order made was not to be a bar to the plaintiff from proceeding as if the action had not been brought The plaintiff then brought a fresh suit in respect of the same cause of action. The High Court of Bengal held that the second suit was barred as *res judicata* under s 2 of the Code of 1859 This decision was affirmed on appeal by the Privy Council. In the course of the judgment their Lordships of the Privy Council, referring apparently to sec 97 of the Code of 1859, said as follows —

> "There is a proceeding in those Courts (Courts of India) called a non suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit But that seems to be limited to cases of misjoinder either of parties or matters in contest in the suit; to cases in which a material document has been rejected, because it has not borne a proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit In all those cases the suit fails *by reason of some point of form*, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit except in the particular instance that is now before them."

(*h*) (1869) 13 M I A 160, 170, 3 Beng L R P C 48 49, *supra* *Kannuswami* v *Jagathambal* (1918) 41 Mad 701, 707, 46 I C 265

(*i*) (1918) 41 Mad 701, 707 709, 46 I C 265, *supra*

(*j*) (1869) 13 M I A 160, 170, 3 Beng L R P C. 48 49, *supra*

(*k*) *Muser Debea* v *Bulldeo* (1873) 5 N-W P 116

(*l*) *Sahib & Co* v *Adamsa* (1924) 2 Rang 66, 81 I C 465 (24) A R. 249

(*m*) (1918) 41 Mad 701, 708 46 I C 265, *supra*

(*n*) (1869) 13 M I.A 160, 3 Beng L R P C 48

O. 23, r. 1.

The passage cited above indicates their Lordships view of the meaning of the words "sufficient grounds" in sec 97 of the Code of 1859 This decision was followed by the High Court of Bengal in *Madan Ram* v *Izrail* (o) where it was held that a plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issues have been joined and he has failed to produce the evidence to support his claim *Madan Ram's* case was also a case under the Code of 1859 The words "by reason of some formal defect" appeared for the first time in sec 373 of the Code of 1877 The decision in *Watson's* case was also followed by the High Court of Calcutta in *Kharda Co Ltd* v *Doorga Charan* (p) a case under the present Code The question in that case was whether a plaintiff can be permitted to withdraw from the suit with liberty to bring a fresh suit after he has adduced all his evidence and finds that the evidence is insufficient to establish his case It was contended for the plaintiff that the words "other sufficient grounds" were wide enough to entitle the Court to allow the plaintiff to withdraw from the suit *under any circumstances that might be deemed sufficient by the Court*, but this contention was overruled, and it was held that the Court had no power to allow a plaintiff to withdraw from the suit after evidence had been adduced, and the evidence was found to be insufficient to support his case In the course of his judgment Mookerji, J, after referring to clauses (a) and (b) of sub rule (2) said 'The intention plainly is that a ground indicated in clause (b) must be *of the same nature as the ground specified in clause* (a)" This decision has been followed by the same High Court in subsequent cases (q) The High Courts of Patna (r), and Lahore (s) have followed the Calcutta decisions The High Court of Bombay held in some cases that the Court should not allow a suit to be withdrawn after the parties were ready for trial "*if such withdrawal might operate to the prejudice of the defendant*" (t) But this view has been dissented from in a recent case in which the Court followed the Calcutta decisions (t2) In an Allahabad case (u), Richards, C J, observed that "a Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits" In Madras, there is a conflict of opinion whether the words "other sufficient grounds" mean grounds analogous to a "formal defect" as held in Calcutta or include grounds which may not be analogous to a "formal defect" In one case (v) the High Court held that the words "other sufficient grounds" must be *ejusdem generis* with the words 'some formal defect,' and that the Court had no power under this rule to give leave to the plaintiff after a substantial portion of his evidence had been heard In a later case (w), however, Sadashiva Ayyar, J, expressed the opinion that the words 'other sufficient grounds" were not *ejusdem generis* with the words "some formal defect' and that they included grounds which might not be analogous to a' formal defect," and that even if they did not, objection to a suit on the ground of jurisdiction or insufficient Court fees were analogous to 'formal defects' It will be seen, from what has been stated above, that the majority of Judges are in favour of the view that the mere inability of the plaintiff to prove his case is not a "sufficient ground' within the meaning of this rule for giving him leave to withdraw with liberty to institute a fresh suit

(o) (1874) 21 W R 291 (Civ Rul.)
(p) (1909) 11 Cal L J 45 5 I C 197
(q) *Mabuna* v *Rani Hemangini* (1910) 11 Cal L J 512 6 I C 672, *Kali Prasanna* v *Panchanan* (1917) 44 Cal 367 33 I C 670 *Hiralal* v *Uday Chandra* (1912) 16 C W N 1027, 14 I C 33 But see *Hriday Nath* v *Ramchandra* (1921) 48 Cal 138 at p 141 58 I C 810, (order of Reference to Full Bench)
(r) *Mahendra Ram* v *Sagun Lal* (1919) 3 Pat L J 651 49 I C 197 *Uchant* v *Barseen* (1921) 6 Pat L J 312 61 I C 657
(s) *Jawher Das* v *Lal Singh* (1925) 7 Lah L J 290, 90 I C 632, (25) A L 497
(t) *Mahipat* v *Nathu* (1909) 33 Bom 722, 726 4 I C 232 *Lal Kashi Lal* v *Shidapa* (1913) 37 Bom 642, 21 I C 23 (leave granted after the hearing was finished) See also *Narandas* v *Shantilal* (1921) 45 Bom 377 384 385 58 I C 1004
(t2) *Lala Punjabhai* v *Motiram* (1926) 50 Bom 192
(u) *Jhandu Lal* v *Lukeshar Das* (1918) 40 All 612 613-614 46 I C 71
(v) *Aiya* v *Gopanna* (1914) 27 Mad L J 450, 25 I C 57
(w) *Kannusami* v *Jagathambal* (1918) 41 Mad 701 707, 46 I C 264

O. 23, r. 1. Where a plaintiff sought to recover a sum of money upon certain allegations which were found untrue by the first Court, and the first Court dismissed the suit, and on appeal the District Judge came to the same conclusion, but granted leave to the plaintiff to withdraw from the suit with liberty to institute a fresh suit, it was held by the High Court that the order should not have been made and the same was set aside (x)

"On such terms as it thinks fit"—Where leave is granted to a plaintiff to withdraw from a suit with liberty to institute a fresh suit, the defendant is ordinarily entitled to the costs of the suit (y) It has been held by the High Court of Madras that where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant s costs *on or before a specified date*, but no payment is made on or before that date the plaintiff is precluded from bringing a second suit, and if such suit is brought, it should be dismissed (z) It has been similarly held by that Court that if leave is granted to bring a fresh suit *on payment of the defendant s costs* (without specifying any date) the plaintiff is precluded from bringing a second suit unless the costs are paid *before* the institution of the second suit The payment of costs after the close of the trial in the second suit is not a compliance with the condition (a) But the same Court has held, that when it is absolutely impossible for the plaintiff to pay the costs on or before the date fixed by the Court as where the exact amount of costs cannot be ascertained in time the Court has power to extend the time (b)

The High Court of Calcutta has not taken the same strict view of the condition as to the payment of costs as the Madras High Court Thus in *Abdul Aziz* v *Ebrahim* (c), where leave was granted to the plaintiff to bring a fresh suit *on payment of the defendant s costs*, it was held that though the payment of costs was a condition precedent to the institution of a second suit non payment of costs before the institution of the second suit did not render the fresh suit bad *ab initio* and further that payment of costs before the trial of the fresh suit cured the irregularity In *Shitlal* v *Gaya* (d), Sir Lawrence Jenkins, while agreeing with the result of the ruling in *Abdul Aziz* v *Ebrahim* based his decision on some what different reasons In that case also permission was granted to the plaintiff to institute a fresh suit on payment of the defendant s costs The plaintiff did not pay the costs and brought a second suit The suit was dismissed by the Munsif for non payment of costs. The plaintiff appealed to the Subordinate Judge Pending the appeal the plaintiff paid the defendant s costs The Subordinate Judge thereupon sent back the case to the Munsif for trial on the merits It was held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment the original suit could not be deemed to be withdrawn until those costs were paid and it must therefore be deemed to be a pending suit which became disposed of as soon as payment was made In the course of the judgment the learned Judge said

When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once for until they were paid there is no withdrawal with the permission of the Court In that view, when the case came before the Munsif he was not entitled to dismiss it All he could do was to regard sec 10 (of the Code) as a bar to his proceeding with the trial of the suit In so far as he dismissed it, he exercised a power that was not vested in him, and I think the Subordinate Judge was right when, on payment of the costs, he set aside the decree of the Munsif and sent back the case in order that the Munsif should proceed with the trial, for on the payment of those costs there was the withdrawal complete under O 23 It appears to me important in cases of this

(x) *Padma* v *Girish Chandra* (1919) 46 Cal 168, 45 I C 241
(y) *Khimchand* v *Sobhagchand* (1923), 47 Bom. 559 72 I C 324 ('23) A B 206
(z) *Fisher* v *Nagappa* (1910) 33 Mad 258, 6 I C 288

. . . 646,

kind to have regard to the precise terms of the section, and I think it will be well that the Court when giving permission to withdraw with liberty to bring a fresh suit should see that the orders are complete, and the proper order in such circumstances is one which limits the time within which the payment should be made and which goes on to direct that on failure to pay within the time, the original suit is dismissed with costs.' The High Court of Patna has followed the Calcutta decisions (e). The High Court of Madras has dissented from the view taken by the Calcutta High Court in *Shitlal* v. *Gaya*, and held that the withdrawal operates not when the costs are paid, but from the date of the Court's order granting permission to withdraw (f).

Where a plaintiff who had brought a suit for redemption against the mortgagee, was allowed to withdraw the suit with liberty to bring a fresh suit *within two years*, and he brought the fresh suit after two years, the High Court of Bombay held that he was entitled to do so. The reason given was that a mortgagor has a right to sue for redemption at any time within the period of limitation unless his equity of redemption has in the meantime been extinguished (g).

Notice.—Though this rule does not specifically require that notice of an application under it must be given to the opposite party, still it is an elementary rule of universal application that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard. Hence if an order is made under this rule granting leave to the plaintiff to withdraw from a suit with liberty to bring a fresh suit without giving notice to the opposite party, the order will be set aside under s. 115 of the Code on the ground of material irregularity (h).

Permission need not be express.—The permission mentioned in this section need not be given in express terms. It is sufficient if it can be implied from the order read with the application on which the order was made (i).

Form of order.—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order must not be one *dismissing* the suit with liberty to bring a fresh suit, but one *granting permission* to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (j). Where leave is refused, the Court should simply dismiss the *application*. It should not make an order disposing of the suit on the assumption that the plaintiff would withdraw the suit under sub-rule (1) if the application was refused (k).

Permission extends to one fresh suit only.—The permission granted in the original suit to bring a fresh suit in respect of the same subject matter extends only to the filing of one fresh suit and not more. Hence where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs, and the plaintiff brings a fresh suit without paying the costs, and the suit is dismissed, the dismissal is a bar to the institution of a third suit in respect of the same subject matter (l).

Dismissal of suit coupled with liberty to bring a fresh suit.—There is no power in the Courts of India to *dismiss* a suit *with liberty* to the plaintiff to bring a fresh suit for the same matter (m).

Liberty to consolidate withdrawn suit with another pending suit.—A Court, it seems, has no power under this rule to grant permission to a plaintiff to consolidate the claim in the suit which is withdrawn with a claim in another suit pending at the

(e) *Kulip* v. *Kulip* (1918) 3 Pat. L. J. 63, 44 I. C. 79.

(f) *Seshayya* v. *Subayya* (1924) 47 Mad. L. J. 646, 82 I. C. 499, ('24) A. M. 877.

(g) *Ramchandra* v. *Hanmanta* (1920) 22 Bom. L. R. 933, 58 I. C. 43.

(h) *Jatindra* v. *Atal* (1917) 44 Cal. 454, 39 I. C. 983.

(i) *Jaswant Lal* v. *Kishen* (1920) 2 Lah. L. J. 242, 67 I. C. 102, dissenting from *Jita Singh* v. *Hari Singh* (1916) Punj. Rec. no. 97, p. 294, 37 I. C. 127.

(j) *Dowell* v. *Wise* (1864) 1 W. R. 322; *Banwari Das* v. *Muhammad* (1887) 9 All. 690.

(k) *Mahant* v. *Purshotamdas* (1908) 32 Bom. 345.

(l) *Amtulal* v. *Shankarrao* (1925) 27 Bom. L. R. 243, 87 I. C. 807, ('25) A. B. 272.

(m) *Watson* v. *Collector of Rajshahye* (1869) 13 M. I. A. 160, 3 Beng. L. R. P. C. 48; *Banwari Das* v. *Muhammad* (1887) 9 All. 690; *Sukh Lal* v. *Bhikhi* (1889) 11 All. 187; *Fateh Singh* v. *Jagannath Baksh Singh* (1925) 52 I. A. 100, 105-106, 47 All. 154, 162-163, 91 I. C. 280, ('25) A. PC. 55.

O. 23, r. 1. time But if such an order is made, it cannot be said to be one made without jurisdiction, and it is not a nullity (n) But there is nothing to prevent the Court from granting leave to a plaintiff to withdraw from two suits with liberty to bring a fresh suit consolidating the claims in the two suits (o)

Withdrawing with permission: additional relief in fresh suit—Where a suit is withdrawn with the permission of the Court, the effect is to leave the parties in the same position as that in which they stood before the suit was brought Such being the case the plaintiff may include in the fresh suit a *relief* which he might have included in the first suit but which he had omitted to include in it (p)

Withdrawing with permission after suit has abated against some of the defendants—Where a suit has abated against a defendant, and it is then withdrawn with liberty to bring a fresh suit such permission does not entitle the plaintiff to join the legal representatives of such defendant as party defendants in the fresh suit (q)

Withdrawing without permission: Bar of fresh suit—Where a plaintiff withdraws from a suit without the permission of the Court he is precluded from instituting a fresh suit in respect of the same subject matter [sub rule (3)], and against the same defendant See notes below Same defendant and ' Same subject matter '

Same defendant—Though the rule does not expressly say so, the fresh suit that is barred must be a suit against the same defendant A second suit will not be barred if it is brought against a different person *A* obtains a decree against *B* and in execution of the decree attaches certain property alleged to belong to *B* *C* intervenes under O 21 r 58 alleging that the property belongs to him C's application is rejected, and he brings a regular suit against *A* alone to establish his title to the property *C* then withdraws from the suit without obtaining permission of the Court to bring a second suit for the same subject matter After the suit has been withdrawn the attachment falls through *A* then re attaches the same property in execution of the same decree, and the property is sold and purchased by *D* *C* does not appear to contest the second execution proceeding after the withdrawal of his suit He then institutes a suit against *D* to recover possession of the property alleging that the property is his sole and exclusive property The suit is not barred under this rule as *B* the judgment debtor, was not a party to the first suit (r)

Same subject matter—As stated above, if a suit is withdrawn without the permission of the Court the plaintiff is precluded from bringing a fresh suit in respect of *the same subject matter* The expression used in the corresponding s 373 of the Code of 1882 was matter As to that expression it was held in a Calcutta case under the Code of 1882 that it did not mean property, but that it had reference to the *right* in property which the plaintiff seeks to enforce. In that case *A* had instituted a suit to establish his right to sell certain property in satisfaction of a decree against *B* but he withdrew the suit without obtaining leave to bring a fresh suit Subsequently he instituted another suit to establish his right to sell the same property in satisfaction of *another decree* against *B* It was held that the second suit was not barred The Court said Now, though the property in respect of which the present suit is brought is the *same* as that in respect of which the former suit was brought still that would not be sufficient to make the present suit one for ' *the same matter* as that for which the former suit was brought, within the meaning of s 373

(n) *Lakshmanan v Muthaya* (1921) 40 Mad L J 198 62 I C 833 *Tuljaram v Gopala* (1917) 32 Mad L J 434 40 I C 611
(o) *Sahib & Co v Adamsa* (1924) 2 Rang 66 81 I C 465, (24) A R 249
(p) *Behari Lal v Srimati Baran* (1895) 17 All 53
(q) *Seshamma v Suryanarayana* (1915) 38 Mad 643 22 I C 260
(r) *Mukhoda v Ram Churn* (188?) 8 Cal 871

O. 23, r. 1.

the causes of action in the two suits being different (s) In a Madras case under the present Code, where the next reversionary heir of a deceased Hindu instituted a suit against the widow of the deceased and an alienee from her of her husband s property for a *declaration* that the alienation was not binding on the estate, and the widow died pending the suit, and the reversioner withdrew the suit without obtaining leave to bring a fresh suit, and subsequently brought a suit *against the alienee* for *possession* of the same property, it was held that the second suit was not barred. Wallis C J, in delivering the judgment of the Court, said 'The terms 'subject matter and 'the same matter which occurred in the corresponding section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character Without attempting an exhaustive definition of all that may be included in the term subject matter,' we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit" (t) The contrary, however, was held by the Chief Court of the Punjab in a case in which the facts were almost similar to the Madras case (u) In a Bombay case (v) *A* sued to eject *B* Finding, however, that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court Subsequently *A* gave a formal notice to quit, and brought a fresh suit for ejectment It was held that the suit was not barred under this rule, as the previous suit was not for the *same subject matter* as the second suit Scott, C J, said, "We are of opinion that 'subject matter' means to use the words of Order I, Rule 1, 'the series of acts or transactions alleged to exist giving rise to the relief claimed' Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree It was incomplete because there was no notice to quit The second series of acts or transactions is complete because the notice to quit has been given, and, therefore, the two suits are not in respect of the same subject matter" But the withdrawal of a prior suit for a *declaration* of title to certain war bonds is a bar to a subsequent suit for *consequential relief* in respect of the same bonds [that is, for recovery of possession] (w)

A suit for partition, however, stands on a different footing, the cause of action in such a suit being a recurring cause of action Hence the withdrawal of a suit for partition of joint property, though without permission of the Court, is no bar to a second suit for partition of the same property against the same defendants (x)

Withdrawing without leave of Court but with consent of defendant —In a case decided under s 97 of the Code of 1859 it was observed by Norman, J, that where a plaintiff withdraws his suit without the permission of the Court, but with the consent of the defendant, he is not precluded from instituting a fresh suit in respect of the same subject matter (y) The observations of Norman, J, on this point have been doubted in a recent case (z) The doubt seems to be well founded.

Withdrawing from suit pending arbitration —When the matters in dispute in a suit are referred to arbitration *by an order of the Court* made under Schedule II, para. 3, the Court has no power under this rule to grant permission to the plaintiff

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(t) *Singa Reddi* v *Subba Reddi* (1916) 39 Mad 987 35 I C 185 overruling *Achutta* v *Achutan* (1898) 21 Mad 35

(u) *Jita Singh* v *Hari Singh* (1916) Punj Rec no 97 p 294 37 I C 123

(v) *Rakhmabai* v *Mahadeo* (1918) 42 Bom 155, 43 I C 752

(w) *Maung Mu* v *Maung Kan* (1923) 1 Rang

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O. 23, r. 1. to withdraw from the suit with liberty to institute a fresh suit The provisions of this rule do not apply to such a case, for when once a matter is referred to arbitration, the Court is precluded from dealing with it in the same suit save in the manner and to the extent provided in Schedule II *A* sues *B* for possession of certain property The matters in difference between the parties are referred to arbitration by an order of the Court The Court has no power, either before or after the award is made, to grant permission to the plaintiff to withdraw from the *suit* with liberty to bring a fresh suit (*a*) But where a reference to arbitration has been made *without the intervention of the Court* (that is not by an order of the Court) and one of the parties to the reference applies to the Court under Schedule II para 20, to file the award, the provisions of this rule apply and it is open to the applicant to withdraw the *application*, though numbered and registered as a *suit* under that para 20, under sub r (1) of this rule (*b*)

Power of appellate Court to give leave to plaintiff to withdraw from a suit —It has been held by the High Courts of Allahabad (*c*) Madras (*d*), and Bombay (*e*) that where a plaintiff's suit is dismissed and he appeals from the decree, the *appellate* Court has power to allow the plaintiff appellant to withdraw from the suit with liberty *to bring a fresh suit in respect of the same subject matter* see s 107 (2) The contrary view seems to be implied in a Calcutta decision (*f*) But an appellate Court has no power to grant such leave *before* the appeal is admitted (*g*)

Erroneous order granting leave to withdraw and jurisdiction —An order for withdrawal of a suit with leave to institute a fresh suit made in circumstances not within the scope of this rule that is made in a case where there is no formal defect or other sufficient ground within the meaning of this rule cannot be treated as an order made without jurisdiction (though it may be challenged in revision on the ground of material irregularity—see notes below Revision) such order is consequently not null and void (*h*) The order not being a nullity a fresh suit instituted upon leave so granted is maintainable it is not barred as *res judicata* Further the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had power to make the order and had properly made it (*i*)

Appeal —An order under this rule granting leave to a plaintiff to withdraw from a suit or to abandon a part of his claim with liberty to institute a fresh suit is not appealable Such an order is not one of the appealable orders mentioned in O 43, r 1, nor is it a decree within the meaning of s 2 (2) (*j*)

Letters Patent appeal —An order of a single Judge of a High Court granting leave to withdraw from a suit with liberty to bring a fresh suit is a ' judgment ' within the meaning of cl 15 of the Letters Patent, and appealable as such (*k*) Similarly an order of a single Judge of a High Court dismissing an application for the

(*a*) *Sheoa ler Deod* [illegible] 188 9 All 168 *D* [illegible] *Chur* [illegible] Cal W N 148

(*b*) *Gauri Shanka* [illegible] (1904) 31 Cal 516

(*c*) *Afzal* v *Akbari* (1915) 37 All [illegible] 28 I C 857 *Ganga Ram* v *Akbari* (188) 8 All 8

(*d*) *Kamayya* v *Papayya* (1917) 40 Mad 259 37 I C 414 (F B)

(*e*) *Chhanubhai* v *Dahyabhai* (1920) 44 Bom 594 57 I C 530 *Sheikh Hassan* v *Mahomed* (1921) 45 Bom 206 59 I C 210

(*f*) *Kali Prasanna* v *Panchanan* (1916) 44 Cal 367 33 I C 670

(*g*) *Eknath* v *Ranoji* (1911) 35 Bom 261 10 I C 813

(*h*) *Hriday Nath* v *Ram Chandra* (1921) 48 Cal 138 58 I C 806 (F B) overruling *Kali Prasanna* v *Panchanan* (1917) 44 Cal 367 33 I C 670 *Rajkumar* v *Ram Khelawan* (19) 1 Pat 90 64 I C 337 ( ) A P 44 (F B) *Jhunku Lal* v *Bisheshar Das* (1918) 40 All 612 46 I C 71 *Sheikh Hassan* v *Mahomed* (1921) 45 Bom 206 215 216 264 59 I C 210

(*i*) (1921) 48 Cal 138 58 I C 806 *supra* (1922) 1 Pat 90 64 I C 337 (22) A P 44 *supra* *Perumal* v *Karupan* (1911) 1 Mad L J 574 8 I C 268 *Chhajjua* v *Khyali Ram* (191) 9 All L J 378 14 I C 175

(*j*) *Genda Mal* v *Pirbhu Lal* (1895) 17 All 97 *Jogodindro* v *Sarup Sundari* (1894) 18 Cal 3— *Abdul Hussein* v *Ram Sahu* (1900) 27 Cal 36

(*k*) *Narandas* v *Shantilal* (1921) 45 Bom 377 55 I C 1004

revision of an order giving leave to withdraw a suit with liberty to bring a fresh suit is a "judgment" within the meaning of that clause and is appealable as such (*l*)

Revision —Though an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit is not appealable it is open to revision if it falls within s 115 of the Code An order is open to revision under that section if the Court which made it had *no jurisdiction* to make it as in the undermentioned case (*l1*) or if the Court acted *illegally or with material irregularity* in making the order

An order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit in circumstances not within the scope of the present rule that is in a case in which there is no "formal defect" or "other sufficient ground" for making it as where the order is made on the ground of the plaintiff s inability to prove his case cannot be treated as an order made without jurisdiction [see notes "Erroneous order granting leave to withdraw and jurisdiction" on p 764] The High Court therefore has no power to interfere with such an order on the ground that it was made without jurisdiction (*m*) But it has been held in a series of cases that the High Court will interfere with such an order on the ground of material irregularity and will set it aside in revision (*n*) Similarly the High Court will interfere and set aside in revision on the ground of material irregularity an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit if the order was made *ex parte* (*o*) or if leave was granted without assigning any reasons (*p*) or if leave was granted on the ground that there was a "formal defect" or "other sufficient ground", but no inquiry was made as to whether there was in fact a formal defect or other sufficient ground (*q*) In a Patna case the High Court held that where the defendant himself alleges a "formal defect" the Court has jurisdiction to pass any order it pleases under this rule (*r*) But this seems to be an extreme view In a Madras case, where the plaintiff deliberately undervalued his suit and paid insufficient court fees and brought the suit in a District Munsif s Court and then applied for leave to withdraw from the suit with liberty to bring a fresh suit and leave was granted it was held that the Court acted with material irregularity and the order was set aside in revision (*s*) In a Calcutta case the first Court dismissed the plaintiff s suit on a finding that the plaintiff s allegations were untrue On appeal the District Judge came to the same conclusion but granted leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit The High Court held that the order was not "properly" made and the order was set aside (*t*)

In Allahabad it has been held that the High Court will interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions of this rule in other words if it has not exercised a judicial discretion (*u*)

(*l*) *Iya* v *Gopanna* (1914) 27 Mad L J 480 26 I C 57 *Rama Ayar* v *Venkatachella* (1907) 30 Mad 311

(*l1*) *Choudhury Ram* v *Mahesh* (1922) 1 Pat 93 65 I C 1[illegible]

(*m*) *Jhunki Lal* v *Bisheshar Das* (1918) 40 All 614 46 I C 71

(*n*) *Kharda Co Ltd* v *Durga Charan* (1910) 11 Cal L J 45 5 I C 187 *Mabulla* v *Ram* [illegible]

(*o*) *Rajendra* v *Atal* (1917) 44 Cal 454 39 I C 969

(*p*) *Muhammad* v *Kunji* (1888) 11 Mad 3 3 *Rahmat Ullah* v *Dharam Singh* (1922) 20 All L J 90 64 I C 948 (2[illegible]) A A 185 *Subasini* v *Ashutosh* (1924) 39 Cal L J 371 84 I C 37[illegible] ('24) A C 751

(*q*) *Nathuni Ram* v *Mosammat Sheo Coer* (1918) 3 Pat L J 460 46 I C 179 *Mahendra Ram* v *Singi Lal* (1918) 3 Pat L J 651 48 I C 197

(*r*) *Bisheshar* v *Brijra* (1918) 3 Pat L J 630 44 I C 406

(*s*) *Kannuswami* v *Jagathambal* (1918) 41 Mad 01 46 I C 765

(*t*) *Padma* v *Girish Chandra* (1919) 46 Cal 163 45 I C 941 [in second appeal]

(*u*) *Radha* v *Tula* (1919) 10 All L J 393 17 I C 647 *Ganga* v *Mussamat Kishni* (1925) 47 All 319 87 I C 175 ('25) A A 466

O. 23, rr. 1, 2.

But if the lower Court has exercised a judicial discretion the High Court will not interfere in revision merely because the High Court itself might have taken a different view of the matter (*v*)

Effect of reversal of order granting leave to withdraw —Where an order granting leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit is reversed by the High Court in revision, but before the reversal a fresh suit is filed the procedure is to declare the fresh suit null and void and to direct the lower Court to proceed with the original suit from the stage which it had reached when the order granting leave was made by that Court (*w*)

Sub-rule (4); Co-plaintiffs

Co plaintiffs.—By sub-r (4) it is enacted that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others. This sub rule limits the jurisdiction of the Court to grant permission to withdraw a suit to cases where all the plaintiffs join in the application. Where the Court in contravention of this sub-rule allows two out of four plaintiffs without the consent of the other two to withdraw from a suit with liberty to bring a fresh suit it acts without jurisdiction and a second suit in respect of the same subject-matter is barred But if the suit that was withdrawn was a suit for partition, the second suit it has been held will not be barred the reason given being that a cause of action in a suit for partition is a recurring one and a joint owner has a right to come to Court at any time provided he proved that he has a subsisting joint title and possession in the property within the period of limitation (*x*)

Rule does not apply.

Bengal Rent Act—The provisions of this rule do not apply to suits instituted under the Bengal Rent Act 10 of 1859 which is a complete Code by itself (*y*)

Probate proceedings.—This rule does not apply to probate proceedings, the provision in s. 83 of the Probate and Administration Act 5 of 1881 [now Indian Succession Act 39 of 1925 s. 268] being qualified by the words so far as the circumstances of the case will admit ( )

Execution proceeding —*See r 4 below*

2. [S 374] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation law not affected by first suit

Limitation —The fresh suit must be instituted within the period of limitation. It will not be after the period of limitation even though the suit that was permitted to be

(*v*) *Jhunku Lal* v *Bisheshar Das* (1918) 40 All. 612, 46 I. C 71 *Ratan Lal* v *Mohammad* (1921) 19 All L. J 47 60 I C. 893 (the facts of the case are not reported)

(*w*) *Nathuni Ram* v *Sheo Koer* (1919) 3 Pat L.J 460 46 I C 179

(*x*) *Mussamat Ram Dei* v *Mussammat Bahu Rani* (1922) 1 Pat. 223 ('22) A. P 4 9

(*y*) *Gulam Mahomed* v *Shibendra* (1902) 30 Cal. 990

(*z*) *Banwari Lal* v *Kasher* (1920) 2 Lah. L. J 242, 67 I C. 1002.

withdrawn was within the period of limitation (a) But if the first suit was brought in a Court that had *no jurisdiction* to entertain it, that Court would have no power under rule 1 above to give leave to withdraw with liberty to bring a fresh suit. If it does give leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order is one made without jurisdiction. Hence if a second suit is instituted, though upon leave so granted, the case will be governed not by the provisions of this rule, but by those of sec. 14 of the Limitation Act, 1908, and the time during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit (b)

3. [S. 375.] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Compromise of suit

Alterations in the rule.—This rule differs from the corresponding s. 375 of the Code of 1882 in three respects, namely .—

1. The words " where it is proved to the satisfaction of the Court that " have been added into the rule to set at rest the conflict of opinion noted below in the commentary under the head " Where a compromise set up by one party is denied by the other "
2. The words " the Court *shall order* such agreement. . . . to be recorded" have been substituted for the words " such agreement . . . shall be recorded." The object is to bring out the word " order " prominently, as an appeal is now given from an *order* made under this rule recording or refusing to record an agreement See O 43, r 1, cl. (m), and notes below, " Appeal "
3. The words, " and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction," which occurred in the old section after the words " so far as it relates to the suit " have been omitted. See notes to s 96, " Sub s (3) . consent decree not appealable "

Scope of the rule.—The agreement, compromise or satisfaction contemplated by this rule may (1) relate *wholly* to the suit, or (2) it may relate only to a *part* thereof or (3) it may also comprise *matters that do not relate to the suit* When the agreement relates *wholly* to the suit, the Court must, on being invited by the parties, record the agreement, and pass a decree in accordance with the agreement, and the suit stops there. Where the agreement relates to a *part only* of the suit, the Court must, on the application of the parties, pass a decree in accordance with the agreement, and the suit may be proceeded with as to the rest Where the agreement, besides relating to the suit or a part thereof, comprises matters that do not relate to the suit, the decree must comprise only such terms of the agreement as relate to the suit, but not the rest As to the case where a decree comprises matters not relating to the suit, see below notes " Where the decree comprises matters that do not relate to the suit "

(a) *Varajlal* v *Shomeshwar* (1905) 29 Bom. 219 | (b) *Ramdeo* v. *Goneshnarain* (1908) 35 Cal. 924

O. 23, r. 3. **Procedure to be followed under this rule**—It is important to note that a consent decree under this rule can be passed only after an *order* is made directing the compromise to be recorded This is not a mere matter of form, as the aggrieved party has a right of appeal against such order under O 43, r 1, cl (m) (c) See notes below, "Appeal

Where a compromise set up by one party is denied by the other—Suppose that a party to a suit alleging that the suit has been adjusted by a lawful agreement applies to the Court to record the agreement and to pass a decree in accordance therewith. Suppose, further that the opposite party to the suit denies that there was any such agreement as alleged, or while admitting that there was such an agreement, alleges that he wishes to recede from it Has the Court power, if the fact of the agreement is denied, to determine whether as a fact the alleged agreement adjusting the suit was made, and to pass a decree if it finds as a fact that the alleged agreement was made? Further, if the opposite party while admitting that there was such an agreement alleges that he wishes to recede from it has the Court power under this rule to pass a decree in accordance with the agreement? Both these questions were, under the old section answered in the affirmative by the High Courts of Bombay, Madras and Calcutta (d) but in the negative by the High Court of Allahabad (e) According to the Allahabad decisions the Court had no power under the old section to record an agreement and to pass a decree in accordance therewith unless both the parties consented *before the Court* to have the agreement recorded that is to say even where there was an agreement to adjust the suit the Court could act under that section only if both the parties were in agreement *at the moment of moving the Court* and if they were not then in accord the agreement could only be enforced by a fresh suit for specific performance The conflict arose from the words if a suit be adjusted wholly or in part by any lawful agreement or compromise with which s 375 commenced The present rule gives effect to the Bombay Madras and Calcutta decisions The words *where it is proved to the satisfaction of the Court that* a suit has been adjusted wholly or in part clearly show that the Court has power under this rule where an agreement or compromise is denied, to decide whether as a fact the alleged agreement or compromise was made, and if it is satisfied that it was made to record it (f)

Submission and award—It was held in two Bombay cases under the Code of 1882 that when the matters in difference *in a pending suit* are referred to arbitration *without the intervention of the Court* and an award is made, the submission and the award may be treated as an adjustment of the suit by an agreement' within the meaning of s 373 of that Code and it may be recorded as an adjustment under that section (g) In the later of the two cases (h) Starling J said that it was open to the plaintiff to proceed under s 525 [now sch II, para 20], but that it was not obligatory upon him to do so as there was no express provision in the Code of 1882 that no other course than that prescribed by s 525 should be followed.

The present Code however does contain such a provision, for it is enacted by s 89 that ' save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other

(c) *Paban Sardar* v *Bhupendra Nath* (1916) 43 Cal 85 33 I C 769

(d) *Goculdas Manufacturing Co* v *Scott* (1892) 16 Bom 202 *Samibai* v *Premji* (1896) 20 Bom 304 *Appasami* v *Varadachari* (1896) 19 Mad 419 *Sridharan* v *Puranathan* (1900) 23 Mad 101 *Brojodurlabh* v *Ramanath* (1897) 24 Cal 908

(e) *Bandhu* v *Shah Muhammad* (1892) 14 All 350

(f) *Sital* v *Lal Bahadur* (1916) 38 All 75 80-81, 31 I C 963

(g) *Samibai* v *Premji* (1896) 20 Bom 304 *Pragdas* v *Girdhardas* (1902) 26 Bom 76 The correctness of these decisions were doubted in *Rukhanbai* v *Adamji* (1909) 33 Bom 69 1 I C 6..

(h) (1902) 26 Bom 76 80 *suppra*

O. 23, r. 3.

law for the time being in force, *all* references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule In a Bombay case decided under this Code it was held by Davar, J, that where *in a pending suit* the parties go to arbitration without the intervention of the Court and an award is made, the provisions of para 20 of Schedule II do not apply to the award, but that the submission and the award may be recorded as an adjustment under this rule As to s. 89, it was said that the words any other law for the time being in force" were wide enough to include the provisions of O 23 r 3 (i) Four years later Sir Norman Macleod, another judge of the same High Court, held in *Shavakshaw v Tyab Haji Ayub* (j), that the words 'any other law for the time being in force in s 89 do not include the present rule, and that having regard to the provisions of that section a submission and an award could not be recorded as an adjustment under this rule, and that the correct procedure was to apply to the Court to file the award under paragraphs 20 and 21 of Sch II The above decisions were reviewed by Sir Norman Macleod in *Manilal v Goculdas* (k) The learned judge came to the conclusion that his decision in *Shavakshaw s case* was erroneous, and he held as follows "They [that is, the parties] may make the agreement an order of Court, and then paras 1 to 16 of Schedule II apply If they do not make the agreement an order of Court, they cannot ask for the agreement to be filed under para 17, they cannot ask for the award if made to be filed under paras 20 and 21 If an award is made and both parties accept the award, they can apply for a consent decree in terms thereof and there is no need to apply for an order recording the terms of the adjustment If the *plaintiff* disputes the award for any reason and proceeds with the suit, the defendant may plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment If the defendant disputes the award, the plaintiff may have the case set down for trial on the issue whether the adjustment could be recorded Either party may file a suit to enforce the award, and apply for a stay of the original suit The ground of the ruling in *Manilal s case* is that a submission and an award properly made in accordance with the submission amounts to an 'adjustment' within the meaning of this rule, and as such it may be enforced *under the general law of contract* The result according to that ruling, is that where parties to a suit refer their disputes to arbitration without the intervention of the Court, and an award is made, an application to pass a decree in terms of the award is an application to record a compromise within the meaning of this rule Further, if an objection is taken to the award on the ground of misconduct on the part of the arbitrator, the Court acting under this rule, has jurisdiction under this rule to enquire into the charge of misconduct If the Court does make the inquiry, and refuses to record the submission and award, the order is not open to revision under s 115 above (l) The High Court of Calcutta has dissented from the decision in *Manilal s case,* and held that the words "any other law for the time being in force in s 89 do not include the present rule, further, that where in a pending suit the parties go to arbitration without an order of the Court the award cannot be enforced under this rule or Schedule II or under the Arbitration Act, also that if a submission to arbitration of matters in difference *in a pending suit* is to take place, there is no provision for it other than the provisions in Schedule II (m) The result, according to the Calcutta decisions, is that if an award is made under a reference without an order of the Court in a pending suit the Court should not take any notice of the award, and the suit may be proceeded with on the application of either party (n) The High Court of Lahore has held that an award made without the inter

(i) *Harakhbai v Jamnabai* (1913) 37 Bom 639 19 I C 786

(j) (1916) 40 Bom 386 37 I C 140

(k) (1921) 45 Bom 245 59 I C 53 overruling (1916) 40 Bom 386 37 I C 140 *s pra*

(l) *Thakoredas v Lallubhai* (1923) 25 Bom L R 452 75 I C 102 (23) A B 401

(m) *Amarchand v Banwari Lall* (1922) 49 Cal 608 69 I C 808 (22) A C 404

(n) *DeLari Tea Co, Ltd v The India General Steam Navigation Co, Ltd* (1920) 25 C W N 127 61 I C 919

O. 23, r. 3. vention of the Court in a pending suit cannot be recorded as an adjustment under this rule unless all parties agree thereto (o) The High Court of Madras has expressed the opinion that such an award may be recorded as an "adjustment" under this rule (p) In a recent case a Full Bench of the High Court of Allahabad dissented from the Calcutta rulings, and followed the decision of the Bombay High Court in *Manilal's case* (q) It is submitted with respect, that the view taken by the Calcutta High Court is correct

It has been held that a *mere agreement to refer* to arbitration matters in difference in a pending suit where the parties have not gone beyond the agreement to refer and no award has been made, cannot be treated as an 'adjustment' of the suit within the meaning of this rule (r) It has also been held that a decree obtained upon an award on a reference to the presiding judge and another individual must be regarded as a consent decree, and it is not subject to the provisions of the Sch II (s)

"Agreement" adjusting a suit—Where in the course of a suit the pleaders for both parties agreed that if a certain fact appeared upon a certain document, the Court should decree the suit, otherwise the suit should be dismissed it was held that the agreement was not one *adjusting* the suit within the meaning of this rule, for it was not complete, and left something to be done by the Court, viz, to ascertain whether a certain fact appeared upon a certain document (t) But an agreement that the parties will consent to a decree being passed in terms to be stated by a person named is an adjustment of the claim (u) Where a defendant made an offer to the plaintiff that if a certain witness in the case would eat *kachcha* food served by the plaintiff the suit should be decreed, and the plaintiff accepted the offer and the witness ate the [illegible] ntiff, it was held that the offer an[illegible] should be decreed. It

Agreement to take oath under the Oaths Act—Where it is agreed in the course of the hearing of a suit between the plaintiff and the defendant that the plaintiff should take a certain oath on a certain date, and that if he did so, there should be a decree for him, but that if he failed to do so, his suit should be dismissed [illegible] ff fails to take the oath, the agreement [illegible]

[illegible] of the suit (w)

"Lawful agreement or compromise"—Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the compromise arrived at between them the Court has no power to refuse to pass the decree [illegible] compromise is too favourable [illegible] mise is unlawful, as wh[illegible] a decree in accordance [illegible] decree is pa[illegible] not enforce [illegible]

(v) *Hari Parshad* v *Soogni* (1921) 3 Lah L J 162 67 I C 123

(s) *Chinna* v *Venkatasami* (1919) 42 Mad 625 629 51 I C 627

(t) *Muhammad* v [illegible]

a temple is against public policy Hence if in a suit against the holder of such an office a compromise is arrived at whereby the holder of the office consents to the office being sold in satisfaction of the debt due to the plaintiff, and a decree is passed on the compromise, the Court should notwithstanding the consent decree refuse to sell the office in execution (z) It is clear that if the matter had rested in contract only, the Court could not have enforced the sale in a suit brought for that purpose The mere fact that the contract is embodied in a decree does not alter the incidents of the contract By private agreement, converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone (a) The principle is that where a decree is based on an agreement of compromise, the Court must be taken to adopt the agreement *with all its incidents* (b) The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge (c) On this principle in a case where A sued B on a mortgage, and C, who was a second mortgagee, was joined as a party defendant, and A and B entered into a compromise whereby A agreed to pay to B more than what B was entitled to, the Court refused to pass a decree in terms of the agreement on the ground that the compromise was detrimental to the interests of C, and that it was not therefore 'lawful' within the meaning of this rule (d) See notes to s 11, 'Consent decree and estoppel,' p 65 above The following are further illustrations —

(a) B holds certain lands under a lease from A The rent falls into arrears, and A sues B for arrears of rent and for possession It is subsequently agreed between the parties that B should continue to hold the lands as A's tenant, but upon fresh terms arranged between the parties, and that if default should be made in payment of rent on the due dates, the lease should be forfeited [*note* that this last is a forfeiture clause] A decree is passed in terms of the agreement under this rule B commits default in payment of rent A thereupon applies for possession of the land *in execution of the decree* B offers to pay the arrears, and applies that he may be relieved against forfeiture It is clear that if the matter had rested in contract only, the Court could have granted the relief The mere fact, therefore that the agreement has been recorded and a decree passed in accordance therewith, does not preclude the Court from granting relief against forfeiture (e)

(b) The facts are the same as in the above illustration except that instead of proceeding in *execution* a fresh *suit* is instituted by A against B for possession on default of payment of rent The same principle applies as in the above case (f) It would seem that the proper procedure in cases where the forfeiture clause is in the form stated in ill (a) is to enforce the forfeiture not by an application to execute the consent decree, but by a regular suit (g) The clause does no more than *declare* the right of forfeiture and thus far the decree is declaratory, and it is an elementary principle that a declaratory decree can only be enforced by a suit

Dekkhan Agriculturists Relief Act —It has been held by a Full Bench of the Bombay High Court that a compromise in a suit between parties one of whom is an agriculturist within the meaning of the Dekkhan Agriculturists Relief Act (XVII of 1879) is not bad in law because it is made without compliance with the provisions of sec 15B of that Act (h) and that the compromise may be recorded under this rule

(z) *Lakshmanaswami* v *Rangamma* (1903) 26 Mad 31
(a) *Great N W Central Ry Co* v *Charlebois* (1899) A C 114
(b) *Nagappa* v *Venkat Rao* (1901) 24 Mad 265, 270
(c) *Wentworth* v *Bullen* (1829) 9 B & C 84 *Lawsley* v *Gilmore* (1866) L R P C 570 See also *Conolan* v *Leyland* (1884) 27 C D 632 638

Bom 435
(g) 31 Bom 15 22 *supra*
(h) *Shivarayappa* v *Govindappa* (1913) 37 Bom 614 20 I C 969

O. 23, r. 3. But it has also been held by the same High Court that the present rule does not exclude the operation of the special provisions of s 12 of that Act, and the Court can under that section go behind the transaction where the whole of the claim is admitted by the agriculturist defendant (i)

Compromise of probate proceedings—Unless a will is proved in some form no grant of probate can be made merely on the consent of parties Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not 'lawful' within the meaning of this rule and no probate can be granted merely because the caveator consents to the grant Such an agreement is against public policy for its object is to exclude inquiry into the genuineness of the will which it is the duty of the Probate Court to make (j) Hence it is open to the caveator before probate is granted to withdraw from the compromise and to require that the will be proved (k) For the same reason if an executor withdraws his petition for probate such withdrawal being pursuant to a compromise he is not precluded by the provisions of r 1 above from presenting another petition for probate, though the first petition was withdrawn without the permission of the Court (l)

Form of decree where compromise includes matters which do not relate to the suit—In *Hemant Kumari* v *Midnapore Zamindari Co* (m) where a decree comprised lands outside the suit their Lordships of the Privy Council observed as follows —

> A perfectly proper and effectual method of carrying out the terms of this [rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or it could introduce the agreement in a schedule to the decree, but in either case although the *operative* part of the decree would be properly confined to the actual subject matter of the then existing litigation the decree taken as a whole would include the agreement This in fact is what the decree did in the present case It may be that as a decree it was incapable of being executed outside the lands of the suit but that does not prevent it being received in evidence of its contents

It is clear from the passage cited above that where a suit is adjusted by a lawful agreement between the parties the proper course is to recite the agreement in the decree or to annex it as a schedule to the decree but in either case the *operative* part of the decree should be confined to the actual subject matter of the suit It would be wrong to refuse to incorporate in the decree matters which form part of the compromise because they are extraneous to the suit such matters are to be excluded only from the *operative* part of the decree

Where in a testamentary suit consent terms are proposed, some of which fall within the testamentary jurisdiction and others do not the decree may properly embody all the terms in a schedule for reference but its *operative* part should be confined to such terms as are within its jurisdiction and the Testamentary Court should leave the parties to take separate proceedings in the ordinary original civil jurisdiction to enforce the remaining terms if necessary (n)

(i) *Goturam* v *Barku* (1922) 46 Bom 560 67 I C 253 (2) A I R 331

(j) *Monmohini* v *Ranga* (1904) 31 Cal 357

(k) *Janakibati* v *Gajanand* (1916) 1 Pat L J 377 37 I C 12

(l) *Jugeshwar* v *Jagatdhari* (1917) 2 Pat L J 535 40 I C 345

(m) (1919) 46 I A 240 246 47 Cal 485

(n) 53 I C 534 *Giban* v *Ramesh* (1923) 38 Cal L J 72

(n) *Bai Monghibai* v *Bai Tambhalaxmi* (1920) 22 Bom L R 1286 59 I C 344

O. 23, r. 3.

Matters which relate to the suit.—It is clear from what is stated above that where a compromise comprises matters *extraneous to the suit* the *operative* part of the decree should be confined to matters *that relate to the suit*. What, then, are matters that relate to the suit? In *Gobinda* v *Dwarka Nath* (o) Mitra J said "The question whether any particular term relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts." In a later Calcutta case (p) Rankin J said: "In some of the decisions section 375 [now, O. 23, r. 3] has been applied by making a distinction between property in suit and property extraneous to the litigation. Where a suit is *merely for the recovery of specific properties* that distinction will be adequate and will be equal to the distinction between matters which relate to the suit and matters which do not. In some cases however, suits are not for the recovery of property *but to establish particular rights* and I certainly prefer the opinion expressed in the case reported in 35 Cal 837 to the effect that the facts have to be looked at as a whole in order to decide whether matters have been introduced into the suit that do not relate to the suit. As to the latter class of cases it may be stated that as a general rule all terms which form the *consideration* for the adjustment of the matters in dispute whether they form the subject matter of the suit or not, become related to the suit and can be embodied in the decree." Thus where *A* sued *B* on a promissory note, and a compromise was arrived at between the parties whereby *B* agreed to pay the amount of the note by instalments and the amount was also made a charge on certain immoveable property of *B*, it was held that there was nothing in the present rule to preclude the Court from making the amount a charge on *B*'s property, even though the relief claimed was for a *money decree* only. The *charge*, though not claimed as a relief *related to* the suit (q). It formed the *consideration* for the time allowed for payment of the sum decreed by instalments and thus constituted an integral and necessary part of the adjustment of the claim in the suit (r). It has similarly been held that where *A* and *B* are joint tenants of certain land and *A* having paid up the entire rent sues *B* for contribution and a compromise is arrived at whereby *B* in consideration of *A* abandoning his claim gives up his share of the land to *A*, the term as to *B* giving up his share is a term which relates to the suit (s). Where in execution of a decree obtained by *A* against *B*, *A* attaches certain property and *C* claiming the property as his own brings a suit against *A* for a declaration of his title to the property, and a compromise is arrived at between the parties whereby *A* admits *C*'s ownership of the property, and *C* agrees to execute a mortgage of the same property in favour of *A* for the amount of the decree obtained by *A* against *B*, the term as to the execution of the mortgage is a term which relates to the suit (t). But where *A* sued *B* to restrain *B* from building a projected house in such a way as to interfere with *A*'s enjoyment of light and air and a compromise was arrived at between the parties whereby *B* undertook not to build his house higher than what it originally was and also agreed as regards a passage between the two houses not to let water into the passage, it was held that the

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(s) *Jachim* v *Chenmessa* (1919) 24 C W N 328, 54 I C 538.

(t) *Saudamini* v *Behary Lal* (1920) 25 C W N 69, 61 I C 535; *Bharat* v *Srinath* (1921) 25 C W N 806, 66 I C 273 (2) A C 358.

O. 23, r. 3. arrangement as to the passage did not relate to the suit, and that the operative part of the decree should be confined to the undertaking as to the house (u) But the parties can get over the difficulty by amending the pleadings with the leave of the Court so as to comprise in the pleadings and the decree matters that did not relate to the original suit but are comprised in the compromise (v) In a Patna case where the plaintiff claimed Rs 7,000 with interest at the rate of 9¾ per cent per annum, and a consent decree was passed whereby the defendant agreed to pay Rs 2,500 with interest at the rate of 9 per cent per annum if the amount was paid on a specified date, but at 24 per cent per annum if it was not paid on or before that date, the Court refused execution of the decree with interest at 24 per cent on the ground that that part of the compromise which provided for the payment of interest at the rate of 24 per cent per annum was outside the scope of the suit, and allowed execution with interest at 9 per cent *only* (w) This decision cannot be supported either on principle or on authority so far as the ground on which it is based is concerned *See notes below,* " Execution of decree based on a compromise

Parties —A compromise cannot be recorded under this rule if besides the parties to the suit there are other persons who are parties to the compromise, unless those persons are brought on the record as parties to the suit The reason is that before recording a compromise under this rule, the Court has to be satisfied that there is a lawful compromise, and this cannot be done in the absence of those that are not parties to the suit (x)

Compromise pending arbitration —It has been held by the Calcutta High Court that where the matters in dispute in a suit are referred to arbitration *under an order of reference made by the Court* and pending the reference the parties adjust the suit by an agreement in writing signed by them and the arbitrators, the agreement does not amount to an award Nor can it be recorded as an adjustment under this rule unless the arbitration has been superseded by an order of the Court, the mere fact that the time for making the award has expired does not amount to a supersession of the arbitration, there must be an order of supersession under para 8 of Schedule II (y) In a Madras case, where the lower Court had under somewhat similar circumstances recorded the adjustment under the present rule, it was held that as the time for making the award had expired when the adjustment was recorded, the Court must be deemed to have exercised its power to supersede the arbitration under para 8 of Schedule II (z)

Execution of decree based on a compromise —This rule requires that where the Court is invited to pass a decree in terms of an agreement or compromise the agreement or compromise should be *lawful* and further, that the *operative* part of the decree should be confined to the *actual subject matter of the suit* Suppose now that a decree is passed on an agreement that is not lawful, or that the *operative* part of the decree comprises matters that do not relate to the suit Is the Court bound to execute the decree literally according to its terms ? We proceed to state the effect of the decisions on the subject

First, where a consent decree is based on an agreement or compromise that is not lawful. As to this, it has been held that so far as the decree embodies unlawful terms of a compromise, it is inoperative, and will not be enforced ' (a) The subject has already been dealt with above in the notes, Unlawful agreement or compromise

(u) *Pullonsey* v *Poonbai* (1883) 7 Bom 304
(v) *Mohiuddiah* v *Imami* (1887) 9 All 229
(w) *Gauri Dutt* v *Dohan* (1917) 2 Pat L J 673, 43 I C 459
(x) *Dooly Chand* v *Mohon Lal* (1924) 51 Cal 432 83 I C 608 (24) A C 722
(y) (1924) 51 Cal 432 439-440 83 I C 608, (24) A C 722 *supra*
(z) *Alagu* v *Mavilappa* (1923) 45 Mad L J 76 78 74 I C 609 (23) A M 576
(a) *Lakshmanaswami* v *Rangamma* (1903) 26 Mad 31

O. 23, r. 3.

Next, where a consent decree embraces matters that do not relate to the suit.—Where a decree passed on a compromise includes terms that relate to the suit, all the terms may be enforced in execution of the decree But where it contains terms that do not relate to the suit, there is a conflict of opinion whether those terms can be enforced in execution According to the Allahabad and Madras decisions, such terms can be enforced in execution of the decree (b) It is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to the suit Such an objection, it has been said by the Madras High Court, must be taken by way of appeal from the decree [and now by way of appeal under O 43 r 1 (m), from the *order* recording the compromise], and it cannot be taken in execution of the decree (c) On the other hand, the High Court of Calcutta has expressed the opinion that such terms cannot be enforced in execution of the decree but they may be enforced as a *contract* by a separate suit (d) Such a suit, however, according to the Allahabad High Court, would be barred under s 47, the question in the view taken by that Court being one relating to *execution* (e) In *Hemanta Kumari* v *Midnapur Zamindari Co* (f), where a decree comprised lands outside the suit, the Judicial Committee observed A perfectly proper and effectual method of carrying out the terms of [the present rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree, but in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation, the decree taken as a whole would include the agreement This in fact is what the decree did in the present case *It may be that as a decree it was incapable of being executed outside the lands of the district*, but that does not prevent it being received in evidence of its contents ' The correct view, it is submitted, is that the decree may be executed as to the *operative* part alone which, as stated above, is to be confined to the actual subject matter of the suit As to the rest it may be enforced as a contract by a separate suit

Appeal.—An *order* under this rule recording or refusing to record a compromise is appealable under O 43 r 1 (m) The Court may, under this rule, either record a compromise or it may refuse to do so If an order is made recording the compromise, the Court must pass a decree in accordance with the compromise If an order is made refusing to record the compromise the suit will be proceeded with But in either case, as stated above an appeal will lie from the *order* Where an order is made recording the agreement, an appeal may be preferred on any of the following grounds —

1 That there was no compromise at all, or no such compromise as the Court ordered to be recorded (g)

2 That the compromise is *not lawful* (h)

3 That the compromise recorded by the Court comprises *matters that do not relate to the suit* (i)

[illegible]

[illegible] I C [illegible]

(c) *Manager of Sri Meenakshi Devastanam* v *Abdul Kasim* (1907) 30 Mad 4[?]1 *Ratnasawmi* v *Patnammal* (1914) 27 Mad L J 398 24 I C 135

(d) *Jasimuddin* v *Bhuban* (1907) 34 Cal 456 463 *Purna Chundra* v *Nil Madhub* (1901) 5 Cal W N 485

(e) *Mohibullah* v *Inami* (1887) 9 All 229

(f) (1919) 46 I A 240 246 47 Cal 485 495 53 I C 534 in app from 19 C W N 347 28 I C 879

(g) *Coculdas* v *James Scott* (1892) 16 Bom 202 212 *Talamand* v *Fateh Din* (1918) Punj Rec no 83 p 277 45 I C 230 [where no consent was given at all by some of the parties to the suit]

O. 23, rr. 3, 4.

A compromise entered into by a pleader without the authority of his client is no compromise at all (j) and as such it comes under group (1) above

It has been held by the High Courts of Lahore (k), and Madras (l) that the fact that a *decree* has been passed in accordance with the compromise does not preclude an appeal from the *order* recording the compromise On the other hand it has been held by the High Court of Calcutta that an appeal from the *order* is incompetent if the appeal is filed after the passing of the decree (l2) See notes to s 96, 'Sub-sec (3): consent decrees not appealable p 263 above, and notes above under the head Scope of the rule

O. 43 r 1 (m) does not apply to an order setting aside an award under a reference made *through the intervention of the Court* Such a case falls within Schedule II of the Code (m)

Registration —As to registration of decrees based on a compromise, see Mulla's Registration Act p 78 *et seq*

Execution proceedings —See r 4 below

Proceedings in execution of decrees not affected

4. [S. 375 A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order

Proceedings in execution —This rule provides *inter alia* that the provisions of r 3 shall not apply to execution proceedings The reason is that O 21, r 2 and s 47, taken together provide a complete procedure for recording compromises arrived at in execution proceedings (n The rule also provides that the provisions of r 1 shall not apply to proceedings in execution Hence where an application for execution of a decree has been made the Court has no power to allow the applicant to withdraw the application under r 1 (2) above with permission to make a fresh application (o). For the same reason the applicant cannot withdraw his application under r 1 (1) above, though he may apply for its dismissal if he does not wish to proceed further with it (o2). A compromise of a suit after the passing of a preliminary decree and during the pendency of an enquiry before the Commissioner is not a compromise of a proceeding in execution. Such a compromise may therefore be recorded under r 3 above (p) The High Court of Patna has held that an application to set aside a sale under O 21, r 90 is not a proceeding in execution, and that a compromise arrived at between the parties that on the judgment debtor paying a certain sum into Court by a particular date the Court sale should be set aside may therefore recorded under r 3 above (q) But the correctness of this decision is doubtful

ORDER XXIV

Payment into Court

O 24, r 1

Deposit by defendant of amount in satisfaction of claim

1. [S. 760, R. S. C., O. 21, r. 1.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

(j) Thenal v Sollammal (1917) 41 Mad 233 41 I C 479
(k) Mahomed Fatheh v Rahmat Ullah (1914) Punj Rec no 96 p 355 24 I C 630 Mesh
(m) Munshi v Gokar (1921) 29 C W N 773; C 2 A C 994
(n) Choudhury v Choudhury (1921) 6 Pat L J 253 254 62 I C 608
(o) Mata v Beni (1914) 36 All 173, 42 I C 961
(o2) Chowdhury v Mahesh (1922) 1 Pat 252
(p) Prandas v Girdhardas (1907) 26 Bom 76, 82
(q) (1921) 6 Pat L J 253 62 I C 608 *supra*

Payment into Court with denial of liability —There is no provision in this rule enabling a defendant to pay money into Court *with a defence denying liability*, in other words, *without prejudice to his contentions*, as there is in the corresponding English rule see R S C, O 22, rr 1 and 6

Mere willingness to pay —A mere allegation of willingness to pay made in the written statement is not equivalent to payment into Court, and it does not stop interest from running (*r*)

"Suit to recover a debt or damages" —This order applies only to suit to recover a "debt or damages" and not to any other suits Where a suit is instituted against a defendant to recover a debt or damages, he may pay into Court such amounts *as he considers* a satisfaction in full of the plaintiff s claim By such payment into Court, the defendant may be benefited (1) in respect of interest, for which see r 3, and (2) in respect of costs, for which see r 4 and illustrations thereto

Suit for injunction —A suit for an injunction to restrain a defendant from building so as to interfere with the plaintiff s light and air, but *not including any claim for damages*, is not a suit for "debt or damages" within the meaning of this rule No doubt, the Court has in such a suit a discretion under s 19 the Specific Relief Act 1 of 1877 to award damages in lieu of injunction, but this circumstance does not make the suit one for "damages" within the meaning of this rule (*s*) But it has been held by the High Court of Bombay, in view of the long established practice of that Court, that where a defendant in a suit for an injunction pure and simple pays into Court a sum which he considers a satisfaction in full of the plaintiff s claim, though it be with defence denying liability, and the Court allows damages only to the plaintiff and that too to the extent of the amount deposited by the defendant, the principle underlying r 4 below ought to regulate the discretion of the Court (which it has under s 35) in directing the payment of costs (*t*)

Suit for accounts —This rule does not apply to suits for accounts (*u*)

Suit to recover debt or damages together with other relief —This rule applies to suits to recover debt or damages though there may be other reliefs claimed in the suit, *e g*, injunction (*v*)

"At any stage of the suit"—This means *before decree* as indicated by the words "in full of the *claim*" and the subsequent rules See notes to r 3 below, "Execution proceedings"

Payment into Court and insolvency of defendant —In England it has been held that when money is paid into Court *admitting* liability, the plaintiff, in the event of the defendant s bankruptcy is a secured creditor in respect of it, and when liability is denied, he is a secured creditor to the extent to which his claim is admitted by the trustee in bankruptcy or proved (*w*)

2 [s 377] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application

Notice of deposit

(*r*) *Haji Abdul Rahman* v *Haji Noor Mahomed* (1891) 16 Bom 141 150
(*s*) *Laxuman* v *Moroba* (1897) 21 Bom 507
(*t*) 21 Bom 507 *supra*
(*u*) *Nichols* v *Evens* (1883) 22 C D 611
(*v*) See *Moon* v *Dickinson* (1890) 63 L. T 371
(*w*) *Re Gordon* [1897] 2 Q. B 516

O. 24, rr. 2-4.

Compare R S C, O 22, rr 4 and 5

Form —For form of notice, see App H, form no 3

"Unless the Court otherwise directs"—These words show that the Court has a discretion to refuse to allow monies to be paid out That discretion, however, should be exercised reasonably Where the money sued for and paid into Court is due on a promissory note, it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out The fact that the payment into Court is accompanied by a denial of liability on the ground of minority is not such a circumstance (x) Where there are conflicting claims, as where the amount deposited in Court is claimed by different parties no party can withdraw the amount without an order of the Court (y)

3 [S 378] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed to plaintiff after notice

Tender —A plea of tender before action must to stop interest be accompanied by a payment into Court after action otherwise the tender is ineffectual (z)

Execution proceedings —The principle of this rule applies to proceedings in execution, therefore if money is paid into Court by a judgment-debtor no interest should be allowed to the decree holder on the amount so paid, although such amount may not in fact be the whole amount due under the decree (a)

4 [S 379] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance, and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim

Procedure where plaintiff accepts deposit as satisfaction in part

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly, and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full

(x) Dwarka Dass v Girish Chunder (1899) 26 Cal 768

(y) Haji Abdul Rahman v Haji Noor Mahomed (1892) 16 Bom 141

(z) Haji Abdul Rahman v Haji Noor Mahomed (1892) 16 Bom 141

(a) Amtul v Muhammad (1917) 40 All 125, 43 I C 520

Illustrations

O. 24, r. 4.

(a) *A* owes *B* Rs 100 *B* sues *A* for the amount having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage On the plaint being filed *A* pays the money into Court *B* accepts it in full satisfaction of his claim but the Court should not allow him any costs the litigation being presumably groundless on his part

(b) *B* sues *A* under the circumstances mentioned in illustration (a) On the plaint being filed, *A* disputes the claim Afterwards *A* pays the money into Court *B* accepts it in full satisfaction of his claim The Court should also give *B* his costs of suit *A*'s conduct having shown that the litigation was necessary

(c) *A* owes *B* Rs 100 and is willing to pay him that sum without suit *B* claims Rs 150 and sues *A* for that amount On the plaint being filed *A* pays Rs 100 into Court and disputes only his liability to pay the remaining Rs 50 *B* accepts the Rs 100 in full satisfaction of his claim The Court should order him to pay *A*'s costs

Compare R S C O 22 r 6

Apportionment of costs—See notes to r 1, Suit for injunction on p 777 above

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ORDER XXV.

Security for Costs.

O. 25, r. 1.

When security for costs may be required from plaintiff

1 [Ss. 380, 382.] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant

Residence out of British India

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub rule (1)

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is

O. 25, r. 1. satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Object of the rule —The object of the rule is to provide for the protection of defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff (*b*)

Application of the rule —Security for the costs of a defendant *may* be required, from a plaintiff in the following two cases —

I (*a*) Where the plaintiff resides out of British India, or where there are two or more plaintiffs, *all the plaintiffs reside* out of British India; *and*

(*b*) where none of the plaintiffs has sufficient immoveable property within British India *other than the property in suit*

II (*a*) Where the plaintiff is a woman,

(*b*) where her suit is for the payment of money, *and*

(*c*) she does not possess sufficient immoveable property within British India

Discretion of Court in requiring security for costs from non-resident plaintiffs —The word *may* implies discretion In the exercise of this discretion the Court will not order security for costs from a plaintiff residing out of British India in cases in which he cannot be rendered liable for the defendant's costs, *e g*, an administration suit by the plaintiff as a creditor or a legatee in which the plaintiff's claim is *admitted* or a suit on a mortgage or a promissory note *where there is no defence.* In such cases no security for costs will be ordered *even though* the plaintiff resides out of British India, and has not sufficient immoveable property within British India, not even though the plaintiff be a woman (*c*)

Resides —The residence intended in this rule is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided *Mere presence* in British territory at the time of suit is not "residence" (*d*) Thus a resident of a Native State staying in Bombay for the sole purpose of taking proceedings to get his wife back cannot be said to "reside" in Bombay within the meaning of this rule (*e*). See notes to s 20, "Actually and voluntarily resides", on p 87 above

Trading corporations —The 'residence and domicile' of an incorporated trading company are determined by the situation of its principal place of business. By the principal place of business is meant the place where the administrative business of the company is conducted This may not be the place where its manufacture or other operations are carried on Dicey s Conflict of Laws, 3rd ed, p 164

British India —Aden is within British India (*f*) The Kathiwar States are not within British India (*g*) nor is the Cantonment of Wadhwan (*h*), nor the Cantonment of Secunderabad (*i*) nor the Rajkot Civil Station (*j*) See notes to s 1, "British India," p. 2 above

"Immoveable property" —A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus *income* derived from immoveable property cannot

(*b*) *Premchand* in the goods of (1894) 21 Cal 832 at p 836
(*c*) *Premchand*, in the goods of (1894) 21 Cal 832 836
(*d*) *Mahomed Shuffi* v *Laldin* (1879) 3 Bom 227
(*e*) *Hanif* v *Kulsum* (1922) 46 Bom 583, 64 I C 703 (22) A B 299
(*f*) Aden Laws Regulation, 1891, s 2

be said to *possess immoveable property* within the meaning of this rule (*k*) Leasehold property is '*immoveable property*' within the meaning of this rule (*l*)

Poverty of plaintiff—Mere poverty is no ground for requiring a plaintiff to give security for the cost of the suit (*m*) But it is otherwise if he is not the real litigant, and issuing on behalf of another who is not a party to the suit (*n*) In a recent Bombay case, a suit was brought by a Parsi father and his minor daughter as plaintiffs for damages for the defendant's breach of his promise to marry the daughter The father was an undischarged insolvent and it was alleged that the suit was really the father's suit and that he was seeking to make money out of his daughter's engagement The Court upon these grounds ordered the father to furnish security for the costs of the defendant (*o*) In the last mentioned case the Court relied upon a dictum of Bowen, L J, in *Cowell* v *Taylor* (*p*) 'that, in order to prevent abuse, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security '

Inherent power to order security for costs—The case for security for costs from a puppet plaintiff is clearly outside the scope of this rule It can only be brought in under the inherent power of the Court In one case the Calcutta High Court said that it had such power (*q*) In a later case the same High Court said that the Court had no such power, the reason given being that the inherent power of the Court cannot be invoked in matters for which the Code does actually provide (*r*) See notes above, "Poverty of plaintiff"

Where leave has been granted to plaintiff to sue as a pauper—The Court has no power under this rule to require security for costs from a person to whom leave has been granted under O 33, r 8, to sue *as a pauper*, for to do so would be to render the leave nugatory (*s*) If an order is made requiring a plaintiff to furnish security for the costs of the defendant, and leave is subsequently granted to the plaintiff to continue the suit as a pauper, the order ceases to operate as regards antecedent costs provided leave is granted before the time limited for giving security has expired (*t*)

Where the plaintiff is a minor—The power as to requiring security for costs is a discretionary one, and except in exceptional cases, neither a minor plaintiff nor his or her next friend should be required to give security for costs (*u*), not even if both the minor and his next friend are residing out of British India and do not own immoveable property in British India (*v*)

Where the plaintiff is a woman—The necessity for the provisions of sub r (3) arises from the provisions of s 56 by which it is enacted that no woman can be arrested or detained in the civil prison in execution of a decree for the payment of money (*u*) But the Court has a discretion in the matter, and in the exercise of its discretion it will not as a general rule require security for costs from a woman plaintiff, if the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* (*x*)

(*k*) *Premchand* in the goods of (1894) 21 Cal 832

(*l*) *Russicklall* v *Jadubram* (1873) 10 Beng L R App 25

(*m*) *Maneckji* v *Goolbai* (1879) 3 Bom 241 *Khajah Assenoollajoo* v *Solomon* (1887) 14 Cal 533

(*n*) *Ram Coomar Coondoo* v *Chunder Canto Mookerjee* (1877) 2 Cal 233 4 I A 23 [a case under the Code of 1859 which did not contain any provision for security for costs] *Khajeh Assenoollajoo* v *Solomon* (1887) 14 Cal 533 *Harinath* v *Ram Kumar* (1913) 18 Cal W N 119 20 I C 703

Cal 853 864 866 79 I C 798 (24) A C 251

(*s*) *Mussamat Hafizan* v *Abdul Karim* (1908) 12 C W N 163 See also *Yusseeroodeen Biswas* v *Ujjul Biswas* (1871) 17 W R 68 [no security for costs from a pauper appellant]

(*t*) *Bai Laxmi* v *Harjivan* (1912) 36 Bom 415, 12 I C 538

(*u*) *Bai Porebai* v *Devji* (1899) 23 Bom 100, *Mani Bai* v *Lodd Govind* (1908) 18 Mad L J 155

(*v*) *Bhaishanker* v *Mulji* (1910) 35 Bom. 339, 11 I C 551

(*w*) *Premchand*, in the goods of (1894) 21 Cal 832 836

(*x*) *Nanibai* v *Daji Govind* (1911) 35 Bom 421 8 I C 1055 *Sonabai* v *Tribhowandas* (1908) 32 Bom 602 606

O. 25, rr. 1, 2.

"Suit for the payment of money."—The words "suit for the payment of money" have been substituted for the words "suit for money" which occurred in the old section. Suits which are not exclusively for the payment of money, but which will result in a decree for the payment of money on the relief sought, are "suits for the payment of money" within the meaning of this rule (y). Thus a suit to recover possession of specific moveable property (e g, ornaments), or in the alternative the money value of such property, is a "suit for the payment of money" within the meaning of this rule (z) But a suit for the administration of an estate which consists largely of immoveable property is not a "suit for the payment of money" Such a suit is in fact a suit relating to immoveable property, though it may ultimately be necessary to sell the estate and distribute the proceeds in money (a)

Cross-claim and security for costs—There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person residing out of British India who, upon being sued in British India, sets up a cross claim, either by counter claim or by cross suit It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross claim must be treated as made, substantially, by way of defence to the suit against the claimant, or whether it must be regarded as [illegible] stantially in the nature of an independent claim [illegible] suit, and therefore [illegible] given (b)

Appeal—There is no appeal under the Code from an order made under this rule, but there is one from an order rejecting an application under r 2 (2) below for an order to set aside the dismissal of the suit But an order under this rule made by a Chartered High Court requiring a plaintiff to give security for the costs of a suit is a "judgment" within the meaning of clause 15 of the Letters Patent, and is therefore appealable (c).

Revision—Where a Court passes an order [illegible] to give security for [illegible] erroneously [illegible] suit which is not "a suit for the paym[illegible] within the meaning of sub r. (3), the case is one of "illegal exercise of jurisdiction within the meaning of s 115, and the High Court has power to interfere in revision (d)

Other cases in which security for costs may be required under the Code—See O 22, r 8 [plaintiff's insolvency], O 37, r 4 [summary suit on negotiable instruments], O 41, r 5 [security on stay of execution], O 41, r 6 [security where execution is granted of a decree appealed from], O 41, r 10 [security from appellant] and O 45, r 7 [security on grant of certificate of leave to appeal to the Privy Council]

Effect of failure to furnish security

2. [S. 381.] (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(y) *Soonabai* v *Tribhowandas* (1908) 32 Bom 602

(z) *Dayumbari* v *Aushootosh* (1890) 17 Cal 610. See also *Bai Porebai* v *Devji* (1899) 23 Bom 100, *Bomonji* v *Nusserwanji* (1903) 27 Bom 100.

(a) *Saw Durmay* v *Baggah Singh* (1925) 3 Rang 213, 90 I C 969, (25) A R 351

(b) *New Fenix Compagnie* v *General Accident Assurance Corporation* (1911) 2 K. B 619

(c) *Seshagiri* v *Nawab Askur* (1903) 26 Mad 502, *Sonabai* v. *Tribhowandas* (1908) 32 Bom 602

(d) *Saw Durmay* v *Baggah Singh* (1925) 3 Rang 213, 90 I C 969, (25) A R 351

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. **O. 25, r. 2.**

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

Res Judicata.—A plaintiff whose suit has been dismissed under this rule for failure to furnish security is not precluded from instituting a fresh suit on the same cause of action (*e*), or from pleading the subject matter of such suit in answer to any other suit instituted against him (*f*). *A* sues *B* for the cancellation of a promissory note alleging that the note was obtained by fraud. The suit is dismissed under this rule for failure to furnish security. This does not preclude *A* from instituting a fresh suit for the cancellation of the note, nor does it preclude him, if a suit is brought against him by *B* to recover the amount of the note, from pleading fraud in answer to such suit.

Limitation.—An application by a plaintiff for an order to set aside a dismissal for failure to furnish security for costs must be made within 30 days from the date of dismissal [Limitation Act, 1908, sch. I, art 163].

Appeal.—An appeal lies from an order under this rule rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit; see O. 43, r. 1 (n).

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses.

1. [S. 383.] *Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.* **O. 26, r. 1.**

Cases in which Court may issue commission to examine witness.

Power of Court to issue commissions.—See s. 75 above.

Cases in which commissions may be issued.—A commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case. Therefore, a commission should not be issued for the examination of the head of a *mutt*,

(*e*) *Hariram* v. *Lalbai* (1902) 26 Bom. 637.

(*f*) *Pungrav* v. *Sidhi Mahomed* (1882) 6 Bom. 482.

O. 26, rr. 4-6.

Appeal—It was held at one time by the High Court of Madras that an appeal lay under cl 15 of the Letters Patent from an order made by a single Judge of the High Court directing the issue of a commission (s) as well as from an order refusing a commission (t), on the ground that such order amounted to a judgment within the meaning of cl 15 of the Letters Patent But those decisions have since been overruled by a Full Bench of the same High Court (u) In Bombay it has been held that no appeal lies from an order *directing* the issue of a commission, the reason given being that such an order is merely an interlocutory order and not a "judgment" within the meaning of the said clause (v) The High Court of Calcutta (u) and Rangoon (w2) have held that no appeal lies from an order *refusing* a commission

Revision.—An order refusing the application of a defendant to be examined on commission is in a proper case open to revision (x) Similarly an order granting the application of the plaintiff to be examined on commission may in a proper case be revised by the High Court (y)

5 [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request to examine witness not within British India

"**Or a letter of request**"—These words are new See s 77 above. For form of letter of request, see App H form no 8

Evidence of a foreign witness—Evidence of a foreign witness taken in foreign territory (e g, Chandernagore) under a commission issued under this rule and executed in accordance with the provisions of r 17 below, is clearly admissible (z)

Revision—An order made under this rule refusing the issue of a commission is not subject to revision under s 115 (a)

6 [S 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

Court to examine witness pursuant to commission

Examination on commission—A party who has not joined in a commission is entitled to cross examine the witness examined under the commission (b) Evidence taken on commission without full opportunity for complete cross examination should not be admitted (c) But where the Court is satisfied that the cross examination of any witness on commission is being unnecessarily prolonged, it will order such cross examination to be concluded within a certain time (d)

(s) *Veerabadram v Natraja* (1905) 28 Mad 28

(t) *Maruthamuthu v Krishnamachariar* (1907) 30 Mad 143

(u) *Tuljaram v Alagappa* (1912) 35 Mad 1, 8, 20-21 8 I C 340

(v) *Miya Mahomed v Zorabi* (1909) 11 Bom L R 241 2 I C 157

(w) ...sundaram (1924) 46 Mad L J 131, 78 I C 407, ('24) A M 541

(w2) ...

(x) *Nawab Sayid v Herbert* (1924) 3 Pat 863, 84 I C 993 ('25) A P 125

(z) *Kadumbiny v Kumudini* (1903) 7 Cal W N 808

(a) *Nizam of Hyderabad In re* (1886) 9 Mad 256

(b) *Gregory v Dooley Chand* (1864) 14 W R O C 17

(c) *Boisagomoff v Nahapiet Jute Co* (1901) 5 Cal W N p ccxxx

(d) *Suraj Prosad v Standard Life Insurance Co* (1903) 30 Cal 625

O. 26, rr. 7, 8.

7. [s. 389] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

Return of commission with depositions of witnesses

Evidence taken on commission shall form part of the record of the suit.—See notes to r 8 below, "Reading depositions in evidence"

8. [s. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless—

When depositions may be read in evidence.

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (*a*), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

"Or is a civil or military officer—public service."—These words which occur in cl (a) are new.

Reading depositions in evidence.—According to the practice prevailing on the Original Side of the High Court of Calcutta, evidence taken on commission is not treated as evidence in the suit until the same has been tendered and read as evidence in the suit by the party on whose behalf it has been taken It therefore follows that evidence taken under a commission at the instance of one party cannot be used by the opposite party until it is tendered and read as evidence by the party on whose behalf it has been taken (e) On the other hand, the practice in the Courts in the mofussil of Calcutta is

(e) *Kusum* v *Satya* (1903) 30 Cal 999, *Hemanta* v *Banku Behari* (1905) 9 C W N 791

O. 26, rr. 4-6.

Appeal—It was held at one time by the High Court of Madras that an appeal lay under cl 15 of the Letters Patent from an order made by a single Judge of the High Court directing the issue of a commission (s) as well as from an order refusing a commission (t), on the ground that such order amounted to a judgment within the meaning of cl 15 of the Letters Patent But those decisions have since been overruled by a Full Bench of the same High Court (u) In Bombay it has been held that no appeal lies from an order *directing* the issue of a commission, the reason given being that such an order is merely an interlocutory order and not a "judgment" within the meaning of the said clause (v) The High Court of Calcutta (w) and Rangoon (w2) have held that no appeal lies from an order *refusing* a commission

Revision—An order refusing the application of a defendant to be examined on commission is in a proper case open to revision (x) Similarly an order granting the application of the plaintiff to be examined on commission may in a proper case be revised by the High Court (y)

Commission or request to examine witness not within British India

5 [S 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request

"Or a letter of request"—These words are new See s 77 above. For form of letter of request, see App H, form no 8

Evidence of a foreign witness—Evidence of a foreign witness taken in foreign territory (*e g*, Chandernagore) under a commission issued under this rule and executed in accordance with the provisions of r 17 below, is clearly admissible (z)

Revision—An order made under this rule refusing the issue of a commission is not subject to revision under s 115 (a)

Court to examine witness pursuant to commission

6 [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto

Examination on commission—A party who has not joined in a commission is entitled to cross examine the witness examined under the commission (b). Evidence taken on commission without full opportunity for complete cross examination should not be admitted (c) But where the Court is satisfied that the cross examination of any witness on commission is being unnecessarily prolonged, it will order such cross examination to be concluded within a certain time (d)

(s) *Veerabadram v Nataraja* (1905) 28 Mad 28

(t) *Maruthamuthu v Krishnamachariar* (1907) 30 Mad 143

(u) *Tulsiram v Alagappa* (1912) 35 Mad 1 8 20-21 8 I C 340

(v) *Haji Mahomed v Zorabi* (1909) 11 Bom L R 241 2 I C 157

(w) *Toremull v Kunj Lall* (1920) 31 Cal L J 162 55 I C 766

sundaram (1924) 46 Mad L J 131, 79 I C 407, (24) A M 541

(y) *Nawab Sayid v Herbert* (1924) 3 Pat 663, 84 I C 993 (25) A P 125

(z) *Kadumbiny v Kumudini* (1903) 7 Cal W N 606

(a) *Nizam of Hyderabad In re* (1886) 9 Mad 256

(b) *Gregory v Dooley Chand* (1868) 14 W R O C 17

(c) *Bonnajomoff v Nahapiet Jute Co* (1901) 5 Cal W N p ccxxx

(d) *Suraj Prasad v Standard Life Insurance Co* (1903) 30 Cal 625

Interference with commissioner's report.—Interference with the result of a careful local investigation except upon clearly defined and sufficient grounds is to be deprecated (*m*)

Amount of profits.—The report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s 164 of the Agra Tenancy Act is admissible in evidence having regard to this rule and rules 16 17 and 18 (*n*)

Mesne profits—burden of proof.—See notes to O 20 r 12 Burden of proof on p 580 above

Form.—For form of commission for local investigation see App H form no 9

10. [S. 393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court

Procedure of Commissioner

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation

Report and disposition to be evidence in suits

Commissioner may be examined in person

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit

Alterations in the rule.—The words or as to his report in sub rule (2) after the words mentioned in his report are new Sub-rule (3) is also new

Further evidence after commissioner's report.—This rule does not contemplate the tender of further evidence after the Commissioner's report except the examination of the Commissioner himself but it does not forbid it It is consistent with either course and the point must be decided on general principles according to the facts of each case (*o*)

(*m*) *Surut Soondari* v *Prosonno Coomar* (1870) 13 M I A 607 6 Beng L R 677 *Monkee* v *Bhullunder* (1871) 15 W R 423 *Pani Amrita* v *Munshi* (1923) 28 C W N 318 80 I C 755 (924) A C 690

(*n*) *Bakhtawar* v *Sheo Prasad* (1917) 39 All 634 42 I C 770 The provisions of O 26 are applicable to suits under the Agra Tenancy Act 2 of 1901

(*o*) *Grish Chander* v *Shoshi Shikhareswar Roy* (1900) 27 Cal 951 966 27 I A 110 *Sabapathy* v *Perumal* (1921) 44 Mad 840 62 I C 700

O. 26, rr. 11-13.

Commissions to examine accounts.

Commission to examine or adjust accounts

11. [S. 394.] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Commission to examine accounts—The words of this rule clearly indicate that no order can be made for the appointment of a commissioner unless the examination or adjustment of accounts is considered necessary (p)

The commissioner to whom a suit is referred by a Judge on the original side of the High Court of Bombay is entitled to decide questions of law which may arise while taking accounts (q)

Form—For form of commission to examine accounts *see* App H form no 9

Court to give Commissioner necessary instructions

12. [S. 395.] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination

Proceedings and report to be evidence Court may direct further inquiry

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit

Commissions to make partitions

Commission to make partition of immovable property

13. [*S. 396,* **1st para**] *Where a preliminary decree for partition has been passed,* the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree

Alteration in the rule—The singular person has been substituted for the plural persons, under the old section it was held that the use of the plural persons showed that the Court could *not* issue a commission to make partitions *to a single* Commissioner (r) The substitution of the singular person for the plural

(p) *Bharat Chandra* v *K[illegible]an Chand[illegible]a* (19[illegible]) 52 Cal 766 90 I C 914 (2[illegible]) A C 1069

(q) *Laxmibai* v *Hussainbhai* (1917) 41 Bom 719 36 I C 818

(r) *Mulchand* v *Muhammad Al[illegible]* (1907) 23 All 235

"persons clearly shows that under the present rule the commission may be issued to a single Commissioner

Form—For form of commission to make a partition see App H form no 10

14. [**S.** 396, **2nd and 3rd paras**] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares

Procedure of Commissioner

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds Such report or reports shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied, but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit

Alterations in the rule—The words shall confirm vary or set aside the same at the end of sub rule (2) and the whole of sub rule (3) have been substituted for the words shall either quash the same and issue a new commission or (where the Commissioners agree in their report) pass a decree in accordance therewith' Under the wording of the old section it was held that the Court must either accept the report or reject the report and that it had no power to *vary* it (s) The word vary has been added into sub rule (2) to enable the Court to modify the report in a proper case

Resistance to Commissioner—Where a commission has been issued to make a partition the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of the suit (t)

General provisions

15 [S 397] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a

Expenses of commission to be paid into Court

(s) *Janki v Ca n* (1906) 28 All 7. (t) *Masum n n ssah v Lat fan* (1910) 3. All 319 5 I C 872

O. 27, r. 15-17.

time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

16 [S. 398] Any Commissioner appointed under this Order, may, unless otherwise directed by the order of appointment,—

Powers of Commissioners

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;

(*b*) call for and examine documents and other things relevant to the subject of inquiry ;

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

17. [S 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a *Court situate beyond the limits of British India, and for* the purposes of this rule the Commissioner shall be deemed to be a Civil Court

Attendance and examination of witnesses before Commissioner

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper

Sub-rule (2)—*This sub rule is new It enables the Court within the local limits* of whose jurisdiction a witness resides to issue a summons for his examination on the application of the Commissioner In the absence of any such provision in the old section it was held that where a witness failed to appear before a Commissioner pursuant to a notice issued by him, the only course left open to the Commissioner was to return the commission to the Court from which it was issued, and the latter Court would then send the commission to the Court within the local limits of whose jurisdiction the witness to be examined resided (*u*)

(*u*) *Mahomed v Wazid Ali* (1896) 23 Cal 404

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ORDER XXVIII.

Suits by or against Military Men.

1. [S. 466.] (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (*b*) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed Such commanding or other officer shall countersign the authority, which shall be filed in Court

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment corps, detachment or depot to which the officer or soldier belongs

2. [S. 465.] Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier

Person so authorized may act personally or appoint pleader

3. [S. 467.] Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person

Service on person so authorized or on his pleader to be good service

O. 27, rr. 5-8.

5. [S 420] The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion

Fixing of day for appearance in behalf of Government

6. [S 421] The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person

Attendance of person able to answer questions relating to suit against Government

7. [S 423] (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel

Extension of time to enable public officer to make reference to Government

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8. [Ss 426, 427] (1) Where the Government undertakes the defence of a suit against a public officer the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits

Procedure in suits against public officer

(2) Where no application under sub rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree

ORDER XXVIII.

Suits by or against Military Men

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(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

Explanation —In this Order the expression ' commanding officer" means the officer in actual command for the time being of any regiment corps, detachment or depot to which the officer or soldier belongs

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Person so authorized may act personally or appoint pleader

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Service on person so authorized or on his pleader to be good service

ORDER XXIX.

Suits by or against Corporations.

O. 29, r. 1.

Subscription and verification of pleading

1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Companies authorized to sue and be sued in the name of an officer or trustee—All reference has been omitted in this and the next following rule to companies authorised to sue and be sued in the name of an officer or of a trustee, as such companies must be very few, if, indeed, any exist

Foreign corporation—The procedure prescribed by this rule applies *to foreign* corporations as well It is not necessary before a foreign corporation can claim the *benefit of this rule that it must be registered under the Indian Companies Act* or under an Act of Parliament (*v*) Thus a plaint in a suit by the Singer Manufacturing Company, which is a company incorporated in the United States, may be verified by an agent holding a general power of attorney from the company as a "principal officer" of the company within the meaning of this rule (*w*) The fact that the Agent also acts for another foreign firm is not material (*w2*)

Suit by an unregistered or unincorporated society—A suit by an unregistered or unincorporated society must be brought in the names of all the members of the society (*x*) Where there are numerous members, the suit may be instituted by one or more of them with the permission of the Court on behalf of all [O 1, r 8]

Suit by or against a registered company— A suit by or against a registered company must be instituted in the name of the company A suit against two companies described as "the India General S N and R Co, Ltd, and the Rivers S N Co, Ltd, *by their joint Agent A E Rogers*," is substantially a suit against Rogers and it is in contravention of the provisions of this rule The words "by their joint agent A E Rogers" should be omitted (*y*)

"Other principal officer of the corporation"—The manager at Lucknow *of the local branch of the Delhi and London Bank was authorised by a power of attorney* to manage the affairs of the Bank and to substitute any person for himself In pursuance of this power he gave a *power of attorney* to the accountant of the Bank to manage the affairs of the Bank, but such power omitted words giving authority to sue It was held that the accountant was, under the circumstances, the principal officer of the Bank, and that he could, as such, sign and verify the plaint in a suit filed by the bank (*z*)

(*v*) *Singer Manufacturing Co* v *Baijnath* (1903) 30 Cal 103

(*w*) *Singer Manufacturing Co* v *Yar Mukummad* (1912) Punj Rec no 8 p 33 10 I C 141

(*w2*) *Saccharin Corporation Ltd* v *Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K B 516 See also *Aktieselskabet Dampskib "Hercules"* v *Grand Trunk Pacific Railway* [1912] 1 K B 222

(*x*) *Panchaiti* v *Gauri Kuar* (1893) 20 All 187

(*y*) *India General S N & R Co, Ld* v *Lal Mohan* (1916) 43 Cal 441, 31 I C 35

(*z*) *Delhi and London Bank* v *Oldham* (1894) 21 Cal 60 20 I A 139, *Allen Brothers* v *Arun Mal* (1925) 7 Lah. L J 66, 68, 88 I C 546, ('25) A L. 338.

"Who is able to depose to the facts of the case"—Where a pleading is signed and verified by a director, secretary or other principal officer of a corporation, it must be stated in the pleading, that he is a director, secretary or principal officer of the Company, and that he is able to depose to the facts of the case If there is no such statement in the pleading, the pleading should not be admitted, unless the defect is made good by an affidavit containing such statement (a)

Dismissal of suit—Where in the case of a suit by a corporation, the plaint is signed and verified by an officer other than a principal officer of the corporation, the suit should be *dismissed* (b) Similarly, the suit should be *dismissed*, if in the case of an unregistered or unincorporated society, the suit is brought in the names of some only of the members of the society (c) See notes above

Service on corporation

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

Service by post—The language of the old section has been enlarged so as to allow of service by post on corporations and by this means the rule is brought into line with the provisions of s 148 of the Indian Companies Act 7 of 1913

Power to require personal attendance of officer of corporation

3. [S 436, last para] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

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ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

O. 30, r. 1.

Suing of partners in name of firm

1. [*New.* R. S. C., O. 48A, r. 1.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm

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(a) *Sreenath v. East Indian Railway Co.* (1895) 22 Cal 268

(b) *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church* (1894) 16 All 420

(c) *Lanchand v. Gauri Kuar* (1895) 20 All 167

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Companies authorized to sue and be sued in the name of an officer or trustee.—All reference has been omitted in this and the next following rule to companies authorised to sue and be sued in the name of an officer or of a trustee, as such companies must be very few, if, indeed, any exist.

Foreign corporation.—The procedure prescribed by this rule applies to foreign corporations as well. It is not necessary before a foreign corporation can claim the benefit of this rule that it must be registered under the Indian Companies Act or under an Act of Parliament (t). Thus a plaint in a suit by the Singer Manufacturing Company, which is a company incorporated in the United States, may be verified by an agent holding a general power of attorney from the company as a "principal officer" of the company within the meaning of this rule (u). The fact that the Agent also acts for another foreign firm is not material (u2).

Suit by an unregistered or unincorporated society.—A suit by an unregistered or unincorporated society must be brought in the names of all the members of the society (x). Where there are numerous members, the suit may be instituted by one or more of them with the permission of the Court on behalf of all [O. 1, r. 8].

Suit by or against a registered company.— A suit by or against a registered company must be instituted in the name of the company. A suit against two companies described as "the India General S. N. and R. Co., Ltd., and the Rivers S. N. Co., Ltd., *by their joint Agent A. E. Rogers*," is substantially a suit against Rogers and it is in contravention of the provisions of this rule. The words "by their joint agent A. E. Rogers" should be omitted (y).

"Other principal officer of the corporation".—The manager at Lucknow of the local branch of the Delhi and London Bank was *authorised by a power of attorney* to manage the affairs of the Bank, and to substitute any person for himself. In pursuance of this power he gave a *power of attorney* to the accountant of the Bank to manage the affairs of the Bank, but such power omitted words giving authority to sue. It was held that the accountant was, under the circumstances, the principal officer of the Bank, and that he could, as such, sign and verify the plaint in a suit filed by the bank (z).

(t) *Singer Manufacturing Co. v. Baijnath* (1903) 30 Cal. 103.

(u) *Singer Manufacturing Co. v. Yar Muhammad* (1912) Punj. Rec. no. 8 p. 33, 10 I. C. 141.

(u2) *Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 K. B. 516. *See also Aktieselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway* [1912] 1 K. B. 222.

(x) *Panchatti v. Gauri Kuar* (1894) 20 All. 167.

(y) *India General S. N. & R. Co., Ld. v. Lal Mohan* (1916) 43 Cal. 441, 31 I. C. 35.

(z) *Delhi and London Bank v. Oldham* (1894) 21 Cal. 60, 20 I. A. 139; *Allen Brothers v. Arura Mal* (1925) 7 Lah. L. J. 66, 68, 88 I. C. 546, (25) A. L. 339.

"Who is able to depose to the facts of the case."—Where a pleading is signed and verified by a director, secretary or other principal officer of a corporation, it must be stated in the pleading, that he is a director, secretary or principal officer of the Company, and that he is able to depose to the facts of the case If there is no such statement in the pleading, the pleading should not be admitted, unless the defect is made good by an affidavit containing such statement (a)

Dismissal of suit—Where in the case of a suit by a corporation, the plaint is signed and verified by an officer *other* than a principal officer of the corporation, the suit should be *dismissed* (b) Similarly, the suit should be *dismissed*, if in the case of an unregistered or unincorporated society, the suit is brought in the names of some only of the members of the society (c) See notes above

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business

Service by post—The language of the old section has been enlarged so as to allow of service by post on corporations and by this means the rule is brought into line with the provisions of s 148 of the Indian Companies Act 7 of 1913

3. [S 436, last para] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

Power to require personal attendance of officer of corporation

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ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. [*New.* R. S. C., O. 48A, r. 1.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm

Suing of partners in name of firm

(a) *Sreenath* v *East Indian Railway Coy* (1895) 22 Cal 268

(b) *Yusuf Beg* v *The Board of Foreign Missions of the Presbyterian Church* (1894) 16 All 420

(c) *Panchait* v *Gauri Kuar* (1898) 20 All 167

O. 30, r. 1. (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

Suits by or against firms—The whole of this Order is new It is a reproduction almost *verbatim* of the principal rules comprised in O 48A of the English rules The rules as to the *attachment* of partnership property and the execution of decrees against firms will be found in O 21, rr 49 and 50 above

In applying English decisions under the corresponding rules in England, it must be remembered that there is a distinction between the English and the Indian law as to the liability of partners According to the English law the liability is joint, according to the Indian law it is joint and several See Indian Contract Act, 1872, ss 42 to 45

This order deals with the mode of suing firms Rule 1 provides that two or more persons claiming or being liable as partners may sue or be sued in the firm name Rule 3 provides that where a suit is instituted by partners in the name of their firm the plaintiffs shall on demand in writing by the defendant, declare in writing the names and places of residence of the partners If the plaintiffs fail to comply with the demand, the Court may stay further proceedings If the demand is complied with, the suit will proceed as if all the partners had been named as plaintiffs in the plaint. As regards *signature and verification* where a suit is brought in a firm name it is provided by r 1 sub r (2), that it will suffice if the pleading or any other document required to be signed or verified is signed or verified by *any one* of the partners it is not necessary that all the partners should sign or verify it As regards *appearance* in a suit brought against a firm it is to be noted that a firm cannot appear as a firm and the partners should therefore appear individually in their own names, but all subsequent proceedings should continue in the name of the firm (r 6) Where a suit is brought against a firm no partner can put in a personal defence (*d*) He can only file a written statement *for and in the name of the firm* The decree also must be in the name of the firm (*e*), though all the partners may not have appeared (*f*)

Minor—The fact that one of the members of a partnership, which is sued in the firm name is a minor does not prevent judgment being obtained against the firm and execution issuing thereon against the property of the partnership (*g*) In this connection it is to be noted that a minor cannot become a *partner* by contract, but he may be admitted to the benefits of a partnership He cannot be made personally liable for

(*d*) *Ellis v Wadeson* [1899] 1 Q B 714

(*e*) *Harris v Beauchamp Brothers* [1893] 2 Q B 534 535

(*f*) *Lysaght Ltd v Clark & Co* [1891] 2 Q B 552

(*g*) *Harris v Beauchamp Brothers* [1893] 2 Q B 534

any obligation of the firm, but his share in the property of the firm is liable for the obligations of the firm. see Indian Contract Act, 1872, s 247 The share of which s 247 speaks is no more than a right to participate in the property of the firm after its obligations are satisfied (h) A partner suing in the firm's name may refer the suit to arbitration and if a minor is a member of the firm his share will be bound by the reference (i) See O 21, r. 50.

Suit against "manager and owner" of a firm—In a Bombay case (j) the plaintiff filed a suit against "*C K*, manager and owner of the shop of *M C*," but as *C K* was already dead before the suit was filed, plaintiff applied to bring the heirs of *C K* on the record The period of limitation had by that time expired and so the lower Court dismissed the suit as time barred The High Court reversed the decree on the ground that the suit was in substance a suit against the firm

"At the time of the accruing of the cause of action"—These words show that a suit may be brought by or against a firm in the firm name though the firm may have been dissolved before the date of the suit, provided the cause of action *arose before dissolution* (k)

"Carrying on business in British India"—This rule applies to all partnerships carrying on business in British India Therefore a firm which carries on business in British India may be sued in the firm name under this rule, although it be a foreign firm the members of which are resident out of the jurisdiction (l) "The only question to be considered in order to see whether the case comes within the rule is whether the firm carries on business [in British India]" (m) If it does, the partners may be sued in the firm name If it does not, the partners cannot be sued in the firm name (n). The expression "carry on business" has no special legal meaning It must be interpreted in the ordinary business sense (o) A firm in England cannot be said to carry on business in Bombay, merely because it has employed an Agent in Bombay to collect orders for the firm, *the agent having no authority to accept or reject the orders* (p) it does not make any difference that the name of the firm is affixed to the agent's office (q) See notes to s 20, "Carries on business," p 88

Statement of names and addresses—Rule 2 enables a *defendant* to obtain disclosure of the names of the partners in a *plaintiff firm* by a statement in writing by the plaintiffs or their pleader Under r 1 *any party* to the suit *may apply to the Court* for a statement of the names of the partners in the *plaintiff or defendant firm* to be furnished *and verified* in such manner as the Court may direct (r) "It is perhaps not altogether easy to reconcile the two rules but r 2 is applicable to the case only of plaintiffs, whereas r 1 applies generally" (s) Where an affidavit has been filed under r 1 or a declaration made under r 2, the Court has no power to require the deponent or declarant to attend to be cross examined on the affidavit or declaration, nor has the Court any power to direct the separate trial of an issue as to whether a person whose name has been disclosed in the affidavit or declaration was a partner in

(h) *Sanyasi Charan* v *Krishnadhan* (1922) 49 I A 108 116, 49 Cal 560, 569 67 I C 124 ('22) A I C 237

(k) *Davis & Sons* v *Morris* (1883) 10 Q B D 463 *Lalin* v *Mahendra* (1921) 34 Cal L J 405 *Harjivandas* v *Bhagwandas* (1922) 49 Cal 394, 69 I C 236, ('22) A C 390

(l) *Worcester City & County Banking Co* v *Firbank Pauling & Co* [1894] 1 Q B 784

(m) *Ib* p 788

(n) *Von Hellfeld* v *Rechnitzer* [1914] 1 Ch 748

(o) *Grant* v *Anderson & Co* [1892] 1 Q B 108 107 per Lord Esher, M R

(p) *Grant* v *Anderson & Co* [1892] 1 Q B 108

(q) *Baillie* v *Goodwin & Co* (1886) 33 C D 604

O. 30, rr. 2, 3.

the firm at the time the cause of action accrued (t) But the statement of names disclosed in the affidavit or declaration will be treated as embodied in the plaint and will be a necessary part of the cause of action, and if the plaintiffs fail in establishing it, the suit will fail (u)

Suit by or against individual partners—See Indian Contract Act, 1872, ss 43 and 45

2. [*New* R. S. C., O. 48 A, r. 2.] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

Disclosure of partners names

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Disclosure of partners' names—See notes to r 1 above Statement of names and addresses, p 799 If the plaintiff firm has not made a full disclosure of their partners the proper procedure is not to dismiss the suit, but to allow the firm to put in a further declaration making a full disclosure and thus remedy the defect (v)

Proceedings to continue in name of firm—See notes to r 1 above Suits by or against firms on p 798 and r 6 below, "Subsequent proceedings to continue in name of firm

3 [*New* R. S. C., O. 48 A, r. 3.] Where persons are sued as partners in the name of their firm, the summons shall be served either—

Service

(*a*) upon any one or more of the partners, or

(*b*) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

(t) *Abrahams & Co* v *Dunlop Pneumatic Tyre Co* [1905] 1 K B 46
(u) *Ib* p 1
(v) *Imperial Pressing Co* v *British Crown Assurance Corporation* (1914) 41 Cal 581, 585 21 I C 836

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India: **O. 30, r. 3.**

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

Service of summons.—This rule is to be read with r. 1 above and with O. 21, r. 50. It applies only to suits against partners *in the name of their firm.* It provides a special mode of service upon firms *carrying on business in British India*, whether the partners reside within or without British India (*w*). One mode of service authorized by the rule is service upon any one or more of the partners; the other is service at the *principal place of business of the partnership*, within British India, upon the manager of such business. If the summons is not served in either of these ways, the service is irregular (*x*). If it is served in either of these ways, the service is good service *upon the firm* whether all or any of the partners are within or without British India. The service being good service *upon the firm*, any decree that may be passed in the suit against the firm may be executed against the property *of the firm.* When the firm has been dissolved, the only method of service is under clause (a) on a partner (*y*); and if service by registered post has been ordered, the registered letter should be addressed to a partner and not to the firm name at the place where the business used to be carried on (*yy*).

If the service is effected in the first mode prescribed by the rule, that is, if the service is *upon a partner*, it is good service *upon the firm as well as upon that partner personally*, but it is not service upon *any other member* of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within the meaning of O. 21, r. 50, sub-r. (1), cl. (c). If the service is effected in the second mode prescribed by the rule, that is *upon a manager* at the place of partnership business, and the manager is not a partner, the service is good service upon the firm, but it is not service upon any member of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within the meaning of O. 21, r. 50, sub-r. (1), cl. (c) (*z*). This distinction is important for the purposes of execution, for, as we have seen in O. 21, r. 50, where a decree has been passed against a firm, execution can at once issue without leave of Court against the property of the firm and also against the separate property of any individual partner who was served with the writ. But execution cannot be issued without leave of Court against the separate property of any partner who was not served with the writ and did not appear (*a*).

Dissolution of partnership before institution of suit.—Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he served the writ of summons upon him. *A* sues the firm of *E & Co.* upon a promissory note passed to him by the firm. When the note was given, the firm consisted of three partners, *X*, *Y* and *Z*, but *Z* had retired from the firm before the

(*w*) *Grant* v. *Anderson & Co* [1892] 1 Q. B. 108.

(*x*) See *Worcester City and County Banking Co.* v. *Firbank Pauling & Co.* (1894) 1 Q. B. 784, 788.

(*y*) *Harjibhandas* v. *Bhagwandas* (1922) 49 Cal. 894, 69 I. C. 236, (’22) A. C. 893.

(*yy*) (1922) 49 Cal. 894, 69 I. C. 236, (’22) A. C. 293, *supra*.

(*z*) *In re Lee* (1886) 17 Q. B. D. 753.

(*a*) *Hasmab* v. *Bank of Bengal* (1914) 19 C.W.N. 1008, 1012, 26 I. C. 566.

O. 30, rr. 2, 3.

the firm at the time the cause of action accrued (t) But the statement of names disclosed in the affidavit or declaration will be treated as embodied in the plaint and will be a necessary part of the cause of action, and if the plaintiffs fail in establishing it, the suit will fail (u)

Suit by or against individual partners —See Indian Contract Act, 1872 ss 43 and 45

2 [*New* **R. S. C., O. 48 A, r. 2.**] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

Disclosure of partners names

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Disclosure of partners' names —See notes to r 1 above Statement of names and addresses p 799 If the plaintiff firm has not made a full disclosure of the r partners the proper procedure is not to dismiss the suit, but to allow the firm to put in a further declaration making a full disclosure, and thus remedy the defect (v)

Proceedings to continue in name of firm —See notes to r 1 above Suits by or against firms on p 798 and r 6 below, "Subsequent proceedings to continue in name of firm

3 [*New* **R. S. C., O. 48 A, r. 3.**] Where persons are sued as partners in the name of their firm, the summons shall be served either—

Service

(*a*) upon any one or more of the partners, or

(*b*) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

(t) *Abrahams & Co v Dunlop Pneumatic Tyre Co* [1905] 1 K B 46

(u) *Ib* p 51

(v) *Imperial Pressing Co v British Crown Assurance Corporation* (1914) 41 Cal 581, 585 21 I C 836

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India: **O. 30, r. 3.**

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

Service of summons.—This rule is to be read with r 1 above and with O. 21, r 50 It applies only to suits against partners *in the name of their firm* It provides a special mode of service upon firms *carrying on business in British India*, whether the partners reside within or without British India (*w*) One mode of service authorized by the rule is service upon any one or more of the partners, the other is service at the principal place of business of the partnership, within British India, upon the manager of such business If the summons is not served in either of these ways, the service is irregular (*x*) If it is served in either of these ways, the service is good service *upon the firm* whether all or any of the partners are within or without British India The service being good service *upon the firm*, any decree that may be passed in the suit against the firm may be executed against the property *of the firm* When the firm has been dissolved, the only method of service is under clause (a) on a partner (*y*), and if service by registered post has been ordered, the registered letter should be addressed to a partner and not to the firm name at the place where the business used to be carried on (*yy*)

If the service is effected in the first mode prescribed by the rule, that is, if the service is *upon a partner*, it is good service *upon the firm as well as upon that partner personally*, but it is not service upon *any other member* of the firm so as to make such member "a person who has been *individually* served as a partner, etc, within the meaning of O 21, r 50, sub r (1), cl (c) If the service is effected in the second mode prescribed by the rule, that is *upon a manager* at the place of partnership business, and the manager is not a partner, the service is good service upon the firm, but it is not service upon any member of the firm so as to make such member a person who has been *individually* served as a partner, etc, within the meaning of O 21 r 50, sub r (1), cl. (c) (*z*) This distinction is important for the purposes of execution, for, as we have seen in O 21, r 50, where a decree has been passed against a firm, execution can at once issue without leave of Court against the property of the firm and also against the separate property of any individual partner who was served with the writ But execution cannot be issued without leave of Court against the separate property of any partner who was not served with the writ and did not appear (*a*)

Dissolution of partnership before institution of suit.—Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he served the writ of summons upon him *A* sues the firm of *B & Co* upon a promissory note passed to him by the firm When the note was given, the firm consisted of three partners, *X*, *Y* and *Z*, but *Z* had retired from the firm before the

(*w*) *Grant* v *Anderson & Co* [1892] 1 Q B 108

(*x*) See *Worcester City and County Banking Co* v *Fairbank Pauling & Co* (1894) 1 Q B 784, 88-790

(*y*) *Harjibhandas* v *Bhagwandas* (1922) 49 Cal 394 69 I C 236 ('22) A C 390

(*yy*) (1922) 49 Cal 394, 69 I C 236, ('22) A C. 390, *supra*

(*z*) *In re Ide* (1886) 17 Q B D 755

(*a*) *Baisnab* v *Bank of Bengal* (1914) 19 C W N 1008 1012, 26 I C 866

O. 30, rr. 3, 4.

institution of the suit, and *A* knew before he instituted the suit that *Z* had so retired. *Z* resides in British India, but he is not individually served as required by the proviso to this rule. *Z* does not appear. *A* obtains a decree against the firm The decree cannot be executed against the personal property of *Z* Nor can *A* apply under O. 21, r 50, sub r (2), for leave to execute the decree against the personal property of *Z*. The reason is that the present rule overrides O. 21, r. 50, and the latter rule only applies where there has been no dissolution to the knowledge of the plaintiff (*b*). The above ruling would not apply to the case of a partner who had left the firm before the institution of the suit *without* the knowledge of the plaintiff. If the plaintiff was not aware of the dissolution when he filed his suit, the decree binds all the partners in the firm whether they have been served individually or not (*c*)

Service on manager, subsequent service on partner.—Where a summons is served upon a manager, and subsequently upon a partner, it is the date of the latter service from which time is to be counted for the appearance of the defendant firm (*d*)

"Principal place at which the partnership business is carried on."—See notes to r 1 above, "Carrying on business in British India," p. 799.

"As the Court may direct"—These words do not occur in the corresponding English rule According to the English rule, the summons may be served upon a partner or upon the manager at the plaintiff's option Under the present rule, it would seem, that the plaintiff has no such option, and that he should obtain the directions of the Court as to the mode of service It is conceived, however, that omission to obtain such directions would not vitiate the service, but would constitute at the most an "irregularity" within the meaning of s 99 above

Notice to be given to the person served as to the capacity in which he is served.—See r. 5 below and notes thereto

Right of suit on death of partner

4. [*New.*] (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(*a*) to apply to be made a party to the suit, or

(*b*) to enforce any claim against the survivor or survivors.

Indian Contract Act, 1872, s, 45—*A* passes a promissory note for Rs 5,000 to a firm consisting of two partners *B* and *C*. If *B* dies, *C* alone cannot sue

(*b*) *Wigram* v *Cox, Sons, Buckley & Co* [1894] 1 Q B 792.

(*c*) *Gordhandas* v *Gaulamchand* (1925) 27 Bom. L R. 541 87 I C 1001, ('25) A B 331

(*d*) *Alden* v. *Beckley* (1890) 25 Q B D 543

to recover the amount of the note The suit must, under s. 45 of the Contract Act, be brought by C along with B s legal representative. The effect of the present rule is that where the suit is brought *in the firm name*, it is not necessary to join B's legal representative as a party plaintiff But the legal representative may apply to be made a party plaintiff The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed against C.

Notice in what capacity served

5. [*New.* R. S. C, O 48A, r. 4.] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

Notice in what capacity served.—Where a suit is brought against a firm *in the firm name*, the summons will be issued against *the firm* Such summons may be served either upon any one or more of the partners or upon the person in control of the business [r 3] The present rule provides that the person served should be informed *by notice in writing given at the time of service, whether he is served as a partner*, or as a person, in management of the business, or in both characters. *In default of notice*, the person served will be *deemed* —not merely *presumed*—to be served as a *partner*. If he contends that he is not a partner, the proper course for him to adopt is to appear under protest under r 8 below denying that he is a partner If he does not do so, he will be deemed to have been served *personally* as a partner within the meaning of O. 21, r 50, sub r, 1, cl (c), and execution may be granted against him personally (e)

Service on manager—If service is effected on the person in control of the business and no notice is served as provided by this rule, the service is not effective, and cannot be made so [Annual Practice, notes to O 48A, r 4]

Appearance under protest—Where a summons is served upon a person as a partner, but such person appears under protest denying that he is a partner, the plaintiff may disregard the appearance altogether, and proceed as if the summons had not been *served, that is, he may have service subsequently effected upon a partner or partners* or upon any person having the control of the business as provided by r 3 above The mere fact that the person served as a partner denies that he is a partner and appears under protest does not preclude the plaintiff from *otherwise* serving the summons on the firm (r. 8 below)

Where a summons is served upon a person both as a partner and manager, and such person appears with denial of partnership, but does not deny that he is the person in management of the business, the plaintiff is entitled to a decree against the firm, for the service is then one under r 3, cl (b), and such service is good service upon the firm

Forms of notice.—" Take notice that the summons served herewith is served on you—

(i) as a partner in the defendant firm of *A B & Co.*

(e) *Baisnab* v *Bank of Bengal* (1914) 19 C W N 1008, 26 I C 866

O. 30, rr. 5, 6.

(ii) *or* as the person having the control or management of the partnership business of *AB & Co*

(iii) *or* as a partner in the defendant firm of *AB & Co*, and also as the person having the control or management of the partnership business of *AB & Co*'

6. [*New.* R. S. C, O. 48 A, r 5.] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners

Appearance of partners.—Though all proceedings in a suit instituted against a firm in the firm name are to be conducted *in the firm name*, the partner should, so far as appearance is concerned, appear individually *in their own names* The reason of the rule is that a firm cannot appear as a firm Where a suit is brought against a firm in the firm name, the appearance of one partner is the appearance of the firm (*f*)

The only person entitled to appear in a suit against a firm are—

(i) persons who allege they are partners of the firm sued, or were partners at the time the cause of action arose, and

(ii) persons who are served as partners, but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued Such persons may appear under protest See rr 7 and 8 below

A person served as a manager of the partnership business need not appear unless he is a member of the firm sued (r 7 below) A managing partner of a business firm has an implied authority, in the ordinary course of business, to appoint solicitors, to defend a suit brought against the firm in the firm name, and to instruct them to enter an appearance for the other partners as well No suit will therefor lie against the solicitors at the instance of the other partners for entering an appearance in their name without their express authority (*g*)

The expression "individually" is not synonymous with "in person", hence no partner can be forced under this rule to appear in person (*h*)

'All subsequent proceedings shall continue in the name of the firm"—Where persons are sued as partners *in the firm name*, the plaint (*i*) and every subsequent proceeding must be headed with the firm name as defendants The proceedings in a suit so brought continue in the name of the firm even though the names of the partners are disclosed (*j*) The written statement must be headed in the firm name, and the decree also must be against the firm in the firm name The Court cannot in such a suit pass any *personal* decree against a partner, unless he is sued *personally* along with the firm (*k*)

Defence—Where a suit is brought against a firm *in the firm name*, the claim being against the partnership, the partners ought, if they can agree, to put in one written statement But if they cannot agree on one defence, each partner is entitled to put in a separate written statement In any case the written statement should be a written statement *of the firm*, but where the partners cannot agree on one defence and a partner puts in a separate defence, the proper form would be 'written statement of the defendant firm of *AB & Co*, by *XY*, one of the partners appearing in the suit" It may be asked,

(*f*) *Lysaght Ltd* v *Clark & Co* [1891] 1 Q B 552 556
(*g*) *Tomlinson* v *Broadsmith* [1896] 1 Q B 386
(*h*) *Bridges & Co* v *Shamas Din and Co* (1918) Punj Rec no 78 p 262, 47 I C 422
(*i*) *Ajdning* v *Grunning* (1925) 27 Bom L R 993, (25) A B 494
(*j*) *Pulin* v *Mahendra* (1921) 34 Cal L J 408, 67 I C 10
(*k*) *Taylor* v *Collier* (1882) 30 W.R (Eng) 701

what is the plaintiff to do if he finds a series of inconsistent defences put in by the different partners? The answer is that "to entitle him to judgment against the partnership, he must, to use a homely phrase, beat all the defences—that is to say, he must show and satisfy the judge at the trial that not one of the defences prevents a judgment being entered against the partnership (*l*) What would happen if some of the partners did not appear at all? In case, say, one partner alone chooses to appear, he would be entitled and would be bound to put in a written statement for the firm He might if he choose add 'by' so and so, one of the partners served and appearing, *but his defence would be the defence of the firm*, and the suit would be tried upon that defence and in that case judgment could be obtained *against the firm* Of course, if the partner chose to put in an improper defence and so rendered partnership liable in a case where it ought not to be made liable, he might thereby as between himself and his co partners be committing a breach of duty for which he would be liable to them, but so far as the plaintiff is concerned, the plaintiff would be able to obtain judgment against the firm. A partner is not entitled, in a suit against a firm in the firm name, to put in a personal defence he can only put in a defence for and in the name of the firm (*m*) But where a partner is sued *personally* along with the firm, he may put in a *personal* defence besides a defence for the firm (*n*)

Decree—Where a suit is brought against a firm in the firm name, the decree must be against the firm in the firm name (*o*) From this it follows that if one of the partners fails to appear, no decree can be passed against him separately for want of appear

[illegible]

because he has not appeared. As soon as a decree is passed against a firm the assets of the firm are liable to satisfy it (*s*) The firm name is only a compendious way of describing in the writ the partners who compose the firm and a plaintiff who sues a firm sues the partners (*t*) But though the decree against the firm makes them all liable as to the partnership property, it can only be decided in execution proceedings whether a particular partner is personally liable to satisfy the decree (*u*) See O 21, r 50 and notes to r 8 below As to minor partner see notes to r 1 Minor on p 798 above

7 [*New* R S C, O 48 A, r 6] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued

No appearance except by partners

See notes to r 6 above Appearance of Partners p 804

8 [*New* R S C, O 48 A, r 7] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not

Appearance under protest

(*l*) *Per* Romer L J *Ellis* v *Wadeson* (1899) 1 Q B 714 717
(*m*) *Ellis* v *Wadeson* [1899] 1 Q B 714
(*n*) *Taylor* v *Collier* (188?) 30 W R (Eng) 701
(*o*) *Jackson* v *Litchfield* (1882) 8 Q B D 474
(*p*) *Jackson* v *Litchfield* (1882) 8 Q B D 474 478
(*q*) *Adam* v *Townend* (1884) 14 Q B D 103

(*r*) *Lysaght Ltd* v *Clark & Co* [1891] 1 Q B 552 556
(*s*) *Adiveppa* v *Pragji* (1924) 26 Bom L R 388 80 I C 773 ('24) A B 366
(*t*) *Ram Prasad* v *Anandji* (19..) 49 Cal 5?4 69 I C 885 ('22) A C 408
( ) (1924) 26 Bom L R 388 80 I C 773 ('24) A B 366 *supra*

O. 30, rr 8-10.

preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared

Appearance under protest.—Where a person served with a summons as a partner denies that he is a partner, he may enter appearance under protest under this rule. Where an appearance is entered under protest, its effect is to nullify the service altogether as regards the defendant firm In such a case the plaintiff may disregard the appearance under protest altogether, and have the summons served upon one who is admittedly a partner or one who has the control or management of the defendant firm as provided by r 3 above, and having obtained a decree against the firm, he may apply for leave to execute it against such person under O 21, r 50 But the plaintiff is not bound to adopt this course He may take out a chamber summons and contend that the party who appeared under protest is a partner or was a partner at the time the cause of action accrued, and apply on that basis to strike out of such appearance the denial of partnership See Annual Practice, notes to O 48 A, rr 4 and 7 In a case where the plaintiff did not take out a summons to decide whether the party appearing under protest was a partner he was allowed an adjournment to serve the firm. But as it was not equitable that the claim should be left hanging over the protesting party pending proceedings under O 21, r 50, the Court directed that the issue whether or not he was a partner should be tried in the suit (v)

Party appearing under protest not entitled to dispute liability of firm —In England a party appearing under protest is not allowed to plead in the alternative that if he is a partner the firm is not liable (w)

Suits between co-partners.

9 [*New.* R S C, O 48 A, r 10.] This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just.

Scope of the rule —This rule provides that suits between a firm and one of its members or between two firms with a common member, may be instituted in the firm name provided the firms carry on business in British India (r 1) But no execution can be issued in such a suit *except by leave of the Court.*

Suit against person carrying on business in name other than his own

10 [*New* R S C, O 48 A, r 11.] Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name, and, so far as the nature of the case will permit, all rules under this Order shall apply.

(v) *Vithaldas v Hansraj* (1921) 23 Bom L R 1249 64 I C 658

(w) *Weir & Co v McVicar* K B 1

O. 30, r. 10.

Scope of the rule.—A person trading by himself as a firm or in an assumed or trading name may *be sued* in his trade name, but he cannot *sue* in that name (*x*) The words "as if it were a firm" and "so far as the nature of the case will permit" shew that the case is not identical for one man cannot constitute a firm (*y*). If a sole proprietor dies, a suit after his death must be brought against his legal representatives (*z*). It cannot *after* his death be brought against him in his trade name. If the suit is brought against him in his trade name, the suit is one against a dead man and a nullity (*z*1) If he dies *pending the suit*, the suit will abate unless his legal representative is brought on the record within 90 days from the date of his death (*a*) This rule does not enable a plaintiff to sue the proprietor of a newspaper *in the name of the newspaper* (*b*).

Non-resident foreigner.—As to the corresponding English rule it has been held that it does not apply where the person carrying on business in a name other than his own is a foreign subject resident out of the jurisdiction, though he may carry on business through an agent within the jurisdiction. The decision proceeded upon the broad ground that an English Court has no jurisdiction over foreigners residing abroad merely because they carry on business within the jurisdiction, and that the words "any person," though large enough to include a foreigner, refer only to an English subject (*c*). The question as to whether the Courts of this country have jurisdiction over foreigners residing abroad merely because they carry on business here through an agent arose in the recent Privy Council case of *Annamalai* v *Murugasa* (*d*), but the point was not decided by their Lordships In both Courts in India it was assumed that the Court *had* jurisdiction, but their Lordships said: "This assumption appears to their Lordships to require more attention than it had received."

Application of foregoing rules.—By the latter part of this rule all the foregoing rules of this Order relating to proceedings against firms are to apply to a person trading in a name other than his own *so far as the nature of the case will permit* By virtue of r 1, this rule does not apply unless the business is carried on in British India By virtue of rr. 1 and 2, the person sued in his tradename may be required to disclose his real name and private address By virtue of r 3, the summons may be served upon the person sued or upon any person having the control or management of the business, but in the latter case execution cannot be issued against the personal property of the persons sued except by leave of the Court [O 21, r 50] As regards appearance the person sued must appear in his own name (r 6)

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators.

1. [S. 437.] In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor,

Representation of beneficiaries in suits concerning property vested in trustees, etc

(*z*1) 25 Bom L R 7, (24) A B 109, *supra*

(*a*) *Ram Prosad* v *Anundji & Co* (1922) 49 Cal. 524, 69 I C 585, ('22) A C 408

(*b*) *De Bernales* v *New York Herald* [1893] 2 Q B 97 (foot note)

(*c*) *St Gobain Chauny and Cirey Co* v *Hoyermann's Agency* (1893) 2 Q B 96

(*d*) (1903) 26 Mad 544, 30 I A 220

O. 31, rr. 1, 2.

or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Scope of the rule.—This rule applies only where the contention is between the beneficiaries and a third person. It does not apply where the contention is between beneficiaries and trustees or between the beneficiaries *inter se*. In suit between beneficiaries and a third person the trustees sufficiently represent the beneficiaries (e), though the beneficiaries are an unascertained and unascertainable class (f) or persons (g). As to declaratory decrees it is provided by s. 43 of the Specific Relief Act, 1877, that a declaration made under s. 42 of that Act is binding where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration such parties would be trustees. Compare R. S. C. 16, r. 8.

When beneficiaries may be added as parties.—Beneficiaries should always be made parties when the executors are wholly uninterested in the case as where they have fully administered the estate (h), or where they have an interest adverse to that of the beneficiaries (i). Where a suit was brought by an executor, and the names of the beneficiaries who took possession of the estate pending the suit were substituted as plaintiffs, it was held that it did not amount to a substitution of new plaintiffs within the meaning of s. 22 of the Limitation Act (j).

A purchases certain property at an execution sale in the name of *B*. If the sale is sought to be set aside by the judgment-debtor, *A* is not a necessary party to the proceeding, regard being had to the provisions of this rule (k).

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Joinder of trustees, executors and administrators.

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

Trustees.—The word "trustees" has been newly added in this rule.

Several trustees, executors or administrators.—This rule applies only to suits against, and not to suits by, trustees, executors or administrators. It provides that all executors who have proved the will should be made parties to the suit. The Court may, however, entertain an application as for a receiver even though all proving executors are not made parties to the suit (l). An executor who has neither proved nor intermeddled with the estate cannot be sued as representing the estate (m). See Indian Succession Act 39 of 1925, sec. 311.

"Outside British India".—These words have been substituted for the words "beyond the local limits of the jurisdiction of the Court" (n).

(j) *Jahnabai* v. *Broja* (1903) 7 C. W. N. 817.
(k) *Baroda* v. *Chunder* (1902) 29 Cal. 682.
(l) *Hafizabai* v. *Kazi Abdul* (1895) 19 Bom. 53, 85.
(m) *Molamudu* v. *Patchie* (1894) A. C. 437.
(n) See *Kumar Saradindu* v. *Dhirendra* (1904) 2 Cal. L. J. 484.

Administration decree —A decree for general administration cannot be passed without a general administrator (*o*)

3 [S. 439] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her

Husband of married executrix not to join

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind.

1. [S. 440, 1st para.] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor

Minor to sue by next friend

Minor —Every person domiciled in British India who has not completed the age of 18 years is a minor In the case, however, of a minor of whose person of property a guardian has been appointed by a Court of Justice or whose property is under the superintendence of a Court of Wards, the age of majority is deemed to have been attained on the minor completing his age of 21 years see Indian Majority Act IX of 1875, s 3

Object of having next friend or guardian ad litem —As a minor is deemed incapable of prosecuting or defending a suit himself it is necessary that his interests in the suit should be watched by an adult person Such person is in the case of a minor plaintiff, called his next friend and in the case of a minor defendant his guardian ad litem or guardian for the suit But neither the next friend nor the guardian ad litem is a *party* to the suit (*p*) The next friend of a minor plaintiff is just as much entitled to change his attorney as any other plaintiff who is *sui juris* (*q*) As to liability of next friend for costs, see notes below

Title of suit —Where a suit is brought on behalf of a minor the title of the suit should run thus *A B a minor by his next friend C D v X Y* Where a suit is brought against a minor, the title of the suit should be *F G v A B*, a minor by his gaurdian ad litem *C D* Where the title of a suit in a case was *A B* for self and his minor daughter *C D* instead of *A B and C D* a minor by her next friend *A B*, and the objection was raised for the first time in appeal it was held that the error did not affect the merits of the case, and that it was not therefore fatal to the suit (*r*) [s 99] See notes to r 3 below under the head Where a minor defendant is substantially represented by a guardian ad litem.

Objection to authority of next friend —Where a minor plaintiff has a cause of action, no objection to the *authority to sue* of the next friend through whom the suit is brought will be entertained in appeal (*s*)

(*o*) See Re *Toleman* (1897) 1 Ch 866
(*p*) *Rup Chand* v *Dasodha* (1908) 30 All 55 56
(*q*) *Dinendra* v *Wilson* (1901) 28 Cal 264
(*r*) *Alim* v *Jhalo* (1886) 12 Cal 48
(*s*) *Hardi* v *Ruder Perkash* (1884) 10 Cal 626 11 I A 26

O. 32, r. 1. **When minor may sue without next friend.**—A minor may sue in a Presidency Small Cause Court without a next friend, when the amount *claimed does* not exceed Rs. 500, and is due to him for wages or for work done as a servant: Presidency Small Cause Court Act 15 of 1882, s. 32.

Liability of next friend for costs—Where a suit brought by a minor by his next friend is dismissed, and the Court finds that the suit was not *for the benefit of the minor, the Court* may direct the next friend *personally* to pay the costs (t) But if the Court finds that there were reasonable grounds for instituting the suit, and the next friend has acted bona fide, the Court will not mulct the next friend in costs, and will direct the costs to come out of the property of the minor (u)

Suit on behalf of an alleged minor who is not in fact a minor.—A *suit* is instituted on behalf of a person alleged to be a minor, through his next *friend. It is found that the plaintiff* was not in fact a minor at the date of the institution of the suit. In such a case the suit should, according to Allahabad decisions, be dismissed (v); according to Calcutta (w) and Madras (x) decisions, the suit should not be dismissed, the proper course being to return the plaint for amendment The *latter seems* to be *the better* opinion

Decree against a major treating him as a minor.—A decree passed against a *person* treating him as a minor while in reality he was a major at the date thereof is not a nullity, consequently, whatever rights he may have to appl to set aside the decree, a sale in execution of the decree cannot be set aside on the ground that the *Court* had no jurisdiction to pass the decree (y) See notes below under the head "estoppel"

Estoppel—A minor who, representing himself to be a major, collects rents and *gives receipts therefor*, is estopped from recovering again the rents once paid to him by instituting a suit through a next friend (z) Similarly a minor who representing himself to be of full age sell certain property and *executes a deed of sale*, is *estopped* from suing to set aside the sale on the ground that he was a minor at the date *of sale* (a). But if the purchaser knew that the vendor was a minor, the purchaser could not be said to have been misled by the false representation as to the vendor's age and the *suit to set* aside the sale would not then be barred (b) A Court of Equity will deprive a fraudulent minor of the benefit of the plea of infancy, but he who invokes the aid of the Court *must* establish not only that a fraud was practised on him by the minor, but that *he* was *deceived* into action by the fraud (c). It is clear that if the purchaser *knew* that the vendor was a minor, he could not be said to have been deceived into *action by the* minor's misrepresentation as to his age.

If a person alleged to be a minor, but who is not in fact a minor, is sued as a *minor* by his guardian ad litem, and a decree is passed against him in the suit, *he* will be estopped from impeaching the validity of the decree as well as the sale on the decree if he was aware of the suit and allowed it to proceed against him (*d*)

(t) *Geereeballa* v *Chunder Kant* (1885) 11 Cal 213

(u) *Dexlabas* v *Jefferson* (1886) 10 Bom 248

(v) *Sheorania* v *Bharat Singh* (1898) 20 All 90, *Ruhul Amin* v *Shankar Lal* (1923) 45 All 701, 77 I C 30 (24) A A 54

(w) *Taqui Jan* v *Obaidulla* (1894) 21 Cal 866.

(x) *Shanmuga* v *Narayana* (1917) 40 Mad 743, 41 I C 220

(y) *Seshagiri* v *Hanumantha* (1915) 39 Mad 1031, 32 I C. 391

(z) *Ram Ratun* v *Shew Nandan* (1902) 29 Cal. 126

(a) *Ganesh* v *Bapu* (1897) 21 Bom 198

(b) *Mohori* v. *Dharmodas* (1903) 30 Cal. 539, 30 I A. 114

(c) *Brohmo Dutt* v. *Dharmodas* (1899) 26 Cal 381

(d) *Ramachari* v. *Duraisami* (1898) 21 Mad 167.

O. 32, rr. 1, 2.

Attorney's Costs.—An attorney is entitled to recover from the infant's estate the costs of a proper suit or defence of a suit in which the estate was involved. He is also entitled to have a charge declared on the estate for the amount of his costs (*e*).

Where suit is instituted without next friend, plaint to be taken off the file

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Taking the plaint off the file—This rule contemplates the case where a suit is instituted by a person who is alleged by the defendant to be a minor without a next friend. In such a case the defendant may apply under this rule to have the plaint taken off the file. To bring his case within the rule, the defendant must show that the plaintiff is a minor and that the suit was instituted without a next friend. Now the fact of minority—

(i) may either be apparent on the face of the plaint, or

(ii) it may be ascertained upon objection by the defendant and enquiry by the Court.

In case (i), the pratice is to take the plaint off the file (*f*).

In case (ii), i.e., where the fact of minority is established after evidence has been taken on the point, it may be found—

(a) that the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and evading the payment of costs in the event of failure, or

(b) that the plaintiff had no such knowledge or intention

In case (a), the practice according to the Bombay decisions, is to make an order under this rule directing the plaint to be taken off the file (*g*) According to the Calcutta decisions, the Court should pass a decree dismissing the suit The Calcutta High Court holds that the procedure prescribed by this rule, namely taking the plaint off the file applies only to those cases where the fact of minority is apparent on the face of the plaint, that is to say, in case (i), and that it does not apply where the fact of minority is established on enquiry held by the Court upon that point (*h*). The difference between the practice of the two Courts is important in this way, that while an appeal lies from a decree dismissing a suit, no appeal lies from an order directing a plaint to be taken off the file

In case (*b*), the practice is to stay proceedings and to allow sufficient time to enable the minor plaintiff to be represented by a next friend (*i*)

The Court should take notice of the irregularity and refuse to proceed even if the suit is ex parte (*j*) If the defendant appears and does not object, the Court

(*h*) *Beni Ram Bhutt* v *Ram Lal* (1886) 13 Cal

O. 32, rr. 2, 3.

should not reject the plaint but should allow the plaintiff time to get himself properly represented (k). When a next friend is appointed the objection that the suit was originally instituted without a next friend can no longer be urged (l). If the plaintiff attains majority before the Court has decided that he is a minor, there is no necessity to appoint a next friend (m)

Costs.—When a suit is instituted by a minor without a next friend, the pleader or any other person presenting the plaint is liable for costs and the Court should not render the property of the minor liable for costs (n).

Decree for a minor in a suit instituted by him without a next friend.—Where a suit is instituted by a minor without a next friend and the defendant does not object to it he will be deemed to have waived his objection. The defendant can not in such a case after a decree has been passed against him object to the execution of the decree on the ground that the suit was instituted by the minor without a next friend. The absence of a next friend does *not* make the suit *a nullity*. The institution of a suit by a minor without a next friend is *merely an irregularity* which can be waived by the conduct of the defendant (o)

3 **[S. 446, 1st para., S. 456.]** (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor

Guardian for the suit to be appointed by Court for minor defendant

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Sub rule (4) is new

Guardian ad litem.—Where a guardian ad litem has once been appointed his appointment endures for the whole of the litigation including proceedings in execution

(n) Amichand v Collector of Sholapur (1889) 13 Bom 234

(o) Kamalakshi v Ramasami (1896) 19 Mad 127

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and appeal (*p*) The Calcutta High Court has held that a guardian ad litem appointed in the original suit does not continue as such in execution proceedings without fresh appointment (*q*) But it is submitted that this is erroneous for execution proceedings are a continuation of the suit.

A guardian ad litem is *not a party* to a suit or appeal Therefore a suit or an appeal is not time-barred, merely because the order appointing a guardian ad litem is not made until after the expiration of the period of limitation prescribed for the suit or appeal (*r*)

"Proper" person to be appointed guardian ad litem.—It is the duty of the judge himself to decide who is the proper person to be appointed as guardian ad litem (*s*)

Plea of minority.—*A* sues *B* *B* alleges that he is a minor In such a case the Court should frame a preliminary issue on the question of minority, and appoint a guardian for the purpose of the enquiry on the question of minority If the defendant is found to be a minor, a guardian ad litem should be appointed for him, but if he is found to be a major, the guardian appointed for the inquiry should cease to act and the defendant may conduct his own case (*t*) So also if a dispute arises as to whether a minor is the legal representative of a deceased party, the Court should appoint a guardian ad litem and decide the matter (*u*)

Non-representation.—The provisions of this rule as to the appointment of a guardian ad litem for a minor defendant are imperative Hence if a minor is sued without a guardian ad litem, and a decree is passed against him the decree is a nullity, and it can not be enforced against him (*v*) For the same reason it cannot operate as *res judicata* (*w*)

The Allahabad High Court has held that a minor against whom a decree has been passed without the appointment of a proper guardian ad litem may, if the facts of the case justify, in that very suit, (1) appeal from the decree, or (2) apply for a review of judgment, or (3) apply for an order under O 32, r 5 (2) according as the circumstances of the case may permit, or he may bring a regular suit to set aside the decree and the sale (if any) in execution of the decree (*x*) But he cannot resist *execution* of the decree on the ground that the decree is a nullity, for a minor not represented by a proper guardian ad litem, as where the guardian ad litem is a person whose interest is adverse to that of the minor [r 4], 'cannot be said to be a party to the suit within the meaning of s 47 above (*z*)

The Allahabad High Court has held that where a decree in a suit against a minor is set aside in a subsequent suit by the minor on the sole ground that he was not represented by a proper guardian ad litem, the Court whose decree is set aside has inherent power to restore the suit and to proceed with the appointment of a fit and proper person as guardian ad litem for the minor defendant (*a*) But the Madras High Court has

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All 675 678
(*t*) *Kasi Doss* v *Kassim Sait* (1893) 16 Mad 344

496 72 I C 475 (23) A C 692
(*w*) *Damu* v *Vakrya* (1920) 44 Bom 767, 56

36 I C 366

32, r. 3. held that there is no such inherent jurisdiction (b) Again the Allahabad High Court has held that where an ex parte decree has been passed against a minor not properly represented, the minor may apply to have the decree set aside under O 9, r. 13 (b2) The Madras High Court has held that no such application is competent, the reason given being that a minor not properly represented in a suit cannot be regarded as a "party" to a suit, and an application under O. 9, r 13, can only be made by a party to the suit (b3).

[illegible]

ment or has made an appointment which is open to objection owing to some defect of procedure The rule in this latter class of cases is different, for the decree will bind the minor unless it is shewn that the defect of procedure has prejudiced him In this class of cases the leading case is that of *Walian* v *Banke Behari* (c) That was a suit brought against a minor, but no order was applied for and none was made for the appointment of a guardian ad litem In the plaint, however, which was admitted by the Court, the mother of the minor was described as his guardian Further, the mother appeared throughout the proceedings in the suit as the minor's guardian A decree was passed against the minor and in the decree and the execution proceedings the mother was described as the minor's guardian In a suit brought by the minor on attaining majority to set aside the decree passed against him on the ground that no guardian ad litem had been appointed as required by the present rule, it was held by their Lordships of the Privy Council, overruling the decision of the Calcutta High Court, that the Court in which the former suit was instituted had *by its action*, given sanction to the appearance of the mother as a guardian ad litem, and that *the absence of a formal order of appointment* was not fatal to the suit, unless it was shewn that the defect in procedure prejudiced the minor Their Lordships observed that there was nothing in the proceedings of that suit to suggest that the interests of the minor were not duly protected by the mother or that the defect in procedure had prejudiced the minor and they accordingly held that the decree was binding upon the minor *The particular defects of procedure that have* been condoned on the ground of no prejudice to the minor are—omission to make a formal order of appointment (d), an appointment made without the affidavit required by rule 3 (3) being filed (e), or without notice to the minor under rule 3 (4) (f); appointment of a Court guardian without notice to the person in whose care the minor is (g) But such irregularities will vitiate the decree if there is prejudice to the minor as in *Sadashiv* v. *Trimbuck* (h) where no formal appointment was made and the minor's interests were not protected, or in *Bhagwan* v *Param* (i) where a Nazir was appointed guardian without notice to the mother with whom the minor lived *and* he for want of funds took no steps to defend the suit The rule is well stated by Wallace J in *Tirumalacharyulu* v *Ammisetti* (j) as follows 'No irregularity by way of omission to send notice as required by O 32, r 3,

A [illegible] 46 Mad L J 363, 80 I C 641 ('24) A M 763
(h) (1920) 44 Bom 202 56 I C 393
(i) (1915) 37 All 179, 27 I C 623
(j) (1924) 46 Mad L J 363 80 I C. 641 ('24) A M 763 See also *Sultan* v *Hardiyan* (1925) 88 I C 294, ('25) A A. 548

shall operate to render void the presumed representation of the minors in a suit, unless such omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof '

Notice —Notice should be served both on the proposed guardian and on the minor and the wishes of the minor should be considered (*k*)

Service of Summons —There is no special provision in the Code for service on minors Hence where the defendant is a minor, he should be served with the summons in the way provided for service upon adults (*l*) It is, indeed, doubtful whether service on a guardian ad litem is sufficient service for the purposes of the Code (*m*) But all notices of applications and other processes in a suit should be served upon the guardian ad litem [See rule 5 below] As to service in suits brought against wards of Courts of Wards see Bengal Court of Wards Act, 1879, s. 54, and Bombay Court of Wards Act, 1905, s 34

Fraud of next friend or guardian ad litem —A decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult, but it is open to the minor to impeach the decree *by a suit* in cases where the next friend or guardian for the suit has been guilty of fraud or collusion in allowing the decree to be passed against him (*n*)

Probate proceedings —Until a contest arises section 141 of the Code is not applicable to a probate proceeding so as to attract the applicability of this Order. But where a will of which probate is sought affects the interests of a minor it may be expedient as a rule of practice to appoint a guardian ad litem (*o*)

Execution proceedings —The provisions of this order do not directly apply to execution proceedings. The non representation of a minor by a guardian ad litem in execution proceedings is not in itself sufficient to set aside an execution sale (*p*)

4. [**Ss. 445, 457; ss 440, 443; s 456, and R.S.C., O 65, r. 13.**]

Who may act as next friend or be appointed guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be

(3) No person shall without his consent be appointed guardian for the suit

(*k*) *Rajendra* v *Prabodh* (1921) 6 Pat L J 82 59 I C 936

(*l*) *Jatindra* v *Srinath* (1898) 26 Cal 267 271 272, *Abdul* v *Eggar* (1908) 35 Cal 182 184 See *In the goods of Amrita Lal* (1900) 27 Cal 350 and *Rebells* v *Rebells* (1897) 2 C W N 100 [both cases of service of citation] See also Trevelyan on Minors 4th ed, p 269

(*m*) *Sureeh Chunder* v *Jugal Chunder* (1886) 14 Cal 204 215 *Gobind Ram* v *Muhammad* [illegible] 64 I C 25

O. 32, r. 4. (4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

Code of 1882 —Sub r (1) corresponds to ss 445 and 457 of the Code of 1882, sub r (2) to ss 440 and 443, 2nd paragraph, and sub r (4) to s 456, 2nd paragraph, and R S C, O 65, r 13 Sub r (3) is new. It is in accordance with a Bombay ruling in the undermentioned case (q)

Married woman as guardian ad litem —Under the Code of 1882, though a married woman could be appointed next friend of a minor plaintiff, she could *not* be appointed guardian ad litem of a minor defendant *Under this Code* she may be appointed guardian ad litem as well

Sub-rule (1): adverse interest — A minor represented by a guardian ad litem whose interests are adverse is not represented at all (r) The decree is therefore a nullity so far as he is concerned The Privy Council in *Rashid un nissa* v *Muhammad* (s), where a minor was represented by an uncle whose interests were adverse to that of the minor, said that "the latter was never a party to the suit in the proper sense of the term" Again when a Hindu father mortgaged family property for immoral purposes, but yet was treated as representing his minor sons in the suit filed by the mortgagee, it was held that the sons were not represented and that they could recover their shares (t) In a Madras case the decree was upheld apparently because the adverse interest was too remote to be relevant (u)

Sub r (2) provides that where a minor has a guardian appointed by competent authority, no person other than such guardian should be appointed his guardian ad litem The Allahabad High Court has held that where the Court, in ignorance of the fact that the minor has a guardian appointed by competent authority, appoints another person guardian for the suit, such appointment is not an illegality, but a mere irregularity, and it does not of itself vitiate either the decree passed in the suit or a sale consequent upon such decree (w) But the Madras High Court has held that this is an illegality

(q) *Jadow* v *Chhagan* (1881) 5 Bom 306

(r) *Sellappa Goundan* v *Masa Naiken* (1924) 47 Mad 79, 76 I C 1018, ('24) A M 297

(s) (1909) 36 I A 168, 31 All 572, 3 I C 864

(t) *Baijnath* v *Dharam* (1916) 38 All 315, 35 I C 707, *Murlidhar* v *Pitambar Lal* (1922) 44 All 525 66 I C 372, ('22) A A 91, *Chiranji Lal* v *Syed Ilias Ali* (1924) 46 All 620, 79 I C 608, ('24) A A 791

(u) *Kuppuswamy* v. *Kamalammal* (1920) 43 Mad 842, 59 I C 662

(v) *Budhulal* v *Morarji* (1907) 31 Bom 413

(w) *Dammar Singh* v *Tribhu Singh* (1907) 29 All 290

(x) *Bhimaji* v *Hussain Saheb* (1920) 43 Mad 803, 59 I C 842

(y) *Sridhar Rao* v. *Ram Lal* (1909) 31 All 7, 1 I C 503

(z) *Panelan* v *Manakkal* (1923) 44 Mad L J. 515, 74 I C 309, ('23) A M 503

Sub-rule (3): consent of guardian ad litem—This sub rule controls both sub rule (1) and sub rule (2) and places a material restriction on the power of the Court No person competent under either of these sub rules can be appointed guardian ad litem without his consent (z1) A guardian who has not consented to act as such is no guardian at all and the decree is invalid irrespective of any question of prejudice because the minor has not been represented in the suit (a), Das J seems to take a different view in *Pai de Satdeo* v *Ramayan* (b) but that is erroneous as pointed out by Venkatasubba Rao J in *Srira u' i v Lakshmanarayana* (c) The Allahabad High Court has said that in certain circumstances consent may be presumed when the proposed guardian remains silent and absent (b) But it is submitted that this is incorrect and the proper procedure in such case is, in default of any other person fit and willing to act to appoint an officer of the Court (e) But under the Code of 1882 which did not contain any proviso similar to r 4 (3) when a guardian under the Guardian and Wards Act made no response consent was presumed (f) In an Allahabad case where a father and his minor son were sued the Court appointed the mother guardian ad litem in spite of her refusal The father filed a written statement for the son and defended the suit on his behalf It is clear that the minor was not represented by his mother but the High Court held that there was substantial representation by the father and that there was no prejudice to the minor (g) The consent need not be expressed in writing Some cases use the phrase express consent, but the word ' express is not in the rule Consent is a question of fact and the evidence of it may be indirect and circumstantial (h) or it may be proved by conduct (i)

Officer of Court as guardian ad litem—In cases under the previous Codes it was held that if an officer of Court was appointed guardian ad litem, he should not be paid for his trouble (j) also that if he had no funds to conduct adequately the defence of the minor, the Court could relieve him of his position as guardian (k) But under the present code the Court may provide for the costs to be incurred by him in order that he may obtain legal assistance and this is so even when the guardian ad litem is himself a pleader (l) The appointment of an officer of the Court as guardian ad litem on a false affidavit that there is no other person fit and willing is vitiated by fraud and is of no legal effect A decree so obtained is not binding on the minor (m) As to irregularities in the appointment of a Court guardian see notes under rule 3 above

5. [Ss 441, 444] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub rule (2), shall be made by his next friend or by his guardian for the suit

Representation of minor by next friend or guardian for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way con-

(z1) *Innada* v *Upendra* (1921) 26 C W N 781

(1924) 47 Mad 476 77 I C 628 (24) A M 608
(e) *Dinabandhu* v *Mashuda* (1912) 16 Cal L J 318 17 I C 263
(f) *Tajeshwar Dutt* v *Lalhan Prashad* (1923) 2 Pat 296 83 I C 290 (23) A P 231 *Sarat Chandra* v *Bibhati* (1921) 34 Cal L J 302 66 I C 433
(g) *Kuber* v *Ramakar* (1925) 47 All 357 86 I C 86 (25) A A 351

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J 515 74 I C 309 (23) A M 553 Mad L

O. 32, rr. 5, 6.

cerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

6. [S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

Receipt by next friend or guardian for the suit of property under decree for minor

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Joint Mitakshara family—The Calcutta High Court had held that this rule did not apply when the next friend was the manager of a Mitakshara joint family of which the minor was a member and that qua manager he could receive monies due on a decree in favour of himself and the minor (*n*) But this conflicts with the Privy Council ruling in *Ganesh Rao* v *Tuljaram* (*o*) that a manager of a joint family if he is a next friend or guardian is subject to the control of the Court and that he cannot do in his capacity of manager acts that he is debarred from doing as next friend or guardian without the leave of the Court Accordingly when payment under a decree in favour of a minor and of the manager of a joint Hindu family was certified to the Court by the manager alone who was the next friend of the minor, the Court refused to record it as the leave of the Court had not been obtained, and for the same reason the Court refused to recognize the payment as a valid discharge and granted an execution application for the recovery of the whole amount (*p*)

Security for protection of minor's property—A bond passed by a surety under sub r (2) cannot be enforced by summary process under s 145 (*q*).

(*n*) *Harihar Pershad* v *Mathura Lal* (1908) 35 Cal 561

(*o*) (1913) 40 I A 132 36 Mad 295 19 I C 515

(*p*) *Muchakkuttiya* v *Doraiswami* (1924) 47 Mad L J 498, 82 I C 568 (25) A M 230

(*q*) *Kurugodappa* v *Soogamma* (1918) 41 Mad 40 39 I C 923

7. [S. 462.] (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. O. 32, r. 7.

Agreement or compromise by next friend or guardian for the suit

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Alterations in the rule—The words "expressly recorded in the proceedings" in sub r. (1), and the words "so recorded" in sub r (2), are new They give effect to the practice established under the old section See notes below, "Compromise decree when binding on a minor"

Scope of the rule—This rule contemplates the following steps to be taken in order before a compromise decree is passed in a suit to which a minor is a party, namely, (1) an application by the next friend or guardian ad litem for leave to compromise the suit, (2) the granting of leave by the Court if the Court thinks the case is a fit one for leave, and (3) the consent of the next friend or guardian ad litem to the proposed compromise *after* the Court has granted the leave (r) If the leave is granted, and the next friend or guardian ad litem assents to the compromise, the parties may apply to the Court under O 23, r. 3, for a consent decree in terms of the compromise, and if the compromise is lawful, it is the duty of the Court under that rule to pass the decree applied for If the next friend of a minor plaintiff agrees to compromise a suit on behalf of the minor subject to the leave of the Court, *and then withdraws from the compromise before the leave of the Court is applied for,* the Court will not enforce the compromise at the instance of the defendant, even though the terms of the compromise might appear beneficial to the minor The reason is that such compromise is not binding unless it is sanctioned by the Court (s) The Court cannot force a compromise upon a minor against the opinion of the guardian ad litem or next friend (t) But if the guardian or next friend is acting improperly in refusing to consent to a beneficial arrangement, the Court may take steps to remove him and substitute some other person (t)

Compromise decree when binding on minor.—The provision contained in this rule making it necessary to obtain the leave of the Court is of great importance to protect the interest of minors (u), and it has been extended to a compromise by a natural guardian who has put herself in the place of a guardian ad litem by applying to the Court to sanction a compromise (v) To render a decree passed in pursuance of a compromise binding on a minor, the following conditions must be complied with —

(a) The next friend or guardian ad litem must *apply to the Court* for leave to enter into the proposed compromise (w), stating specifically that the compromise is sought to be made on behalf of the minor (x), and also setting forth the terms of the proposed compromise (y)

Mad 115, 127, 32 I C 258 (P.C.)

(v) *Gurmallappa* v *Mallappa* (1920) 44 Bom. 574, 57 I C 417

(w) *Kalavati* v *Chedilal* (1895) 17 All 531

(x) *Manohar Lal* v *Jadunath Singh* (1906) 28 All 585, 33 I A 128

(y) *Virupakshappa* v *Shidappa* (1902) 26 Bom 109

32, r 7

(b) On such an application being made to the Court, the Court must exercise a judicial discretion as to the propriety, in the interests of the minor, of the proposed compromise (z) And if the Court sees reason to grant leave, it should *record an order* showing that an application has been made to it, that the terms of the proposed agreement or compromise have been considered by it, and that having regard to the interests of the minor, it has granted leave to make the agreement or compromise (a) ' It is not sufficient that the terms of a compromise are before the Court There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition or in some way not open to doubt, that the leave of the Court was obtained (b) A compromise will be deemed to be beneficial to the interests of a minor, if it secures to the minor some demonstrable advantage, or averts some obvious mischief (c) A certificate of counsel for the minor that the compromise is for his benefit is according to ordinary practice sufficient (d)

(c) The leave must be *express*, not implied. It must, in the language of this rule be *expressly recorded* in the proceedings From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court The Court by passing a decree in pursuance of a compromise does not *ipso facto* sanction the compromise (e) The provisions of this rule are complied with if the leave of the Court is expressly recorded it is not necessary that the order granting leave should state that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor (f)

But the non observance of the above conditions does not render the compromise decree *void* or affect the jurisdiction of the Court to record it (g) The decree is only *voidable*, and that too at the option of the minor No other party to the suit can call the decree in question the minor alone is entitled to call it in question, and this he may do either on attaining majority or before then through a next friend (h)

Procedure to set aside compromise decree —A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree (i) But it cannot be called in question by way of objection to any proceeding taken in execution of it (j)

It was doubtful whether under the Code of 1882 a compromise decree can be set aside by an *appeal* from the decree Where an appeal was preferred from a compromise decree on the ground that the lower Court did not consider the question as to

(z) *Kalavati* v *Chedilal* (1895) 17 All 531

(a) *Manohar Lal* v *Jadunath Singh* (1906) 28 All 585 33 I A 128 *Kalavati* v *Chedilal* (1895) 17 All 531 *Gorindasami* v *Alagirisami* (1906) 29 Mad 101 *Hiwa* v *Develand* (1911) 35 Bom 322 10 I C 909 *Sethuram* v *Vasanta* (1911) 34 Mad 314 12 I C 490 *Badri Prasad* v *Gopal* (1919) 41 All 553 50 I C 752.

(1898) 21 Mad 91 *Sharat Chunder* v *Kartik Chunder* (1883) 9 Cal 810, *Ram Colam* v *Durga Pershad* (1921) 6 Pat L J 190 60 I C

22 Bom L R 50- 53 I C 943

(e) *Manohar Lal* v *Jadunath Singh* (1906) 28 All 585 33 I A 128 *Partab Singh* v *Bhabuti Singh* (1913) 35 All 487 40 I A 182, 21 I C 358 *Virupakshappa* v *Shidappa* (1902) 26 Bom 109 *Kalavati* v *Chedilal* (1895) 17 All 531 *Arunachalam* v *Murugappa*

I C 305 (25) A C 866

(i) *Mirali* v *Rehmoolhoy* (1891) 15 Bom 594 *Surendra* v *Hemangini* (1907) 34 Cal 83

(j) *Arunachallam* v *Murugappa* (1889) 12 Mad 503 *Virupakshappa* v *Shidappa* (1899) 23 Bom 620

whether the compromise was a proper one in the interests of the minor, the High Court of Allahabad entertained the appeal (*k*), in a similar case, the High Court of Calcutta refused to entertain the appeal (*l*) Under the present Code no appeal lies from a consent decree [s 96, sub s. (3)]

Compromise under misapprehension of a material fact.—Where a compromise is entered into under a misapprehension of a material fact, it will be set aside even though it may have been sanctioned by the Court under this rule (*m*) See Indian Contract Act, 1872, s 20

Compromise of execution proceedings.—Execution proceedings are a continuation of the suit and a next friend or guardian cannot after decree enter into a compromise or an adjustment of the decree without the sanction of the Court (*n*) See O 21, r 2 And this is so even though the guardian ad litem had power as natural guardian to sell the minor s property (*o*) But the rule is confined to an agreement or compromise in the course of the suit A transfer by a guardian ad litem of a decree in favour of a minor made not with reference to the suit or execution proceeding does not require the sanction of the Court (*p*)

Agreement to be bound by oath under Indian Oaths Act, 1873, s. 9, not within this rule—An agreement by the next friend of a minor that an issue in the suit should be determined by the oath of the defendant, does not come within the purview of this rule and the sanction of the Court is not necessary In such a case the minor is bound by the agreement, provided there is no fraud or gross negligence on the part of the next friend (*q*)

Abandonment of issue does not amount to a compromise—A next friend or guardian ad litem may abandon an issue in the course of the trial of the suit and the sanction of the Court is not requisite for that purpose, for the abandonment of an issue does not amount to a compromise within the meaning of this rule The abandonment is binding on the minor provided there is no fraud or gross negligence on the part of the next friend or guardian ad litem (*r*)

Agreement to refer to arbitration.—It has been held by the High Courts of Madras (*s*) and Bombay (*t*) and by the Chief Court of the Punjab (*u*), that an agreement by a next friend or guardian ad litem to refer any matter in controversy in a suit to arbitration is an agreement within the meaning of this rule and that the sanction of the Court is therefore necessary According to the Allahabad High Court such an agreement is not within this rule and the sanction of the Court is not necessary (*v*) See Schedule II, r 1

The decisions cited above relate to cases where the agreement to refer was made during the pendency of a suit We now proceed to consider cases where there is no suit pending but an agreement to refer is made to which a minor is a party by his

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(*k*) *Kalavati* v *Chedilal* (1895) 17 All 531
(*l*) *Rakhal* v *Adwyta* (1903) 30 Cal 613
(*m*) *Bibee Solomon* v *Abdool Azeez* (1881) 6 Cal 687, *Jhanda Singh* v *Lachmi* (1920) 1 Lah 344 56 I C 878
(*n*) *Virupakshappa* v *Shidappa* (1902) 26 Bom 109 *Arunachalam* v *Ramanandhan* (1906) 29 Mad 309 *Davud* v *Paramasami* (1916) 31 Mad L J 207 35 I C 70 followed in *Kanakayya* v *Mulpuru* (1921) 41 Mad L J 75 63 I C 285 and *Kanakayya* v *Venkataramayya* (1925) 49 Mad L J 443 90 I C 1049 (25) A M 1237
(*o*) *G rmallappa* v *Mallappa* (1920) 44 Bom 574 57 I C 417
(*p*) *Govindarajulu* v *Ranga Rao* (1921) 40 Mad L J 124 62 I C 255
(*q*) *Chengal* v *Venkata* (1889) 12 Mad 483,

(*s*) *Lakshmana* v *Chinnathambi* (1901) 24 Mad 326 *Vijaya* v *Venkatasubba* (1916) 39 Mad 853 32 I C 881
(*t*) *Atmaram* v *Bhula* (1913) 15 Bom L R 223

939 [F B]

32, r. 9. **9** [S. 446.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit

Removal of next friend

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

Alterations in the rule—The words and make such other order as to costs as it thinks fit in sub r (1) are new The words, and shall thereupon appoint, etc , at the end of sub r (2) are also new

Where the next friend does not do his duty—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend or that the minor plaintiff himself may on coming of age elect to proceed with the suit or withdraw from it (*h*) So also if he is acting improperly in refusing to consent to a beneficial compromise (*i*)

Appeal after expiry of limitation period—In a suit brought against a minor by his guardian a decree is passed against the minor The interest of the minor requires an appeal but certain events happen after the passing of the decree which render it to the interest of the ad litem that the decree against the minor should stand, and hence no appeal is preferred by him from the decree In such a case leave will be granted to the minor on his attaining majority to appeal from the decree, though the period of limitation for the appeal may have expired (*j*)

Non-appearance of next friend—When the next friend does not appear, the suit should not be dismissed for default even though a reservation is made that such dismissal is without prejudice to the minor The proper course is to stay further proceedings pending the appointment of another next friend (*k*)

(*h*) *Dorasami* v *Thangasami* (1904) 27 Mad 377
(*i*) *Hemangini* v *Bhagwati* (1923) 27 C W N 792 75 I C 632 (23) A C 685
(*j*) *Cursandas* v *Ladkavahoo* (1896) 20 Bom 104
(*k*) *Kirti* v *Chanchal* (1921) 6 Pat L J 317, 63 I C 736

O. 32, rr. 10-12.

Stay of proceeding on removal etc of next friend

10. [Ss 448, 449] (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit

Retirement removal or death of guardian for the suit

11. [Ss 458, 459] (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit

(2) Where the guardian for the suit retires, dies or is *removed by the Court during the pendency of the suit,* the Court shall appoint a new guardian in his place

The words may permit such guardian to retire in sub r (1) are new The High Court of Patna has held that it is not necessary to give notice under rule 3 (4) before appointing a new guardian under this rule (*l*).

Course to be followed by minor plaintiff or applicant on attaining majority

12. [Ss 450, 453] (1) A minor plaintiff or a minor not a party to a suit on whose behalf, an application is pending shall, on attaining majority, *elect* whether he will proceed with the suit or application

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus —

"*A B*, late a minor, by *C D*, his next friend, but now having attained majority"

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order *to dismiss the suit or application on repayment of the cost* incurred by the defendant or opposite party or which may have been paid by his next friend

(*l*) *Radha Krishna Gopal* v *Lakshmi Narayan* (19-3) 2 Pat 2 3 71 I C 341 (-3) A P 385

O. 32, r. 12-15.

(5) Any application under this rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend

When title to be corrected —The provisions of this rule which require the title of a suit to be corrected apply to a *pending* suit and not to a suit in which a final decree has been passed and in which it only remains to proceed in execution (*m*)

Where minor co-plaintiff attaining majority desires to repudiate suit

13. [s 454] (1) Where a minor co plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co plaintiff, and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit

(2) Notice of the application shall be served on the next friend, on any co plaintiff and on the defendant

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit shall be paid by such persons as the Court directs

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant

Sub r (4) is new

Unreasonable or improper suit

14. [s 455] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper

(2) Notice of the application shall be served on all the parties concerned, and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the cost of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit

Application of rules to persons of unsound mind

15. [s. 456] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity

(*m*) *Doorga Mohun Dass v Tahir Ally* (1895) 2 Cal 0

to be incapable of protecting their interests when suing or being sued.

O. 32, rr. 15, 16.

Persons of unsound mind—The present rule makes the provisions of rules 1 to 14 applicable to persons of unsound mind The result is that where a person of unsound mind is a plaintiff, a suit on his behalf must be brought by a next friend, and where he is a defendant, the suit must be defended by a guardian ad litem Where a manager has been appointed of the property of a lunatic under the Lunacy Act, no person other than such manager should act as the next friend of the lunatic in a suit in respect of the lunatic's property (n) See r 4, Sub r (2) above

Persons adjudged to be of unsound mind—A person may be adjudged to be of unsound mind under the Lunacy Act 4 of 1912

Persons of unsound mind not adjudged to be so—The old section did not contain any provision as to persons of unsound mind not adjudged to be so But it was held that the same procedure applied where a party to a suit was of unsound mind though not adjudged to be so For the title of suits, see App A, pleadings, Title of Suits.

Decree against a lunatic—A decree passed against a lunatic not properly represented in the suit cannot be challenged in execution proceedings. The reason is that a lunatic not properly represented is not a "party" to the suit within the meaning of S 47 above (o)

Saving for Princes and Chiefs

16. [S. 464.] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

A ruling chief sued in his personal capacity if not domiciled in British India, is not subject to the Majority Act. If he has attained majority according to his personal law, no guardian ad litem need be appointed (p)

ORDER XXXIII.

Suits by Paupers.

O. 33, r. 1.

Suit may be instituted in forma pauperis.

1. [S 401.] Subject to the following provisions, any suit may be instituted by a pauper.

(n) See *Bai Divali* v *Hiralal* (1899) 23 Bom 403

(o) *Kalipada* v *Hari* (1917) 44 Cal 627, 35 I C 856

(p) *Pareshchandra* v *Maharaja Birendra* (1925) 29 C W N 287, 80 I C 100, (25) A C 513

O. 33, r. 1. *Explanation.*—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Scope and object of the order—A plaintiff suing in a civil Court must pay the Court fee prescribed by law for the plaint and subsequent proceeding in the suit These fees are prescribed by the Court Fees Act VII of 1870 But a person may be too poor to pay the Court fee, and the object of this Order is to enable such person to bring and prosecute suits without payment of Court fees (*q*) There are, however, certain fees from which even a pauper is not exempted, namely, fees for service of process, and such fees must be paid by him (r 8) If the pauper succeeds in the suit, the Government have a first charge on the subject matter of the suit for the amount of the Court fee which would have been paid by him if he had not been permitted to sue as a pauper (r 10) If the pauper fails in the suit, the Court should order him to pay the Court fees due by him (r 11) An order directing a pauper plaintiff to pay the defendant in cash the costs occasioned by an amendment of the plaint and dismissing the suit in default of such payment was held to be wholly improper (*r*)

"Subject matter of the suit—In determining whether a person claiming to sue as a pauper is worth Rs 100, neither the value of his necessary wearing apparel nor the value of the property claimed by him in the suit should be taken into consideration. The ground for excluding the "subject matter of the suit" under this rule is that such property is presumably out of the pauper's reach and cannot be made use of by him to carry on his litigation (*s*)

A applies for leave to sue as a pauper for the recovery of certain ornaments worth Rs 2,000 from *B* Pending the investigation into pauperism, *B* deposits in Court a portion of the ornaments claimed by *A* of the value of Rs 100 as ornaments belonging to *A* The ornaments deposited in Court, being entirely at *A*'s disposal, are no longer part of the "subject matter of the suit." From the moment of the deposit *A* becomes "entitled to property worth Rs 100," and hence he is not entitled to sue as a pauper for the rest of the ornaments (*t*) Macleod, J, however expressed the opinion that *A* could not be said in such a case to be entitled to property worth Rs 100, for otherwise every application for leave to sue as a pauper may be defeated by the respondent paying into Court Rs. 100 out of the amount claimed (*u*), and has recently given effect to this view in *Bai Balagauri* v *Motilal* (*v*), the reason given being that the property does not cease to be the subject matter of the suit because of defendant's admission or payment

A who has mortgaged his property to *B* sues *B* for redemption. *A*'s equity of redemption is no part of the subject-matter of the suit Its value, therefore, should be taken into consideration in determining whether *A* is a pauper (*w*)

Sons sued as paupers to set aside an alienation of joint family property by the father, but when it was found that there was a share of the property that had not been alienated they were not allowed to continue the suit as paupers (*x*)

(*q*) *Jotindro* v *Dwarka* (1893) 20 Cal 111, 115
(*r*) *Ambaji* v *Hanmantrao* (1922) 47 Bom 104, 69 I C 807, (22) A B 385
(*s*) *Muhammad* v *Ajudhia* (1888) 10 All 467
(*t*) *Dwarkanath* v *Madhavrao* (1886) 10 Bom 207
(*u*) *Fatijabai* v *Dossabhoy* (1910) 34 Bom 635, 5 I C 658
(*v*) (1923) 47 Bom 523, 72 I C 2[illegible]4, (23) A B 247
(*w*) *Kapil Deo* v *Ram Lakha* (1911) 33 All 2[illegible]7, 8 I C 484
(*x*) *Ram Prasad* v *Jagjimba* (19[illegible]) 47 All 87[illegible], 83 I C 4[illegible]0, ('2[illegible]) A A [illegible]47

"Other than his necessary wearing apparel and the subject-matter of the suit' —These words do not qualify that part of the Explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the conditions that the applicant is not entitled to property worth Rs 100 (*y*)

Prosecution of suit as pauper —A plaintiff may be allowed to *continue* as a pauper a suit instituted by him in the ordinary way (*z*)

Minor plaintiff —A minor pauper may sue through a next friend although the latter is not a pauper (*a*) In England when a minor applies to sue as a pauper, it must be proved that the minor *as well as the next friend* are paupers But this rule of English practice does not apply in India, and it is enough if it is proved that the minor is a pauper, it is not necessary to prove that the next friend also is a pauper (*b*)

Pauper defendant —It has been held by the High Court of Calcutta that although the Civil Procedure Code provides only for suits to be brought by a pauper plaintiff, the Court has inherent power to allow a *defendant* to defend in forma pauperis (*c*)

Legal representative of pauper —The legal representative of a deceased person may be allowed to *institute* a suit in forma pauperis, if the deceased himself had been allowed to sue as a pauper if the proceedings had been instituted in his lifetime, provided the legal representative is also himself a pauper (*d*) Similarly, on the death of a pauper plaintiff, his legal representative may be allowed *to continue* the suit in forma pauperis, provided the legal representative is also himself a pauper (*e*) But in *Sivagamme Sivagami* v *Gopalaswami*(*f*) it was said that it was immaterial that the legal representative has means in his private capacity and that he can continue the suit as a pauper if he has not come into possession of sufficient means out of the estate This conflicts directly with *In re Radakrishna Iyer* (*g*) decided a few months earlier by the same Court, but they are both decisions of a single judge In England an executor or administrator is not allowed to sue or defend as a pauper (*h*) unless he is also a beneficiary (*i*)

Official liquidator —The word person in this rule includes a company [see General Clauses Act 10 of 1897 s 3 (39)] An official liquidator therefore of a company is competent to apply for leave to sue in forma pauperis on behalf of the company, if the company is a pauper within the meaning of this rule The fact that the liquidator in his personal capacity is not a pauper does not affect the question (*j*)

Married woman —The mere fact that the applicant s husband has property is not sufficient reason for disallowing her application for leave to sue in forma pauperis (*k*)

Pauper appeals —As to pauper appeals see Order 44 below

(1906) 33 Cal 1163 *In re Radakrishna Iyer* (19..) 88 I C 91 (2.) A M 819 which explains *Bhajbat* v *Bolora n* (186.) 3 W R Mis 20

(*f*) (19..) 48 Mad L J 390 87 I C 372 (2.)

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Lal t Molan Mandal v *Satish Cha dra Das* 44 I C "23 1 8,

O. 33, rr. 2-4.

Contents of application.

2. [S 403] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings

Procedure—Rules 2 to 8 prescribe the procedure to be followed when a suit is proposed to be instituted in forma pauperis.

Death of applicant.—Where an *application* for leave to sue in forma pauperis has bee
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reason
does not survive to the representative of the deceased applicant. But the legal representative may present a *fresh application* for leave to sue in forma pauperis, *if he himself* is a pauper (l).

Presentation of application.

3. [S 404] Notwithstanding anything contained in these rules the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Presented to the Court.—Presentation need not be to the Court itself. Presentation to the proper officer of the Court is sufficient (m)

Purda-nashin woman—A purda-nashin woman exempted from appearing in Court under s. 132 above may present the application for leave to sue as a pauper by a duly authorized agent (n)

Pauper appeals.—The provisions of this rule apply also to applications for leave *to appeal* as a pauper See O 44, r 1

Examination of applicant.

4. [S 406] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant

(l) *Lalit Mohan v Satish Chandra* (1906) 33 Cal. 1163

(m) *Chidambaram v Kadar Mohideen* (19 4) 48 Mad ... (4) A. M 901

(n) *Wazir-un-nissa v Ilahi Bakhsh* (1907) 29 All. 172.

O. 33, rr. 4, 5.

If presented by agent Court may order applicant to be examined by commission

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken

Examination —This Order contemplates examination of two kinds, namely (1) the examination of the applicant which may as indicated in this rule be regarding (a) the merits of the claim and (b) pauperism and (2) the examination of persons other than the applicant which should be confined to pauperism only as indicated by the provisions of rr 6 and 7 below Persons other than the applicant cannot be exmined on the merits of the applicant s claim (o)

Rejection of application

5. [Ss 405, 407] The Court shall reject an application for permission to sue as a pauper—

(*a*) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(*b*) where the applicant is not a pauper, or

(*c*) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(*d*) where his allegations do not show a cause of action, or

(*e*) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject matter

Alteration in the rule —The expression cause of action in cl. (d) has been substituted for the words right to sue in such Court See notes below under the head Clause (*d*) cause of action

Clause (c) fraudulent disposal of property —Thus if a person has property worth Rs 1 000 and he disposes of the same in August 1915 to enable himself to sue as a pauper and applies for leave to sue as a pauper in September 1915 the application should be rejected under this rule

Clause d) · cause of action —The corresponding clause of the old section ran thus That his allegations do not show a *right to sue in such Court* It was contended, on the strength of the words sue in such Court that that clause referred to the question of *jurisdiction* and not to the question whether or not a good *cause of action* was disclosed in the application. But this contention was not upheld and it was held that the terms of that clause did not limit the Court s power to merely ascertaining whether the right to sue arose within the *jurisdiction* but had a more extended meaning namely that an applicant must make out that he has a good subsisting *cause of action*,

(o) *Jogendra* v *Durga* (1919) 46 Cal 651 52 I C 610

O. 33, r. 5. capable of enforcement in Court and calling for an answer, and not barred by the law of limitation or any other law (p) It was accordingly held that the application to sue as a pauper must be rejected, if the right to sue was barred by the law of limitation (q) or as *res judicata* (r), or if it did not disclose a good cause of action as where the application was for leave to sue on a contract which was void as being immoral and opposed to public policy (s) The expression cause of action has been substituted for the words right to sue in such Court to give effect to the above decisions Though the Court as stated above, can go into the question of limitation to see if the applicant has a subsisting cause of action it should not go into that question if it requires an elaborate examination of conflicting authorities on the point "The cases do not decide that an elaborate enquiry into doubtful and complicated questions of law should be raised at the stage contemplated by Order XXXIII, rule 5 (t)

It is open to the Court to consider not only the statements made in the plaint but also the statement made in his examination by the applicant under r 4 in determining whether his allegations do not show a cause of action as laid down in cl (d) of this rule (u) Where the application discloses a cause of action, the Court, it is said, should not inquire into the merits of the case (v) But where the application does not show a *prima facie* case on the merits the Court may examine the applicant regarding the merits of the claim under r 4 above (w) In the case last cited the High Court of Allahabad went to the length of saying that the Court had the power to examine the applicant regarding the merits of his claim though the application disclosed a *prima facie* case on the merits adding that if it were not so the granting of the application would depend not on whether the applicant had any merits to go upon, but on the skill of the person who drafted the application, and the examination as to the merits under r 4 would be superfluous (x) In a recent case the same High Court said that the application should not be dismissed on the ground that the plaint disclosed that the matter in suit was *res judicata* as this had reference to the defence (y) This seems erroneous for cause of action means a valid and subsisting cause of action not barred by limitation or *res judicata* It is submitted that the Court should examine the applicant to ascertain if he has a subsisting cause of action and also on the other matters specified in rule 5, but should not go further and examine the evidence by which the plaintiff intends to prove his case, *e g*, by construing the will on which the plaintiff relies as in *Gopal* v *Bigoo* (z) The subsequent insolvency of the petitioner is no ground for rejecting the application (a)

Clause (e): transfer of interest in subject-matter of proposed suit—The interest transferred may be either vested or contingent Thus an agreement authorising a pleader to recover his fees out of the revenues of a village forming the subject matter of the proposed suit, *in the event of* the applicant failing to pay the fees to the pleader is an agreement under which the pleader obtains a contingent interest in the subject matter of the suit If such an agreement is proved, the application for leave to sue in forma pauperis must be rejected (b)

(p) *Chattarpal* v *Raja Ram* (1885) 7 All 661 *Kamrakh Nath* v *Sundar Nath* (1898) 20 All 299 *Vijendra* v *Sudhindra* (1896) 19 Mad 197 *Amirtham* v *Alwar* (1904) 27 Mad 37 *Dulari* v *Vallabdas* (1889) 13 Bom 126

(q) *Chattarpal* v *Raja Ram* (1885) 7 All 661 *Haur Kaur* v *Munni Lal* (1919) Punj Rec no 134 p 348 53 I C 441

(r) *Vijendra* v *Sudhindra* (1896) 19 Mad 197

(s) *Dulari* v *Vallabdas* (1889) 13 Bom 126

(t) *Govindasami* v *The Municipal Council* (1918) 41 Mad 620 45 I C 95

(u) *Chattarpal* v *Raja Ram* (1885) 7 All 661 *Kamrakh Nath* v *Sundar Nath* (1898)

(w) *Kamrakh Nath* v *Sundar Nath* (1898) 20 All 299

(x) *Ibid* p 301

(y) *Lachmi* v *Ram Bahadur* (1925) 23 All L J 200 88 I C 781 ('25) A A 275

(z) (1903) 8 C W N 70

(a) *Chidambaram* v *Kotler* (1925) 48 Mad L J 491 87 I C 720 ('25) A M 791

(b) *Manohar* v *Lakshman* (1885) 9 Bom 371

Revision —An order rejecting an application under this rule is not appealable (c) but it is open to revision in a proper case (d), though the Allahabad High Court has since doubted whether revision lies (e)

Letters Patent appeal —No appeal is allowed by the Code from an order made under this rule But the Madras High Court has held that an appeal lies under cl 15 of the Letters Patent from an order allowing or refusing to allow a plaintiff to sue as a pauper, on the ground that such an order is a 'judgment and that it is neither interlocutory nor made in the exercise of discretion (f)

Notice of day for receiving evidence of applicant's pauperism

6 [S. 408.] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof

Evidence —See notes to r 4 above under the head Examination

Notice —As to form of notice, see App H form no 12

Procedure at hearing

7 [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper

Sub-rule (2) —The Court has when issuing notice under rule 6 presumably decided ex parte that none of the prohibitions in rule 5 exist This sub rule enables the other party to re open this question But except on the issue whether plaintiff is a pauper he can only do so by argument for the evidence under rule 6 is limited to the issue of pauperism Whether the plaintiff has a cause of action can only be determined from *the plaint itself and the statements of the plaintiff in his examination under rule 4* Therefore the Court has not power to determine on the evidence recorded under rule 6 that plaintiff has no cause of action whether because he is barred by limitation (g) or

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3 Pat ° ₒ 63 I C 8 1 (3) A P 30

O. 33, r. 7. because he has no title (*h*) If there is no argument by the party, the Court can never theless consider the matter of its own motion (*i*)

Review.—An order under this rule refusing leave to sue as a pauper is subject to review (*j*) The application for review is not liable to any Court fee (*k*)

Propriety of order allowing applicant to sue in forma pauperis.—Where after due consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has pas ed a decree in favour of the plaintiff, it is not open to the defendant, in appeal from the decree, to question the propriety of the order permitting the plaintiff to sue as a pauper S 105 does not apply to such an order (*l*)

Limitation where application granted—Where an application for leave to sue as a pauper is *granted*, the date on which the application is *filed* will be deemed to be the date on which the pauper suit is instituted for all purposes of limitation, and *not* the date on which the application is *numbered and registered as a suit* [Limitation Act 1908, s 4] Therefore when the rate of Court fee was enhanced between the date of filing and the date of granting the application, the Court fees were in the calculation of costs assessed at the former rate (*m*)

Limitation where application refused—Where an application for leave to sue as a pauper is *refused*, and the applicant subsequently institutes a suit in respect of the same subject matter in the ordinary way (r 15), the suit will be deemed for the purposes of limitation to have been instituted on the date on which the plaint is pre sented and *not* the date on which the *rejected application* was filed The reason is that upon an order of refusal under this rule, the proceedings instituted under r 2 come to an end (*n*)

Limitation where application is converted into a plaint on payment of court-fees—A person who has applied for leave to sue as a pauper may, at any time, before an order is made under this rule convert his application into a plaint, by paying into Court the necessary Court fees. In such a case, if the application was made *bona fide* the suit would be deemed to have been instituted for the purposes of limita tion on the day on which the application was filed and not the day on which the Court fees were paid But if it is found that the application was made in bad faith, the suit would be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed (*o*)

Illustrations

1 *A* applies for leave to sue as a pauper On the day fixed for the hearing of the application *A* alleging that he has succeeded in negotiating a loan for the payment

paid

2 On the last day of the period of limitation prescribed for the institution of a suit, *A* applies for leave to sue as a pauper The application is heard a fortnight later,

91 I C 30 (26) A M 150
(*l*) Naraini v Malon Lal (1895) 17 All 526.

(23) A R 2?6 Contra [illegible] v Sandi (1?9?) ?? All 206

It transpires at the hearing of the application that *A was possessed of sufficient means to enable him to pay the Court fees* Before an order is made under this rule rejecting the application A pays the necessary Court fees into Court, and the application is there upon converted into a plaint The application not having been made in good faith the suit will be deemed to have been instituted on the day on which the Court fees were paid, and not on the day on which the application was filed The Court fees having been paid *after* the expiration of the period of limitation, the suit is time barred

8 [S. 410] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

Procedure if application admitted

Limitation : where application granted. See notes to r 7 above

9 [S 414.] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit,

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper, or

(*c*) if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter

Clause (a)—Non disclosure by the plaintiff of a life policy worth Rs 225 in a suit where the Court fees were over Rs 500 was held not to justify his being dispaupered (*p*)

Clause (b).—Receipt of interim maintenance during the suit is not a ground for dispaupering the plaintiff if it is not enough to enable her to save the amount required for Court fees (*q*) Nor can she be dispaupered because she is living with a rich relation and appearing by eminent counsel (*r*)

(*p*) *Shankarbhai* v *S Lharanthal* (1922) 46 Bom 1017 70 I C 964 (2) A B 215

(*q*) *Sr nohi* v *Secretary of State* (1923) 2 Pat 879 71 I C 611 (24) A P 27

(*r*) (1923) 2 Pat 879 71 I C 611 (24) A P 2 *supra*

O 33, r. 10

10. [S 411] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit

Costs where pauper succeeds

See rr 12 and 13

Amount of Court-fees shall be a first charge—The charge is to be enforced by an application for the attachment and sale of the subject matter of the suit A separate suit for the sale of the subject matter to realize the Court fees is now barred see r 13 below and s 47 (s) The application for execution by the Government must be made within three years from the date of the decree in the pauper suit (t)

Recovery of Court-fees by Government from party ordered to pay the same—If the plaintiff is directed to pay the Court fees, the Government may realize the same by an application for execution against the person or property of the plaintiff, and if the defendant is directed to pay the Court fees, the Government may realize the same by an application for execution against the person or property of the defendant

Mode of realization of Court-fees by Government.—The plaintiff in a suit *in forma pauperis* obtains a decree against the defendant for possession of certain property It is declared by the decree that the amount of Court fees shall be a first charge on the property, and that the same shall also be recoverable by the Government from the defendant In such a case if the defendant fails to pay the Court fees the Government may at its option realize the Court fees either by attachment and sale of the property which was the subject matter of the suit, or it may realize the same by an application for execution against the person or property of the defendant (u) The former right is not lost merely because the property for the recovery of which the pauper suit was brought has passed from the hands of the judgment debtor into the hands of the pauper decree-holder (v) The Government, however, have *no lien upon the decree* for the amount of the Court-fees (w) hence if the amount of Court fees is not paid the Government are not entitled to sell the decree obtained by the plaintiff for the purpose of recovering such amount (x).

Effect of first charge—Since the amount of Court-fees recoverable by Government is a *first* charge on the subject matter of the suit (y) it follows that a sale held in execution of such charge must prevail against a subsequent sale ( ) For the same reason, the defendant against whom the decree is passed cannot set-off against the subject matter of the suit any sum that may be due to him under a cross decree held by him against the plaintiff A obtains a decree against B for Rs. 1,000 in a suit brought

(s) Ram Das v Secretary of State (1896) 18 All 419 Babui v Secretary of State (1919) 4 Pat L J 166 50 I C 315

(t) Appaya v Collector of Vizagapatam (1882) 4 Mad 155

(u) Ram Das v Secretary of State (1896) 18 All 419

(v) Babui v Secretary of State (1919) 4 Pat L J 166 50 I C 315

(w) Pran Krista v Collector of Moorshedabad (1871) 15 W R 205

(x) Jatindra Nath v Dwarka Nath (1893) 20 Cal 111

(y) See Ganpat v Collector of Kanara (1875) 1 Bom 7

(z) Full av Teloch (190) 25 Mad 733

in forma pauperis A is directed by the decree to pay the Court fees, but he fails to pay the same Thereupon the Government apply to attach and sell the judgment debt of Rs. 1,500 due to A from B B claims to set-off Rs 1,475 due to him under a decree held by him against A B is not entitled to the set off claimed by him, for the Government has a *first* charge on Rs 1,500, that being the *subject matter* of the suit (a)

Crown's prerogative of precedence in respect of Court-fees —If the plaintiff succeeds in the suit, and the amount payable under the decree by the defendant is paid *into Court* the Government is entitled to payment of the Court fees out of the fund in the Court on a mere application for payment without *attaching* the fund in the first instance The reason is that the Crown is entitled to precedence in respect of a Crown debt over all other creditors of the pauper decree holder A obtains a decree against B for specific performance and costs in a suit brought *in forma pauperis* It is directed by the decree that B should pay the Court fees to Government, and the Court fees are also declared to be a first charge on the property directed to be conveyed by B to A B fails to pay A s costs A thereupon applies for attachment and sale of certain property belonging to B for payment of his costs The property is sold, and the sale proceeds amounting to Rs 1,000 are paid into Court Thereafter A s solicitor, C, applies to the Court for payment to him out of the Rs 1,000 of the costs incurred by him on behalf of A At the same time a claim is made by the Government Solicitor for payment of the Court fees out of the Rs. 1,000 in priority to C's claim The Government are entitled to precedence in respect of the Court-fees, and C is entitled only to the balance left after payment of the Court-fees (b)

It is to be observed that in the Calcutta case cited above, C was a creditor of A inasmuch as he was entitled to be paid his costs by A But he was merely an *ordinary* creditor as distinguished from a *secured* creditor It is also to be observed that Court-fees form a Crown debt, and the Crown was to that extent a creditor of A It has to be borne in mind that it is only when claims of the Crown and claims of *ordinary* creditors or 'common persons (to use an old expression) concur or come into competition that the Crown is preferred The Crown has no more right than a common person to seize X s property and apply it in or towards discharge of a debt due from X It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a pauper in a suit by him against X and Y is directed by the decree to pay the Court fees, the Government are not entitled to realize the Court fees by a sale of X s property previously mortgaged by him to A, so as to defeat the right of A (c) All that could be sold by the Government in such a case is the equity of redemption of X in the property (d)

Appeal —Questions arising between the Government and any party to the suit under this rule would be questions relating to the "*execution, discharge and satisfaction*" of a decree within the meaning of s 47 And it is provided by r 13 below that they should be deemed to be questions arising *between the parties to the suit*, within the meaning of s 47 It therefore follows that an order deciding any such question is appealable as a decree [see s 2 cl (2), and s 96] (e) Under the Code of 1882 it was held by the High Courts of Bombay and Madras that the Government not being a *party* to the suit, such questions could not be said to be questions arising *between the parties to the suit* within the meaning of s. 244 [now s 47], and hence orders determining such

(a) *Janki v Collector of Allahabad* (1887) 9 All 64

(b) *Gayanoda v Butto Kristo* (1906) 33 Cal 1040 *Ganpat v Collector of Kanara* (1876) 1 Bom 7 *Secretary of State v Bombay Landing and Shipping Co* (1868) 5 B H C O C 23

(c) *Raghu Prasad v Mewa Lal* (1912) 34 All 2[illegible]3 39 I A 62 15 I C 177

(d) *Dost Muhammad v Mani Ram* (1907) 29 All 537

(e) *Secretary of State v Narayan* (190[illegible]) 29 Bom 102

O. 33, r. 10, 11.

questions were not appealable as decrees (f) On the other hand, it was held by the High Court of Allahabad that such orders were appealable (g) Rule 13 (which is new) sets this conflict at rest by providing that though the Government is *not* a party to the suit, the Government *shall be deemed* to be a party to the suit for the purposes of s 47

Costs where pauper partly succeeds and partly fails —Rule 10 deals with the case of a pauper plaintiff who succeeds in the suit Rule 11 deals with the case of a pauper plaintiff who fails in the suit There is no separate provision for the case in which a pauper plaintiff has partly succeeded and partly failed Presumably the Court is intended to deal with such a case by combining the provisions of the two rules In such a case therefore the Court fees payable on the plaint should be apportioned between the plaintiff and the defendant It is illegal to lay upon the defendant in such a case a larger proportion of the Court fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful (h) In a suit for Rs 3,000 the plaintiff got a decree for Rs 88 15 0 and was ordered to pay the defendant s costs amounting to Rs 101 The Court held that as plaintiff was precluded by O 21, r 19 from executing his decree, the case fell under rule 11 (i) Again when a pauper appeal was allowed on a point that did not touch merits of the case the Court ordered the Court fee to be paid by the appellant and respondent in equal moieties (j)

11 [S. 412] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

Procedure when pauper fails

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fees or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper

See rules 12 and 13

Alterations in the rule

1 The word withdrawn has been newly added. See notes below under the head Withdrawn.

2 Besides the liability to pay the Court fees, the plaintiff was, under the old section, subject to a further penalty of fine or imprisonment if the Court found that the suit was frivolous or vexatious. This provision has been omitted in the present rule

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(f) *Collector of Ratnagiri v Janardan* (1882) 6 Bom 390 *Collector of Kanara v Lambhat* (1891) 15 Bom 464 *Collector of Trichinopoly v Sivaramakrishna* (1900) 23 Mad 73

(g) *Secretary of State v Bhagwanta* (1891) 13 All 226

(h) *Chandramila v Secretary of State* (1890) 14 Mad 163 *Ganga v Gaura* (1916) 38 All 463 34 I C 46

(i) *Chakrapani v Government of India* (1921) 42 Mad L J 191 63 I C 743 (1922) A M 13

(j) *Balamani v Ramu* (1922) 43 Mad L J 273 67 I C 57, (1922) A M 786.

Scope of the rule —An order under this rule directing the pauper plaintiff to pay the Court fees can only be made in the following four cases —

(1) where the plaintiff *fails* in the suit,
(2) where the plaintiff is *dispaupered* under r 9,
(3) where the suit is *withdrawn*, or
(4) where the suit is *dismissed under the circumstances specified* in cl (a) or cl. (b).

It follows from what has been stated above that where an application for leave to sue *in forma pauperis* is returned under O 7, r 10, for want of jurisdiction to be presented to the proper Court, no order can be made under this rule directing the applicant to pay the Court fees It cannot be said in such a case that the plaintiff has *failed* in the suit (*l*) The decision may also be put on the ground that the present rule does not apply until the application is granted, and is numbered and registered under r 8 above. But a dismissal of the suit at the request of the plaintiff and the defendant, the suit being settled out of Court, amounts to a *failure* within the meaning of this rule (*l*)

"Withdrawn."—This word has been newly added Under the old section there was a conflict of decisions as to whether the Court could order the plaintiff to pay the Court-fees if the suit was withdrawn (*m*) The insertion of the word "withdrawn" makes it clear that the Court has the power under this rule to order the plaintiff to pay the Court-fees if the suit is withdrawn, whether the withdrawal is without the leave of the Court or with leave to bring a fresh suit under O 23, r 1

Costs —This rule does not preclude the Court from awarding a successful defendant his costs in a pauper suit. The Court has full power under s 35 to give and apportion costs in any manner it thinks fit. Nothing in this rule limits or otherwise affects the power conferred upon the Court by s. 35 to give and apportion costs (*n*)

Omission to make an order for payment of Court-fees —The Government has the right at any time to apply to the Court to make an order for the payment of the Court fees (r 12) If the order is refused, the Government may, by virtue of the provisions of r 13 (which is new), prefer an *appeal* from the order of refusal Under the Code of 1882 it was held that the Government, not being a party to the suit, had no right of appeal, and it could therefore proceed only by an application for *revision* (*o*)

12. [*New*] The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under rule 10 or rule 11.

Government may apply for payment of Court-fees

This rule is new It enables the Government, in cases of error and omission with regard to Court-fees, to have the error or omission rectified by a mere application to the Court See r 13 below

(*l*) *Collector of Ratnagiri* v *Janardan* (1882), *Collector of Kanara* v *Krishnappa* (1891) 15 Bom 77, *Chandaba* v *Kuver* (1894) 18 Bom 484 (Court fees not ordered)

(*n*) *Jetha* v *Gulraj* (1884) 8 Bom 577

(*o*) *Collector of Ratnagiri* v *Janardan* (1882) 6 Bom 590 *Collector of Kanara* v *Krishnappa* (1891) 15 Bom 77, *Chandaba* v *Kuver* (1894) 18 Bom 484

O. 33, r. 13-16.

13. [*New.*] All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Government to be deemed a party

This rule is new See notes to r 10 under the head "Appeal," and notes to r 11 under the head "Omission to make an order for payment of Court fees"

14. [*New.*] Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to be sent to Collector

15. [S. 413.] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

Shall be a bar to any subsequent application—The bar to a subsequent application being a bar to the *jurisdiction* of the Court, the Court is competent and bound to take notice of it at any stage of the suit (p)

Right to sue—There is no substantial distinction between the words "right to sue" in this rule and the words "cause of action" in rule 5 An application to sue in forma pauperis for maintenance is not barred by the dismissal of a previous application for a different period (q) Nor does a rejection under rule 5 (a) operate to bar a second application (r)

Dismissal for default—The dismissal of a pauper application in default of appearance or for default in prosecution is no bar to a subsequent pauper application in respect of the same cause of action (s)

16. [S. 415.] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

Costs

(p) *Panchod v Lelanji* (1896) 20 Bom 86, *Ali Afzal v Purna* (1924) 40 Cal L J 154, 84 I C 703 (24) A C 1059

(q) *Ratna Mala Dasi v Kamakshya* (1920) 31 Cal L J 331 57 I C 9

(r) *Mt Bal Kaur v Shib Lal* (1920) 1 Lah 151, 56 I C 207

(s) *Lhaj Singh v Maha Koonwar* (1868) 3 Agra Mis I *Umasundari, in the matter of* (1870) 5 B L R App 29

ORDER XXXIV.

Suits relating to Mortgages of Immoveable Property.

O. 34, r. 1.

Parties to suits for foreclosure, sale and redemption

1. [*New.* **Act 4 of 1882, S. 85.**] Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Suits relating to mortgages—This order is new It is a re enactment with some alteration of sections 85 90, 92 94, 96, 97, and 100 of the Transfer of Property Act 4 of 1882 relating to suits on mortgages. The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree This omission has now been remedied, and provision has been made in rules 3 (1), 5 (1) and 8 (1), for the passing of final decrees in such cases The object of removing the provisions as to mortgage suits from the Transfer of Property Act to the Code is to avoid the confusion that arose in regard to execution in mortgage suits owing to such suits having been dealt with in the Transfer of Property Act (*t*) The general effect of this order is that the provisions of the Code as to execution of decrees apply to execution of mortgage decrees (*u*) See notes to r 5 below, " Final decree for sale Limitation."

Transfer of Property Act 4 of 1882, s. 85—This rule is a reproduction with certain alterations of s 85 of the Transfer of Property Act, which ran as follows

" Subject to the provisions of the Code of Civil Procedure, s 437 [now O 31, r 1] all persons having an interest in the *property comprised in a mortgage must* be joined as parties to any suit under this chapter relating to such mortgage, *provided that the plaintiff has notice of such interest* "

Comparing the present rule with s 85 of the Transfer of Property Act, it will be seen that the words " in the mortgage security or in the right of redemption " have been substituted for " in the property comprised in the mortgage " An Explanation has been added and the proviso relating to notice is omitted The explanation was rendered necessary as it was generally thought that s 85 made it imperative on a puisne mortgagee to make a prior mortgagee a party to his action for foreclosure The substitution of the words " in the mortgage security or in the right of redemption " have made it clear that an adverse claimant who is a stranger to the security or the equity of redemption need not be joined (*v*). see notes below, " Persons having an interest either in the mortgage security or in the right of redemption "

Scope and object of the rule.—The object of this rule in requiring all persons having an interest either in the mortgage security or in the right of redemption

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(*t*) See for an instance *Krishnaji v Mahadev* (1901) 25 Bom 104, and the cases there cited

(*u*) See *Amolak Chand v. Sarat Chunder* (1911) 38 Cal 913 921 922 11 I C 943

(*v*) Ghose on mortgages, 4th ed, p 927

O. 34, r. 1. to be joined as parties is to avoid multiplicity of suits (*w*) The rule applies only to suits *relating to a mortgage*, that is to say, to suits for foreclosure, sale and redemption, as indicated by the marginal note to the rule The rule therefore does not apply to suits by a mortgagee for a *personal decree* against the mortgagor (as to which see r 6 below)

"Persons having an interest either in the mortgage-security or in the right of redemption."—The corresponding words in the Transfer of Property Act, s 85, were persons having an interest in the *property comprised in a mortgage* These words gave rise to a conflict of views According to one view, which coincides with the English law and the law as enunciated in the present rule, those persons only could be joined as parties to a suit relating to a mortgage who were either interested in the mortgage security or in the right of redemption A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to such suit for he is neither interested in the mortgage security nor in the right of redemption (*x*) Thus if *A* lets his property on a lease to *B*, and *B* mortgages the leasehold to *C*, *A*, holding the property by title paramount, should not be joined as a party defendant to a suit by *C* to enforce the mortgage (*y*) Similarly, if *A* and *B* are co owners of certain property and *B* mortgages his undivided share to *C*, *A* should not be joined as a party to a suit for sale by *C*, as *A* has no interest in the right of redemption (*z*) According to the other view which prevailed in Allahabad, all persons must be joined as parties if they had an interest in the *property* though they might have no interest either in the mortgage security or in the equity of redemption The word 'property,' according to the Allahabad High Court meant the actual immoveable property mortgaged, and not merely an interest in such property such as an interest in the mortgage security or in the right of redemption (*a*) The view held by the Allahabad High Court is no longer tenable The present rule gives effect to the former view which, as stated above, is in accordance with the English law

But though it was held by the Allahabad High Court that all persons interested in the *mortgage property* must be joined as parties to a suit on mortgage, that Court agreed with the other High Courts in holding that a person who claimed adversely to the mortgagor and the mortgagee is not a necessary party to such suit Thus if *A* mortgages certain property to *B*, and *B* sues *A* for sale of the mortgaged property, and *C* claims the property as his own and denies *A* s right to mortgage it, *C* is not a necessary party to the suit, and the question of *C*'s paramount title cannot be litigated in *B*'s suit (*b*) And this is certainly the law under the present rule

But it must be remembered that the question is not one of jurisdiction but at most one of misjoinder and when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee (*c*), or is in possession and likely to resist the claim of the successful plaintiff in the mortgage suit (*d*), it may be convenient to join him as a party

See notes below under the head Parties to suits for redemption, foreclosure or sale

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(*w*) *Lala Suraj Prasad* v *Golab Chand* (1901) 28 Cal 517 529 530 *Shahusaheb* v *Sadashiv* (1919) 43 Bom 575 578 51 I C 223

(*x*) *Nilakant Banerji* v *Suresh Chandra* (1886) 12 Cal 414 421 422 12 I A 171 *Jaggeswar Dutt* v *Bhuban Mohun* (1906) 33 Cal 425 *Lalla Kunwar* v *Reoti Singh* (1916) 43 I A 167 168 38 All 493 491 35 I C 939 *Maung San* v *U Pon Gyaw* (1924) 2 Rang 106 80 I C 753 (24) A R 240

(*y*) *Jaggeswar Dutt* v *Bhuban Mohan* (1906) 33 Cal 425 See also *Krishna Ayyar* v *Muthukumaraswamya* (1906) 29 Mad 217 224 (*z*) *Mon Mohini Ghose* v *Parvati Nath Ghose* (1905) 32 Cal 746 *Jogo Mohun Deb* v *Daudoong* (1908) 12 C W N 94

(*a*) *Mata Din* v *Kazim Husain* (1891) 13 All 432 (Mahmood J, dissenting)

(*b*) [illegible] (1908) 30 All [illegible]

(*c*) *Bhuban Mohan* v *Co-operative Bank* (1925) 29 C W N 64 88 I C 668 (25) A C 973

(*d*) *Khub Lal* v *Jhagru Kandu* (1924) 3 Pat 244 78 I C 843 (24) A P 613 See also *Basdeo* v *Dwarka* (1923) 2 Pat 605 83 I C 435 (24) A I 234

O. 34, r. 1

Explanation : prior mortgagees—The Explanation to the rule is new It is intended to supersede certain decisions under s 85 of the Transfer of Property Act to the effect that a prior mortgagee is a necessary party to a suit for sale or foreclosure by a puisne or subsequent mortgagee (e) The Explanation declares that a prior mortgagee is not a necessary party to such a suit Thus if *A* mortgages his property to *B*, and subsequently to *C*, *C* may sue for sale without making *B* a party to the suit In such a case if a decree for sale is passed, the property will be sold subject to *B* s mortgage (*f*) But this rule does not preclude *C* from joining *B* as a party , in fact, *B* would be a proper party if *C* offered to redeem *B* s mortgage (*g*) But if *C* merely joins *B* as a party and claims no relief against him, *B* s position is that of a holder of a paramount title outside the controversy and he will not be affected by the decree for sale which *C* obtains, for that sale will be subject to *B* s mortgage This is what happened in the case of *Radha Kishan* v *Khursid Hossein* (*h*) The prior mortgage was of 1892 to *K* whose interest devolved on *B* who assigned it in September 1906 to the plaintiff The puisne mortgage was of 1894 to *C* who sued for sale in August 1906 making *B* a party but claiming no relief against him After *C* obtained his decree for sale the plaintiff sued on his prior mortgage and was met by the plea of res judicata on the ground that his predecessor *B* might and ought to have enforced the security in the former suit The defence failed as *C* had not in his suit sought to displace *B*'s title or to postpone it to his own

It follows from the first branch of the Explanation to the rule that where the same person holds two mortgages of different dates upon the same property, he may sue on the mortgage of the later date subject to his rights under the first mortgage (*i*).

The second branch of the Explanation declares that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage *A* mortgages his property first to *B*, and then to *C* *B* is not a necessary party to a suit by *A* against *C* for redemption of the mortgage to *C*

ants (*p*) But a person not having any interest in the mortgage at the date of the suit need not be joined as a party (*q*)

If a mortgagee, suing on his mortgage either for sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder there is nothing in law to prevent his doing so If

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3 All 701 ... 156 ... 33 ... 84 ... ubtful on

(*f*) *Kanti Ram* v *Kutubuddin* (1895) 22 Cal 33

(*g*) *Raj Coomary* v *Preo Madhub* (1897) ...

pp 188-189

(*k*) *Hughes* v *Delhi and London Bank* (1888) 15 Cal 35

(*l*) *Penuthatelu* v *Bhashyam* (1902) 25 Mad 406 42 But see *Jaganath* v *Kalachand* (19..) 41 Cal L J .90 86 I C 1042 (.25) A I C ...

(*m*) *Hiralal* v *Kishan Lal* (1897) 19 All 543 *Sivalli* v *Ramasubbayar* (1898) 21 Mad 64 *Brojonath* v *Khelut Chunder* (1871) 14 M I A 144

(*o*) *Ragho Vinayak* v *Sheikh Daud* (1889) ...

... 23 ... adoba ... tion ... 123 ... nlak

O. 34, r. 1. he exempts a portion of the mortgaged property from his suit, he is not obliged to make parties *to the suit persons interested in the portion so exempted* (r) The same rule applies where a part of the property originally mortgaged has been absolutely released from the mortgage and has become excluded from the operation of the security (s) If the mortgagee by his laches loses his remedy against the owner of part of the equity of redemption and does not make him a party to the suit, that part of the property is treated as released from the mortgage and the mortgagee must submit to a deduction from his claim (t)

Where there are two or more mortgagors, that is two or more persons interested in the equity of redemption any one of them may sue for redemption but then the other mortgagors must be made party defendants (u) Where there are two or more encumbrances created on the same property the mortgagor seeking to redeem the first mortgage must join the subsequent mortgagees as parties Similarly a second mortgagee seeking to redeem a prior mortgage must join the mortgagor as a party (v) But the prior mortgagee is not a necessary party to a suit by the mortgagor to redeem a subsequent mortgage see Explanation to the rule

All persons *interested in the mortgage security*, either (1) *primarily* as the mortgagee, or (2) *derivatively*, (i) by operation of law, as the Official Assignee or Receiver of the assets of the mortgagee in insolvency, or (ii) by voluntary alienation as the transferee of the security or debt, should be made parties to a suit relating to the mortgage (w) If not joined as plaintiffs, they should be joined as defendants

A mortgages his property to *B* *B* sues *A* on the mortgage During the pendency of the suit *A* executes a second mortgage of his property to *C* *C* is not a necessary party to *A*'s suit, the mortgage to him having been executed subsequently to the institution of the suit (x)

Trustees, executors and administrators—The rule begins with the words "subject to the provisions of this Code The reference is to O 31 r 1, which provides for suits concerning property vested in a trustee, executor or administrator Having regard to the provisions of that rule, a suit for redemption (y), or foreclosure (z), or sale may be brought by *trustees* without making the beneficiaries parties

Benamidar—A benamidar can maintain a suit on a mortgage Thus if a mortgage is executed ostensibly in favour of *A*, but the real mortgagee is *B*, *A* may sue the mortgagor on the mortgage It is not open to the mortgagor to contend that *A* being merely the benamidar he cannot maintain the suit (a)

Sub-mortgagee—A mortgagee may create such estates as he pleases He may convey by way of sub-mortgage to whom and in as many parcels as he pleases (b) It has been held by a Full Bench of the Allahabad High Court that when a mortgagee has sub mortgaged his interest in the property mortgaged to him, the sub mortgagee is *entitled to sell* the interest in the property of his sub mortgagor without impleading the mortgagor and foreclosing his equity of redemption, in other words he is entitled to sell the

(r) *Sheo Tahal v Sheodan Rai* (1906) 28 All 174 *Sheo Prasad v Behari Lal* (1903) 25 All 79 See also *Ganesh v Charan* (1913) 35 All 247, 19 I C 614

(s) *Nasir Husain v Nihal Chand* (1905) All W N 156 *Hari Kissen v Velait Hossein* (1903) 30 Cal 755, *Ponnusami v Srinivasa* (1908) 31 Mad 333

(t) *Imam Ali v Baijnath* (1906) 33 Cal 613 (P C) *Budhmal v Rama* (1920) 44 Bom 223 55 I C 327 *Harchandra v Mahomed* (1921) 25 C W N 594 63 I C 312

(u) *Lim Singh v Nawal Singh* (1902) 24 All 258 *Mangal Raman v Narayanan* (1903) 26 Mad 461

(v) *Thompson v Baskerville* (1688) 3 Ch Rep 215

(w) See Seton on Decrees, 6th ed, Vol III, 1932 Daniell's Chancery Practice, 8th ed, Vol I pp 184-189

(x) *Ishaq Ali Khan v Chunni* (1899) 21 All 143

(y) *Mills v Jennings* (1880) 13 C D 639, affd 6 App Cas 698.

(z) *Morley v Morley* (1858) 25 Beav 253 but see as to a defendant trustee *Francis v Harrison* (1890) 43 C D 183

(b) *Taylor v Russell* [1892] A C 244, per Lord Herschell

A person cannot be both plaintiff and defendant —In a foreclosure action by a first mortgagee where the plaintiff also joined himself as a defendant as one of the puisne mortgagees, his name was struck out as a co defendant (*f*)

Con sequences of non-joinder —Under the corresponding section 85 of the Transfer of Property Act [see the section set out on page 841 above] it was held by the Allahabad High Court that the non joinder of a person who ought to have been made a party to a suit on a mortgage was a *defect fatal to the suit* and that the suit should therefore be dismissed but that the Court if it sees fit to do so may add him as a party under s 32 of the Code of 1882 [O 1 10 (2)] Those decisions proceeded on what the Court said was the imperative character of the word must in section 85 of that Act (*g*) In a recent case under the present rule the same Court held that the result of non joinder of a subsequent mortgagee in a suit on a prior mortgage though intentional would not be the dismissal of the whole suit but only so much of it as relate to the property affected by the subsequent mortgage (*h*) The High Courts of Bombay (*i*) and Calcutta (*j*) took the same view as the Allahabad High Court

The word must which occurred in s 85 of the Transfer of Property Act having been dropped, and the section having been transferred into the Code the question as to the effect of non joinder is it is submitted governed by the provisions of the Code O 1 r 9 provides that no suit shall be defeated by reason of non joinder of parties, and O 34 r 1 is subject to O 1 r 9 (*k*) Under O 1, r 10 (2) the Court has the power to add parties at any stage of the suit By s. 99 of the Code it is enacted that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties [which includes non joinder (*l*)] unless it affects the merits of the case or the jurisdiction of the Court The result is that no suit on a mortgage should be dismissed by reason of non joinder of parties unless the parties are *necessary* parties and the plaintiff refuses to add them as parties If the parties are merely *proper* parties (as distinguished from necessary parties (*m*) the Court may though the plaintiff refuses to add them as parties proceed under O 1 r 9 to deal with the matter in controversy so far as regards the rights and interest of the parties actually before it This was in effect held by the High Court of Bombay in *Shahasaheb* v *Sadashiv* (*n*) a case under the present rule In that case a suit was brought by a mortgagee against the widow and daughters of the deceased mortgagor for sale of the mortgaged properties The deceased was a Mahomedan and besides the widow and daughters he left a brother as one of his heirs It was contended on behalf of the defendants that the brother having an interest in the right of redemption he ought to have been joined as a defendant and that the plaintiff having omitted to join him as a defendant the suit should be dismissed in its entirety At the date when the objection as to non joinder was taken by the defendants the period of

(*e*) *[illegible] v Ganesh Prasad* (1907) 29 All 385 [F B] approve in *Ganesh v [illegible]* (192) 24 Bom L R 911 68 I C 741 (24) A B 494 *[illegible] v Bharat* (1921) 3 Lab L J 3 3

(*d*) *Ganga Prasad v Chunni Lal* (1896) 18 All 113 *[illegible] Jatan Rai v [illegible] Singh* (1905) 27 All 511

(*e*) *[illegible] Subhag v [illegible] Singh* (1905) 27 All 4 477 478 *[illegible] v [illegible]* (1897) 20 Mad 35

(*f*) *[illegible] v Mitchell* (1889) 64 L T 560

(*g*) *[illegible] v [illegible] Husain* (1891) 13 All 43 465 *Bhawani Prasad v Kalli* (1895) 17 All 537 555-556 *Ghulam Kadir Khan v Mustafa Khan* (18 6) 18 All 109 112 *Kundan [illegible] v [illegible] Chand* (190) 27 All 5 [part [illegible] added] *[illegible] Singh v Thakur Kishore* (1898) 20 All 188 [part s added]

(*h*) *Alam Singh v Gokul Singh* (1913) 35 All 484 21 I C 271

(*i*) *[illegible] v [illegible]* (189) [illegible] Bom [illegible]

[illegible] 51 [illegible] I C 638 (25) A I C 15

Where a person who ought to have been joined as a party under this rule is not joined as a party, and a decree is passed in the suit, the decree cannot affect his rights (*p*) [see notes below, Mahomedan co heirs]. Let us take the case which is a common one, of a second or subsequent mortgagee who ought to be, but who is not joined as a party to a suit by the prior mortgagee The second mortgagee not being a party to the suit the proceedings in the suit are not binding on him so as to affect his rights under the second mortgage (*q*) As second mortgagee he could have sued the mortgagor for a sale of the property subject to the first mortgage, or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages The point to be noted is that the second mortgagee does not lose either of these rights, merely because a decree has been passed in the prior mortgagee s suit, and the mortgaged property has been sold in execution of the decree The sale has not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance (if any) of the sale proceeds of the property after satisfying the first mortgagee (*r*) The omission to implead the second mortgagee does not in any way prejudice his rights (*s*) That his right to sue for sale (subject of course to the first mortgage) is not lost, has been held by a Full Bench of the Calcutta High Court (*t*) That his right to redeem the first mortgage and to have the property sold to satisfy his own claim is not lost has been held in the undermentioned (*u*) and numerous other cases cited elsewhere in the notes to this rule The next question to consider is upon what terms he is entitled to redeem the first mortgage In *Umesh Chander* v *Zahur Fatima* (*v*) it was held by the Judicial Committee that a second mortgagee desiring to redeem is bound to pay the whole amount due under the first mortgage, and not merely the price realised at the sale held in execution of the first mortgagee s decree When the decree in *Umesh Chunder s* case was made the Transfer of Property Act had not been passed and the procedure prescribed by that Act for suits for [illegible] Act did not exist, that case was decided on the law as it then stood (*w* [illegible] Property Act, it is provided that where a suit [illegible] is made, the defendant [illegible] extinguished, in other words, an order absolute [illegible] rights under the decree for those under the mortgage The result [illegible] case governed by the Transfer of Property Act the first mortgagee obtains a decree for sale without making the second mortgagee a party to his suit, and the mortgaged property is sold in execution of the decree, and the second mortgagee afterwards sues for a

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(*o*) [illegible] *Prasad* v [illegible] *Singh* (19[illegible]) 2 Pat 175 69 I C 677 (22) A I R Pat [illegible] *Parshad Lal* v *Lu g Singh* (1923) 21 All L J 701 74 I C 943 ('24) A [illegible] A 107

(*p*) *Brojo Nath* v *Khelut Chunder* (18[illegible]) 14 M I A 144, *Rajho Naru* v *Balkrishna* (188[illegible]) 9 Bom 1[illegible]3 *Hasanbhai* v [illegible] (1914) [illegible] Bom 1[illegible]3 *Ram Narain* v *Bandi Pershad* (1904) 31 Cal [illegible] 3 *Judjeo Singh* v *Habibulla* (19[illegible]) 1[illegible] C W N 107 *Hira Lal* v *Kishan Lal* (1897) 19 All 543 *Brij Kishore* v *Madho Singh* (19[illegible]) [illegible]8 All 279 [illegible] v *Ramasubbayyar* (1898) [illegible]1 Mad 64 [illegible] v *Bhashyam* (19[illegible]) [illegible] Mad [illegible] *Rangasamy* v [illegible] (1903) 8 Mad 4[illegible] *Mallikarjunadu* v *Linga Murti* (1903) [illegible] Mad 33[illegible] [illegible] v [illegible] (191[illegible]) 3[illegible] Cal [illegible] 1[illegible] [illegible] [illegible] *Singh* v [illegible] *Prasad* [illegible] 3 Pat 1[illegible] 73 I C 0[illegible] ([illegible]) A I R Pat [illegible] [illegible] v *Fandoh* (19[illegible]2) 44 All [illegible] 67 I C [illegible] [illegible] A [illegible] 135

(*q*) *Umesh Chunder* v *Zahur Fatima* (1891) 18 Cal 164 17 I A 201, *Het Ram* v *Shadi Lal* (1918) 45 I A 130 133 40 All 407 410 4[illegible] I C 798 *Matru Mal* v *Durga Kunwar* (1920) 47 I A 71 42 All 364 55 I C 969

(*r*) *Gobind Lal* v *Ramjanam* (1894) 21 Cal 70 20 I A 16[illegible]

(*s*) *Ram Prasad* v *Bhikari Das* (1904) [illegible]6 All 464 467

(*t*) *Debendra Narain* v *Ramtaran* (1903) 30 Cal [illegible]99 See also Explanation to the rule

(*u*) *Mallikarjunadu* v *Linga Murti* (1903) 26 Mad 332 *Mohan Manor* v *Togu Uka* (1886) 10 Bom [illegible] *Kudratullah* v *Kulsum Begam* (191[illegible]) [illegible]3 All 2[illegible] *Hukum Singh* v *Ladanji* (19[illegible]) 43 All 204, 61 I C 942

(*v*) (1891) 18 Cal 164 17 I A 201

(*w*) (1920) 47 I A 71 75, 4[illegible] All [illegible]64, [illegible]5 I C 969 *supra*

sale decree under his mortgage, he (the second mortgagee) is entitled to a decree for sale on payment of the amount *due under the decree*, and he is not bound to pay the entire amount of the first mortgage It was so held by the Judicial Committee in *Matru Mal* v *Durga Kunuar* (x) a case decided in 1919 In several cases governed by the Transfer of Property Act and decided prior to *Matru Mal s* case, the Indian Courts seem to have overlooked the provisions of s 89 of the said Act, and they held as was done by the Judicial Committee in *Umesh Chunder s* case that the second mortgagee can only redeem upon payment of the entire amount due under the first mortgage (y) It was also held that he was not bound to pay for any improvements which the purchaser might have made in the meantime (z) It was further held that where the property was purchased by a third party, and the purchase money paid by him did not fully satisfy the amount of the first mortgage, the amount payable by the second mortgagee should be apportioned between the purchaser and the first mortgagee, that is to say, the purchaser should be paid the amount of the purchase money paid by him at the sale and the balance should be paid to the first mortgagee Thus if the amount due under the first mortgage was Rs 10,000, and the property was sold in execution of the first mortgagee s decree for Rs 1 050, and the second mortgagee desired to redeem the purchaser, the amount payable by the second mortgagee, namely, Rs 10,000 should be apportioned between the purchaser and the first mortgagee, the former receiving Rs 1,050, and the balance going to the first mortgagee (a) The decision in *Matru Mal s* case (b) was based upon the words the defendant s (mortgagor s) right to redeem, and the security shall both be extinguished which occurred at the end of s 89 of the Transfer of Property Act (c) But these words have been omitted in the corresponding r 5 of this Order The result would seem to be that the second mortgagee who is not made a party to the first mortgagee s suit can only redeem under the present law on payment of the entire amount due under the first mortgage as held in *Umesh Chunder s* case (d), and in the case of *Sukhi* v *Ghulam Safdar Khan* (e) the Privy Council decided that this is so and that the law remains as it was before the Transfer of Property Act A Calcutta case (f) gave terse expression to the same conclusion by saying that the puisne mortgagee could not both approbate and reprobate the prior mortgagee s decree

Where a person *has come into possession* subsequently to the date of the first mortgage either as putnidar or as usufructuary mortgagee he should be joined as a party to a suit by the first mortgagee and thus given an opportunity of redeeming the mortgage If he is not joined as a party the purchaser under the mortgage decree is not entitled to obtain possession without paying off his charge (g)

If the mortgagee obtains a decree for sale and purchases the property, without having made an assignee of the mortgagor a party and that assignee remains in possession for 12 years after the date of the mortgage the mortgagee cannot dis

31 Mad 425

(a) *Wahid un nissa* v *Gobardhan Das* (1903) 25 All 3 8

(b) (1920) 47 I A 71 42 All 364 55 I C 969

(c) See *Het Ram* v *Shadi Lal* (1918) 45 I A 130 133 40 All 407 410 45 I C 798

(d) (1891) 18 Cal 164 17 I A 201

(e) (1921) 48 I A 465 43 All 469

(f) *Jnanendra* v *Shorashi* (19—) 49 Cal 676 69 I C 759 (2?) A C 73

(g) *Jugul Kissore* v *Kartic Chunder* (1894) 21 Cal 116 *Rangasa* v *Jelli Lodi* (1903) 26 Mad 454 *Jambu Chetty* v *Palaniappa* (1903) 26 Mad 526

(h) *Venkat* v *Kunjappa* (19 4) 47 Mad 351 83 I C 102 (4) A M 650

O. 34, r. 1. possess him, for he has only acquired the mortgagee's rights by his purchase and the suit on the mortgage is barred by limitation (i)

Mahomedan co-heirs—A Mahomedan mortgages his property to A He then dies leaving as his heirs a widow, two daughters and a brother After his death, A sues the widow and the daughters for sale of the mortgaged property The brother is not joined as a party to the suit According to the Bombay High Court the brother is not a necessary party to the suit (j) But there is a conflict of opinion whether the Court can in such a case pass a decree for the sale of the whole property In *Virchand* v *Kondi* (k), the Court held that it can In a later Bombay case (l), however, Pratt J expressed the opinion that a decree can be passed for the sale only of the right, title and interest of the widow and the daughters See Mulla's Principles of Mahomedan Law, 8th ed, art 36, p 21

Joint Hindu family—There is a conflict of decisions as to whether where a suit is brought on a *mortgage* by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are necessary parties to the suit having regard to the provisions of the present rule It has been held by the High Courts of Allahabad (m), Madras (n) and Patna (o), following a decision of the Privy Council (p), that where a suit is brought on a mortgage by or against the manager of a joint Hindu family *in his representative capacity*, the other members of the family are not necessary parties to the suit, and that the suit will not fail by reason of the non joinder of those members It does not make any difference that the manager is a father or that he is a collateral relation as an uncle or a brother

According to the Bombay decisions it would seem that the other co parceners are necessary parties to a suit brought on a mortgage by or against the manager (q) But if they are not joined as parties and a decree is passed for the sale of the joint family property against the manager *in his representative character, and* the property is sold in execution of the decree the sale, it has been held, passes the interest of the other co parceners also in the property the mere fact that they were not parties to the mortgage suit is no ground for setting aside the sale, unless it be shown by them that the debt contracted by the manager was one for which they are not liable (r)

In another case before the Privy Council governed by the Transfer of Property Act 1882, where a foreclosure decree was passed against the *manager* of a joint Hindu family, and the other members brought a suit to set aside the decree on the ground

(i) Dattatrya v Venkatesh (1922) 24 Bom L R 741 69 I C 185 (22) A B 334 *Kristopada* v *Chaitanya* (1922) 49 Cal 1048 69 I C 530 (23) A C 274

[illegible] (1921) 21 Mad 2[illegible]
[illegible] v [illegible] (1917) 2 Pat [illegible] 3[illegible] I C [illegible] v Mst [illegible] Mallu

80 I C 34, (2[illegible]) A P 59

(p) *Kishan Prasad* v *Har Narain Singh* (1911) 33 All 272 38 I A 45 9 I C 739

(q) *Ramchandra* v *Shripatrao* (1916) 40 Bom 248 33 I C 771

(r) *Ramkrishna* v *Vinayak* (1910) 34 Bom 354 5 I C 961 *Chinana* v *Sada* (1910) 12 Bom L R 811 7 I C 940

(s) *Lala Suraj Prasad* v *Gol b Chand* (1901) 28 Cal 517 *Biswanath Pershad* v *Jagdip Narain* (1913) 40 Cal 342 17 I C [illegible]7 *Debi Prasad* v *Dharamjit* (1914) 41 Cal [illegible]27 [illegible] I C 517

that they being interested in the equity of redemption ought to have been joined as parties to the suit under s 85 of the Transfer of Property Act, but that they were not so joined, their Lordships held that the decree was in the circumstances of the case binding upon them, though they were not parties to the suit. Their Lordships said: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied. "*There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself,* and no question arises under s 85 of the Transfer of Property Act [O 34, r 1], *because the mortgagee had no notice of the plaintiff's interests*" (t) Note that the words "provided that the plaintiff has *notice* of such interest," which occurred in s 85 of the Transfer of Property Act, do not occur in the present rule

The recent Privy Council case of *Ganpat Lal* v *Bindbasini Prasad* (u), is an authority for the proposition that in a suit on a mortgage against the manager of a joint Hindu family all the other members of the family are represented by the manager The mortgage was by the manager and the mortgagee obtained a decree for sale joining as parties the manager and the other members of the family The mortgagee purchased the property himself. But one of the members of the family who was a minor was wrongly described in the suit as an adult He sued to redeem on the ground that not having been represented in the suit by a guardian *ad litem* he was not a party to the mortgagee's suit. This claim would have been unanswerable if he had not been represented by the manager in the suit But the Privy Council held that as he had not sued to set aside the sale and did not impeach the mortgage or the decree, the suit was not maintainable In other words, he was represented by the manager and it did not matter whether he was a party or not The only ground which he could take was that he was not liable for the mortgage debt contracted by the manager and that he had not done

Where parties are not governed by the Hindu law, and the only interest which a son has under the customary law is a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations, the son has no such interest in the property as is contemplated by the present rule and he is not therefore a necessary party to a suit on a mortgage against his father (v)

Preliminary decree in foreclosure suit

2. [*New.* Act 4 of 1882, s. 86.] In a suit for foreclosure, if the plaintiff succeeds, *the Court shall pass a decree*—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(t) *Sheo Shankar* v *Jaddoo Kunwar* (1914) 36 All 383 41 I A 216 24 I C 504 affirming (1911) 33 All 71, 7 I C 902

(u) (1920) 47 I A 91, 47 Cal 924, 56 I C 274

(v) *Shiv Dev Singh* v *Jai Ram* (1919) Punj Rec no 125, p 3?7, 53 I C 411

O. 34, r. 2.

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims, by derived title, by those under whom he claims, and shall also if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all rights to redeem the property.

Transfer of Property Act, s 86—This rule corresponds to s 86 of the Transfer of Property Act except in the following particulars —

1 The words to the plaintiff or which occurred in s 86 after the word ' pays in cl (c) have been omitted the object being that in every case the defendant should pay the money *into Court*

2 In cl (c) the words ' if so required have been added before the words re transfer the property, as according to mofussil practice a re transfer is not ordinarily required

Form of preliminary decree for foreclosure—See appendix D form No 3

Right to forecloure or sale—The mortgagee has at any time after the mortgage money has become payable to him, a right to obtain from the Court a decree that the mortgagor should be absolutely debarred of his right to redeem the property, or a decree that the property be sold. A suit to obtain a decree that the mortgagor should be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure A suit to obtain a decree that the property be sold is called a suit for sale [Transfer of Property Act, s 67] Rules 2 and 3 relate to decrees in suits for foreclosure Rules 4 and 5 relate to decrees in suits for sale

A suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage A mortgagee by conditional sale cannot institute a suit for sale A simple mortgagee cannot institute a suit for foreclosure A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of Property Act s 67]

Right to redemption—The mortgagor has, at any time after the mortgage money has become payable by him a right on payment or tender of the mortgage money to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to re transfer the property to him This right is

called a right to redeem, so long as there is a mortgage there is a right of redemption (w), and a suit to enforce it is called a suit for redemption [Transfer of Property Act, s 60] Rules 7 and 8 provide for decrees in suits for redemption

Account against mortgagor.—Whether the suit be one for foreclosure, sale or redemption, the preliminary decree in each case must direct an account to be taken of what is due to the mortgagee for principal, interest and costs Where the same property is mortgaged to several persons in succession, and the subsequent mortgagees are joined as parties to the suit, thay are entitled, if they appear and prove their mortgages, to ask for a decree for an account on each of their mortgages and a declaration of their right to participate in the surplus sale proceeds in order of priority An *account is then taken of what is due on each mortgage, the sums so found due to each* mortgagee are included in one report, and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (x) Where the mortgagee is in possession, an account is to be taken of the income derived by him from the property, and also an account of what is due to the mortgagee for principal and interest In taking the account it lies upon the mortgagee to prove what is due to him in respect of principal and interest It follows from this that if the mortgage bond is not put in evidence, as where it is not stamped and the mortgagee refuses to pay the penalty, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal (y)

Principal.—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument But an admission is not conclusive proof of the matter admitted (z) it is therefore open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (a) But the burden of proof in that case lies on the mortgagor (b) But though an admission is not conclusive proof of the matter admitted, it may operate as an estoppel, so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the instrument of mortgage (c) This happens when the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage deed has not been received In such a case the mortgagor cannot redeem on tender or payment of the amount actually received, and the transferee is not bound to re convey the property except on payment to him of the amount stated in the mortgage deed to have been received by the mortgagor (d)

Interest.—The question of interest to be awarded by a decree in suits for the enforcement of a mortgage has already been considered in the notes to s 34 under the head Interest in suits for enforcement of mortgage, on p 106 above There are however, a few matters of detail which have not been dealt with in those notes, and it is to these that we now propose to address ourselves According to this rule as well as rules 4 and 7 there has to be added to the principal sum interest on the mortgage up to the date fixed by the Court for payment But what if the mortgagor contends that the mortgage bond does not provide for the payment of any *interest after the due date*, in other words, that there is no provision for the payment of *post diem* interest?

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33 Cal 9? 111

(y) Ganga Mahto v. Payaji (18) 6 B m C 9 670

(z) Evidence Act 1872 s 31

(a) Evidence Act 1872 s 92 proviso (1)

(b) *Mahabir Prasad v. Pitlam Dayal* (1905) 27 All 71 *Ali Khan Bahadur v. Indar Parshad* (1896) 23 Cal 950 23 I A 97 See also *Brajeshwara v. Budhanuddi* (1881) 6 Cal 263 2 7 278

(c) Evidence Act s 31 115

(d) *Pickerton v. Walker* (18) 31 C D 151, *Bateman v. Hunt* (1904) 2 K B 530

O. 34, r. 2.

(*c*) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims, by derived title, by those under whom he claims, and shall also if necessary, put the defendant in possession of the property, but

(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all rights to redeem the property

Transfer of Property Act, s. 86 —This rule corresponds to s 86 of the Transfer of Property Act except in the following particulars —

1 The words to the plaintiff or which occurred in s 86 after the word pays in cl (c) have been omitted, the object being that in every case the defendant should pay the money *into Court*

2 In cl (c) the words if so required have been added before the words re transfer the property as according to mofussil practice a re transfer is not ordinarily required

Form of preliminary decree for foreclosure —See appendix D, form No 3

Right to forecloure or sale —The mortgagee has, at any time after the mortgage money has become payable to him a right to obtain from the Court a decree that the mortgagor should be absolutely debarred of his right to redeem the property or a decree that the property be sold. A suit to obtain a decree that the mortgagor should be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure A suit to obtain a decree that the property be sold is called a suit for sale [Transfer of Property Act s 67] Rules 2 and 3 relate to decrees in suits for foreclosure Rules 4 and 5 relate to decrees in suits for sale

A suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage A mortgagee by conditional sale cannot institute a suit for sale A simple mortgagee cannot institute a suit for foreclosure A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of Property Act s 67]

Right to redemption —The mortgagor has at any time after the mortgage money has become payable by him a right on payment or tender of the mortgage money, to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to re transfer the property to him This right is

called a right to redeem; so long as there is a mortgage there is a right of redemption (*u*), and a suit to enforce it is called a suit for redemption [Transfer of Property Act, s 60]. Rules 7 and 8 provide for decrees in suits for redemption

Account against mortgagor.—Whether the suit be one for foreclosure, sale or redemption, the preliminary decree in each case must direct an account to be taken of what is due to the mortgagee for principal, interest and costs Where the same property is mortgaged to several persons in succession, and the subsequent mortgagees are joined as parties to the suit, thay are entitled, if they appear and prove their mortgages, to ask for a decree for an account on each of their mortgages and a declaration of their right to participate in the surplus sale proceeds in order of priority An account is then taken of what is due on each mortgage, the sums so found due to each mortgagee are included in one report, and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (*x*) Where the mortgagee is in possession, an account is to be taken of the income derived by him from the property, and also an account of what is due to the mortgagee for principal and interest In taking the account it lies upon the mortgagee to prove what is due to him in respect of principal and interest It follows from this that if the mortgage bond is not put in evidence, as where it is not stamped and the mortgagee refuses to pay the penalty, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal (*y*)

Principal.—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument. But an admission is not conclusive proof of the matter admitted (*z*), it is therefore open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (*a*) But the burden of proof in that case lies on the mortgagor (*b*) But though an admission is not conclusive proof of the matter admitted, it may operate as an estoppel, so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the instrument of mortgage (*c*) This happens when the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage deed has not been received In such a case the mortgagor cannot redeem on tender or payment of the amount actually received, and the transferee is not bound to re convey the property except on payment to him of the amount stated in the mortgage deed to have been received by the mortgagor (*d*)

Interest.—The question of interest to be awarded by a decree in suits for the enforcement of a mortgage has already been considered in the notes to s 34 under the head "Interest in suits for enforcement of mortgage," on p 106 above There are, however, a few matters of detail which have not been dealt with in those notes, and it is to these that we now propose to address ourselves According to this rule as well as rules 4 and 7 there has to be added to the principal sum interest on the mortgage up to the date fixed by the Court for payment But what if the mortgagor contends that the mortgage bond does not provide for the payment of any *interest after the due date*, in other words, that there is no provision for the payment of *post diem* interest?

(*u*) *Ramji* v *Pandharinath* (1919) 43 Bom 334 49 I C 894, *Ramchandra* v *Hanmanta* (1920) 44 Bom 939, 58 I C 45

(*x*) *Beni Madeo Pershad* v *Tara Chand* (1906) 33 Cal 92 111

(*y*) *Ganga Mulchand* v *Bapaji* (1882) 6 Bom 669, 670

(*z*) Evidence Act, 1872 s 31

(*a*) Evidence Act 1872 s 92 proviso (1)

(*b*) *Malabar Prasad* v *Bulan Dayal* (1905) 27 All 71 *Ali Khan Bahadur* v *Indar Parshad* (1896) 23 Cal 900, 23 I A 92, See also *Brajeshware* v *Budhanuddi* (1881) 6 Cal 263, 277 278

(*c*) Evidence Act ss 31, 115

(*d*) *Lickerton* v *Waller* (1886) 31 C D 151, *Bateman* v *Hunt* (1904) 2 K B 530

O. 34, r. 2. Where there is an express provision for the payment of interest up to the date of payment—and this is the usual case—there is no difficulty The Court should in that case award interest at the contract rate up to the date of payment unless the stipulation for the payment of interest is penal within the meaning of s 74 of the Contract Act, in which case the Court may award interest at such rate as it thinks just (see notes to s 34, p 106 above) Where there is no express provision for the payment of interest up to the date of payment the Court should determine the intention of the parties by an *examination of the terms of the deed* If on such examination it comes to the conclusion that there was an intention to pay interest up to the date of payment and not only up to the due date, the position is the same as if the bond contained an express provision to pay interest up to the date of payment (*e*) One of the rules of construction adopted in this connection is that where a mortgage bond contains a stipulation for the periodical payment of interest, and there is nothing in the bond to suggest that the liability should cease on the due date, the Court will presume that there was an intention to pay interest up to the date of payment (*f*) If the Court comes to the conclusion that there was no intention to pay interest after the due date, the mortgagee may recover interest *by way of damages* under Act 32 of 1839, and the rate allowed will *prima facie* be the same as that provided by the bond, although there is no rule of law making that rate necessarily the measure of damages (*g*) Is the interest that may be awarded as damages to be treated on the same footing as interest for the payment of which there is an express or implied stipulation or is it to be treated on a different footing? If the former and that is the view held by the High Courts of Calcutta and Madras, it is to be treated as part of the mortgage money so as to be recoverable *out of the mortgaged property* in the same way as the principal and the costs of the suit (*h*) If the latter and this is the view taken by the High Court of Allahabad, the interest awarded as damages is not recoverable out of the mortgaged property, but that portion of the decree which awards such interest is to be treated as a *decree for the payment of money* and executed as such (*i*)

It may perhaps be thought, as it was thought in some cases (*j*), that a claim for *interest by way of damages* being a claim for compensation for breach of contract, the claim will be barred unless it is made in a suit brought within six years of the due date for payment of the mortgage money, that being the period prescribed by art 116 of Limitation Act for a suit for damages for breach of a contract in writing registered. In the undermentioned case (*k*), however, the Judicial Committee observed that such a claim was a recurring one within the meaning of s 23 of the Limitation Act The result therefore is that as long as the principal is not barred, six years interest can be recovered Thus if the due date for payment of mortgage money under a registered deed of mortgage be 1st January 1900 and the mortgagee brings a suit for foreclosure or sale on 1st January 1908 he will be entitled, according to the observations of the Judicial Committee to interest for a period of six years next preceding the date of the suit, and it is

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Reddi v Appaji Reddi (1895) 18 Mad 244 See also *Chajmal v Brij Bhukan* (1895) 17 All 511 517 22 I A 199 where interest awarded as damages was directed to be added to the principal in taking the accounts

(*i*) *Narindra Bahadur v Khadim Husain* (1895) 17 All 581, *Lakhi Ram v Sheo Parshad* (1896) 18 All 316

(*k*) *Mathura Das v Raja Narindar* (1897) 19 All 39, 47, 23 I A 138

O. 34, r. 2.

only the claim for interest for the years 1900 and 1901 that would be barred According to the earlier cases cited above, the mortgagee would not be entitled to any interest at all, the date of the breach of contract being 1st January 1900, and the suit having been brought more than six years after that date It must, however, be remembered that this rule of limitation applies only to interest by way of damages recoverable in cases where there is no intention to pay interest after the due date In other cases the mortgagee is entitled to have the interest *from the date of his security* up to the date fixed by the Court for payment added to the mortgage debt, though it may be for a period exceeding six years (*l*)

Interest subsequent to the date fixed for payment.—There is no provision made in this rule for interest after the date fixed in the decree for payment as there is in rule 4 which relates to a decree for sale The reason is to be sought in the difference between a foreclosure and sale In the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays (*m*) See notes to s 34, p 106 above

Damdupat—See notes to s 34 ' The rule of damdupat p 107 above

Costs.—Whether the suit be one for foreclosure sale or redemption, the mortgagee is entitled to all costs properly incurred (*n*) by him including costs subsequent to decree (r 10) " This right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract (*o*) Thus costs incurred by the mortgagee after a proper tender has been made have been disallowed (*p*) And where in a suit for redemption the mortgagee, though he had been fully paid, contended that a large amount was still due to him, it was held that he must pay the costs of the whole suit (*q*)

Account against mortgagee in possession.—Where it is provided by the terms of a usufructuary mortgage that the mortgagee should enjoy the profit in lieu of interest, or that the profits should be taken as an equivalent of the interest and of specific portions of the principal no accounting is necessary on the part of the mortgagee, for no questions of account can arise in such a case (*r*) In other cases the mortgagee in possession is bound to render an account of the rents and profits of the mortgaged property (*s*) As to annual rents against a mortgagee in possession see the undermentioned cases (*t*)

Sub-mortgagee.—A sub mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself (*u*) Where the sub mortgagee is a party to the suit, the preliminary decree must direct an account to be taken of what is due to the mortgagee and what is due to the sub mortgagee As to the form of decree in a suit by a sub mortgagee against the mortgagee and mortgagor, see Appendix D, form No 9 As to the form of decree in a suit for redemption by the mortgagor against the mortgagee and sub mortgagee see the undermentioned case (*v*) See notes to r 1 above ' Sub mortgagee, on p 844 above

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(*p*) *Dhondo v Balkrishna* (1884) 8 Bom 190
(*q*) *Ashworth v Lord* (188) 30 C D 545 See 20 Mad 35
(*v*) *Narayan v Ganoji* (1891) 15 Bom 692.

O. 34, rr. 2, 3.

Subsequent incumbrancers—For forms of decree in cases where subsequent incumbrances are dealt with in the same decree, see Appendix D, forms [illegible] 6 [illegible] and 8 and also the undermentioned case (*w*)

Mortgage of chattels and of intangible property.—A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immovable property So also is a mortgagee of intangible property, such as *palas* or turns of worship in a temple (*x*)

Res judicata—See notes to s 11, Application of the above rules to suits on mortgage on p 46 above

Final decree in foreclosure suit

3 [*New* **Act 4 of 1882, s 87**] (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the document which under the terms of the preliminary decree he is bound to deliver up,

and, if so required—

(*b*) ordering him to re transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property

Power to enlarge time

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payments

Discharge of debt

(3) On the passing of a decree under sub rule (2) the debt secured by the mortgage shall be deemed to be discharged

(*w*) [illegible] *Lanndhar* (190[illegible]) 7 All 3[illegible] [illegible]
(*x*) Ma[illegible] *Har das* (191[illegible]) [illegible] Cal 4[illegible]

O. 34, r.

gaged property" (2) Sub r (2) again provides for the passing of a *decree* where no payment is made Under s 87 the Court had merely to pass an *order* See as to this distinction, notes to r 5 below "Final decree for sale, Limitation," p 859

Limitation.—See notes to r 5 below "Final decree for sale, Limitation," p 859

Final decree for foreclosure.—For form, see appendix D, form No 10 Where the mortgagor fails to pay the amount due by him on the date fixed by the preliminary decree, the mortgagee may apply under sub r (2) for a final *decree* declaring that the mortgagor is debarred from all right to redeem the mortgaged property Until such decree is passed, the mortgagor may apply under the proviso for an extension of the time for payment, and according to the Calcutta and Allahabad decisions he may, at any time before the decree is passed, pay the money into Court even without an extension and so avert foreclosure (*y*) It may be worth while to add that there cannot be two decrees for foreclosure passed in respect of one and the same mortgage *A* sues *B* for foreclosure of a mortgage comprising two properties A preliminary decree for foreclosure is passed as regards one of them, but the suit is dismissed as regards the other *A* appeals from the portion of the decree dismissing his suit If *A* applies for and obtains a final decree for foreclosure in respect of the property ordered to be foreclosed, it is not open to him thereafter, even if he succeeds in his appeal, to obtain *another* final decree for foreclosure of the other property To obtain a final decree for foreclosure of both the properties, *A* must wait until the disposal of the appeal (*z*)

Effect of appeal on time fixed for payment.—A preliminary decree is passed in a foreclosure suit fixing a period of six months from the date of *the decree* for payment by the mortgagor of the amount due The mortgagor prefers an appeal from the decree, but the decree is confirmed in appeal The decree of the appellate Court is *silent as to the time allowed for redemption* This does not amount to an extension of the time for payment so as to enable the mortgagor to redeem the mortgage within a period of six months from the date of *the appellate decree* The mortgagee is entitled notwithstanding the appeal, to a final decree for foreclosure after the expiration of six months from the date of the original decree, though six months may not have expired from the date of the appellate decree The appellate decree simply confirming the original decree, cannot be read as giving the mortgagor six months from the date of the decree on appeal (*a*), nor does the summary dismissal of an appeal extend the time for payment (*b*) This is in accordance with the general principle that where time is prescribed by the decree of the lower Court for the performance of a condition precedent, and the appellate Court simply confirms the decree of the lower Court or summarily dismisses the appeal, it cannot be regarded as enlarging the time fixed by the original decree for the performance of the condition (*c*) The result is the same where the appeal is withdrawn, and no decree is passed in appeal The *withdrawal does not* give the mortgagor a fresh period for redemption (*d*) To avoid the difficulty arising in such cases, the mortgagor should take care to have a fresh day fixed for payment by the appellate Court, offering at the same time to pay interest up to that date (*e*) or he should apply under the proviso for an extension of the time for payment

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214 where the same question arose in suits for redemption

(*e*) *Fakhrunnessa Bibi* v *Tarini Churn* (1893) 20 Cal 279

O. 34, rr. 3, 4.

Power to enlarge time.—The Court may under the proviso postpone the day fixed for payment *upon good cause shown* and upon such terms as it thinks fit The mere fact that a final decree for foreclosure has not yet been passed does not entitle the mortgagor to an extension of time (*f*)

It is not necessary that the application for extension of time should be made before the expiry of the time originally fixed for payment It may be made even after the expiry of that time, but it should be made before the final decree is passed (*g*) It follows from this that if the mortgagor deposits the redemption money into Court before the final decree is passed, though after the date fixed for payment, and the deposit is accepted by the Court, it becomes an effectual deposit It makes no difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time If the Court accepts a deposit after due time has elapsed it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay (*h*) See notes to s 148, Act prescribed or allowed by this Code,' p 351 above

Note that the application for a final decree for foreclosure has to be made by the plaintiff, that is, the mortgagee (*i*)

Discharge of debt on foreclosure.—The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgaged and to extinguish the mortgage debt The ownership becoming vested in the mortgagee, the mortgagor is debarred from all right to redeem the property (*j*) And the debt being extinguished, the mortgagee can no longer proceed against the mortgagor personally

Appeal—An appeal lies from an order under this rule refusing to extend the time for payment of mortgage money [O 43, r 1, cl (o)]

4. [*New* **Act 4 of 1882, s. 88.**] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Preliminary decree in suit for sale.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested

Power to decree sale in foreclosure-suit.

Ma [illegible] v Lingamurti (1902) 2[illegible] Mad [illegible] 2[illegible] [illegible] v [illegible] (1902) [illegible] Mad [illegible], Sandram v Lalaji (189[illegible]) 22 Bom 771 Ishwar v Gopal (1904) 28 Bom 102 Murugesa v Ramasami (1916) 39 Mad 8[illegible], 31 I C 2[illegible]

(*h*) Jamna Behary v Mokunda Lal (1909) 36 Cal 1[illegible] I C 7[illegible]

(*i*) [illegible] v Chamra (1919) 4 Pat L J 3[illegible] 3[illegible] 51 I C 8[illegible]

(*j*) Ladu v Eabaji (18[illegible]) 7 Bom [illegible]

either in the mortgage money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms

O. 34, r. 4

Transfer of Property Act, s 88—This rule corresponds with s 88 of the Transfer of Property Act excepting the words together with subsequent interest and subsequent costs in sub r (1) which are new See notes below under the head Preliminary decree for sale

Preliminary decree for sale—A suit for sale of mortgaged property can only be brought where the mortgage is an English mortgage or a simple mortgage or where the property is subject to a charge within the meaning of s 100 of the Transfer of Property Act (see r 15 below) The preliminary decree to be passed in a suit for sale corresponds to the preliminary decree in a suit for foreclosure in all respects except that instead of a direction providing for foreclosure the decree contains a direction providing for sale of the mortgaged property The notes therefore to r 2 relating to the taking of accounts and the determination of principal interest and costs apply equally to this rule But there is this difference as regards interest that while there is no provision made for interest subsequent to the date fixed for payment in the case of a decree for foreclosure the present rule expressly provides for such interest This subject has already been dealt with in the notes to s 34 Interest on suits for enforcement of mortgage p 106 and in the notes to r 2 above Interest subsequent to the date fixed for payment p 853

Form of decree—As to the form of a preliminary decree for sale see Appendix D form No 4 On referring to the form it will be observed that it does contain any declaration of *personal* liability of the defendant for principal interest or costs Such a declaration in fact ought not to be included in the decree for sale If the sale proceeds are not sufficient to pay the amount due to the mortgagee the mortgagee may apply for a decree against the mortgagor personally under r 6 below (*k*) See Appendix D form No 11

Subsequent incumbrancers—For the contents of a decree for sale in a suit by the first mortgagee (*l*) see Appendix D form No 7 For the Contents of a decree for sale in a suit by the second mortgagee see Appendix D form No 8

Rights of second mortgagee in a suit for sale by first mortgagee—*M* mortgages certain property first to *A* and then to *B* *A* sues *M* for a sale of the mortgaged property making *B* a party defendant In such a suit the only right of *B* the second mortgagee is to redeem *A*s mortgage or to receive his mortgage money or part of it out of the surplus sale proceeds after satisfaction of *A*s mortgage But he cannot having regard to the provisions of the Code claim the right to treat the suit brought by *A* the first mortgagee as one for his benefit It follows therefore that *B* could not insist upon a sale of the property if *A*s claim is satisfied by *M* before sale And it also follows that if a decree for sale is passed in *A*s suit *B* cannot claim to be entitled to a decree for sale of another property of *M* included in his mortgage In either case *B* must bring a separate suit for sale on his mortgage (*m*)

(*k*) See *Ja alau na* v *Ko andur* (1907) 30 Mad 404

(*l*) See *Be hamdeo* v *Ta a Chand* (1906) 33 Cal 0 111

(*m*) *Sarat Chand a* v *Nahaput* (1910) 37 Cal 90 8 I C 114 *Vedaruasa* v *Madu a H ndu Sabha Nidhi Co* (1919) 42 Mad 90 49 I C 6

O. 34, rr. 4, 5.

Award.—An arbitra [illegible] decree in terms of an award may order the sale of the [illegible] this rule or final decree under rule 5 has been passed [illegible]

Consent decree.—So also if the decree is a consent decree (o) In *Kashi Chandra* v *Priyanath* (p) Mookerjee J directed that before execution an order absolute should be obtained under O 34, r 5, but the consent decree in this case was in the form of a preliminary decree

Power to decree sale in a foreclosure suit.—This power will generally be exercised where there are several mortgages of the same property In such a case it is clear that the rights of the several mortgagees can be better adjusted by means of a sale See Conveyancing Act, 1881 [44 and 45 Vict, c 41, s 25]

Final decree in suit for sale

5 [*New.* **Act 4 of 1882, s. 89.**] (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(*b*) ordering him to re transfer the mortgaged property as directed in the said decree,

and also, if necesary,—

(*c*) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4

Transfer of Property Act, s. 89.—This rule corresponds with s 89 of the Transfer of Property Act except in the following particulars —

1 The provision contained in sub-r (1) for the passing of a *decree* in the case where payment is made in accordance with the terms of the preliminary decree is new

2 By sub rule (2) it is provided that the application which follows a preliminary decree for sale is not for an *order* for sale as it was in s. 89 of the Transfer of Property Act, but for a *decree* for sale See notes below, ' Final decree for sale Limitation

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(n) *Nripendra Nath* v *Jhumak* (1923) 3 Pat [illegible] I C [illegible] A P 283

(o) *Hemendra Lal* v *Fulchand* (1923) 50 Cal 650 [illegible] I C [illegible] A C 6[illegible] *Ishan Chandra* v *Nuradan* [illegible] Pat [illegible] I C 1043, (23) A P 181 *Sidal Singh* v *Baijnath* (19[illegible]) 44 All 603, 73 I C 455 (2[illegible]) A A [illegible]

(p) (1924) 23 C W N [illegible] 83 I C 424, (24) A C 645.

3 The words "to the plaintiff or" which occurred in s 89 after the word "pays" (see l. 2 of this rule) have been omitted See notes below, "Payment into Court"

4 The words "and thereupon the defendant's right to redeem and the security shall both be extinguished," which occurred at the end of s 89, have been omitted (q) See notes to r. 1 above, "Consequences of non joinder," p 845.

Final decree for sale: Limitation—Where no payment is made by the mortgagor of the amount due on or before the day fixed, the mortgagee may apply for a final decree for sale The procedure prescribed by the Transfer of Property Act in suits for foreclosure, redemption and sale, was in the first place to pass a "*decree*," and then an "*order absolute*" This phraseology gave rise to conflicting decisions In some cases it was held that an application for an order absolute for sale under s 89 of the Transfer of Property Act was an application *to execute the decree*, and that the period of limitation was therefore three years from the date of the decree as provided by art.179 of the Limitation Act of 1877 [Limitation Act, 1908, art 182] In other cases it was held that such an application was one *to obtain a further decree*, that the only article of the Limitation Act that could possibly apply to it was the general article 178 [now art. 181], and that article applied only to applications *under the Code of Civil Procedure*, and that there being no other article, there was no period of limitation for an application for an order absolute *under the Transfer of Property Act*. [It is interesting to note that the former view was taken by the Privy Council in cases under the Transfer of Property Act decided in 1914 (r)] To put an end to this conflict of decisions it is now provided that the application which follows a preliminary decree for sale is to *obtain a decree* for sale [see sub rule (2)] so as to bring it within the purview of art 181 of the Limitation Act of 1908 [old art 178], and *not one to execute* the decree (s) And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code (t) The result is that an application for a final decree for foreclosure, sale, or redemption is now governed by the residuary article 181 of the Limitation Act, 1908, and the period of limi

[illegible]

representative is joined, the suit abates (v) Where an appeal is preferred from the preliminary decree, the right to make such an application accrues not on the expiry of the time limited by the preliminary decree but on the date of the decree of the Court of appeal (w) Where a decree was passed before the new Code came into force, and the application for a final decree was made after the new Code came into force, it was held that "the right to apply" never having accrued to the decree holder until the new Code conferred it upon him, the period of limitation under art 181 did not begin to run

(q) See *Het Ram* v *Shadi Lal* (1918) 45 I A 130 40 All 407, *Sukhi* v *Ghulam Safdar Khan* (1922) 48 I A 465, 43 All 469, *Ram Narayan* v *Sahdeo Singh* (19..) 1 Pat 332 67 I C 221, (22) [illegible]

[illegible] Cal 776, 27 I C 683

(u) *Datto* v *Shankar* (1914) 38 Bom 32, 21 I C [illegible]

[illegible] Act) *Bala Ram* v *Kanhai* (1916) 1 Pat L J 364, 38 I C 385, *Mummadi* v *Venkata* (1922) 42 Mad L J 51, 69 I C 366, (22) A M 65

(v) *Bhutnath* v *Tarachand* (1920) 25 C W N 595 59 I C 177, *Valesa* v *Kannammal* (19..) 46 Mad L J 151, 78 I C 64, (24) A M 786

(w) *Gajadhar* v *Kishan* (1917) 39 All 641, 42 I C 93 overruling *Madho* v *Nihal* (1916) 38 All 21, 30 I C 494, *Nizam ud din* v *Bohra* (1918) 40 All 203 43 I C 870, *Jayanti Venkatta* v *Damisetti* (19..) 44 Mad 714, 64 I C 470

O. 34, r. 5. until the new Code came into force, that is, until 1st January 1909 (*x*) If the preliminary decree directed the mortgagee to pay off a prior mortgage and fixed no period for such payment, the starting point for limitation for an application for a final decree is at the expiry of six months from the preliminary decree (*y*).

Payment into Court.—Under s 89 of the Transfer of Property Act, the defendant was at liberty to pay the amount to the plaintiff or into Court. Under the present rule [sub r (1)] the payment has to be made into Court If the money is not paid into Court, there is to be a decree for sale It has been held in some cases that if any payment is made out of Court or the decree is adjusted in part and the payment or adjustment is certified under O 21, r 2, credit should be given to the defendant in respect thereof (*z*) But the better opinion seems to be that an application for final decree is not an application for execution and therefore O 21, r 2, does not apply at all (*a*) If the decree is passed under rules 4 and 5, there is an obligation to pay into Court, but that obligation does not bar the taking into account of payments made by the judgment-debtor out of Court for the purpose of ascertaining the amount to be entered in the final decree under rule 5 (2) If the decree is a consent decree or a decree not in accordance with rules 4 and 5, there is no obligation to pay into Court and the Court can inquire into the payment or adjustment whether certified or not (*b*)

Sub-rule (2): "Where such payment is not so made."—Sub r. (2) provides that where the mortgagor does not *pay into Court* the amount payable by him, the Court *shall* pass a final decree for sale This gives the Court no option in the matter and if payment has not been made into Court on or before the fixed date, the Court must pass a final decree for sale The result is that if no payment is made into Court and the mortgagee applies for a final decree for sale, the Court must pass a final decree though it may be proved that the mortgagee had after the preliminary decree and before the application for a final decree agreed to take over a portion of the mortgaged property in satisfaction of the debt Sub r (2) recognizes no settlement except by payment into Court (*c*). The final decree for sale does not extinguish the right of redemption The mortgagor s right continues until the sale has actually taken place in pursuance of the decree (*d*) But when a mortgagee obtains a decree for sale, he does not retain all his rights under the mortgage So when a receiver was appointed in execution of a mortgagee s decree for sale, an agreement by which the mortgagee retained possession of part of the mortgaged property in lieu of interest was no longer effective and the receiver could compel the mortgagee to give up possession (*e*). Again if the mortgagee does not bring the property to sale and allows execution of the decree to become barred by limitation, he has no interest left in the property (*f*)

Application.—It is only necessary for the plaintiff to inform the Court that a final decree is to be prepared, and if he so applies the application should not be dismissed for his subsequent absence (*g*)

Limitation.—The period of limitation for an application for a final decree is under Article 181 In a case where the Court erroneously expressed an

Mad 917)

All [illegible] *[illegible]driya* (1917) 25 Cal L J 5[illegible]3 40 I C 845

(*b*) *Mangar Sahu* v *Bhudoo Singh* (1920) 5 Pat L J 674, 57 I C 473, *Sital Singh* v *Baijnath* (1922) 44 All. 663, 75 I C 485, (22) A I R All 3[illegible]3

(*c*) *Banarsi Das* v *Nathu Mal* (1913) Punj. Rec No 12, p 47, 18 I C 937.

(*d*) *Shah Mehdi Hasan* v *Ismail Hasan* (1920) 42 All 517

22[illegible], (2[illegible]) A I R 6[illegible]2

opinion that a puisne mortgagee could not sell the property without paying off a prior mortgagee and time was spent in ascertaining the balance due to him, it was held that, for that time, limitation was suspended (*h*)

Enlargement of time.—This rule does not contain any provision such as is to be found in rr 3 and 8 enabling the Court to extend the time for payment This being so, when the money is not paid by the mortgagor by the day fixed in the decree he cannot obtain an extension of the time for payment (*i*) But though the Court cannot extend the time for payment the mortgagor is entitled to have the sale stopped under O 21, r 69, by payment of the amount due and costs at any time before sale (*j*), and if the property is sold, to recover it back by making the deposit required under O 21, r 89 (*k*) The reason is that the provisions of the Code relating to the execution of decrees apply to sales under mortgage decrees This was the view taken by the High Courts of Bombay, Madras and Allahabad in the cases just cited On the other hand, it was held by the Calcutta High Court that the sections of the Code relating to execution did not apply to sales under mortgage decrees (*l*) To negative the view taken by the Calcutta High Court, the sections of the Transfer of Property Act relating to decrees in mortgage suits have been transferred to this Code But O 21, r 83, is expressly excepted from application to sales in execution of mortgage decrees (*m*)

Sufficient part thereof.—It is not necessary to sell all the properties mortgaged at once Ordinarily the right of selling in a particular order rests with the decree holder, but in view of equities arising in favour of various parties the Court may direct the order in which they should be sold (*n*)

Effect of sale under mortgage decree.—By a sale of property in execution of a decree for the payment of money, the interest of the judgment debtor alone passes to the purchaser (*o*) By a sale of mortgaged property in execution of a decree for sale of such property, the interest both of the mortgagor and mortgagee passes to the purchaser (*p*) See notes to r 1 above under the head " Consequences of non joinder," p 845

Injunction restraining mortgagor from receiving income of mortgaged property.—After a final decree for sale is passed, it is not competent to the Court to restrain the mortgagor from receiving the income of the mortgaged property, merely because the property, when sold, may not realize a sufficient sum of money to satisfy the mortgage claim (*q*)

Appeal.—*Under the present Code, a party aggrieved by a preliminary decree passed* under r 4 of this Order may appeal from it, if he does not appeal from it, he is precluded from disputing its correctness in an appeal which may be preferred from the final decree passed under this rule [s 97] (*r*) " Even under the old Code the correctness of the decree under section 88 of the Transfer of Property Act [now O 34, r 4] could not be questioned in an application for an order absolute under section 89 [now O 34, r 5] or in an appeal

(*h*) *Hemendra* v *Dharani* (1921) 25 C W N 376 67 I C 413

(*i*) *Taniram* v *Gajanan* (1900) 24 Bom 300

(*j*) *Harjas Rai* v *Rameshar* (1898) 20 All 354 *Raja Ram* v *Chunni Lal* (1897) 19 All 205 *Bibijan* v *Sachi* (1904) 31 Cal 863, *Tirupuranam* v *Gopalasami* (1908) 31 Mad 354

(*k*) See *Tirumal* v *Syed Dastaghiri* (1899) 22 Mad 256 *Mallikarjunadu* v *Lingamurti* (1902) 25 Mad 244, *Krishnaji* v *Mahadev* (1901) 25 Bom 104

(*l*) *Pramatha Chandra* v *Khetra* (1902) 29 Cal 651

(*m*) *Kora Lal* v *Panjab National Bank* (1923) 5 Lah L J 67

(*n*) *Rajkeshwar Prasad* v *Mahommad Rahiman* (1924) 3 Pat 5-2 78 I C 796, (24) A P 459

(*o*) See notes to O 21 r 94

(*p*) *Maganlal* v *Shakra* (1898) 22 Bom 945 *Desai Lallubhai* v *Mundas* (1896) 20 Bom 390, *Perumal* v *Kaveri* (1893) 16 Mad 121

(*q*) *Muhammad Inamullah* v *Narain* (1915) 37 All 473 29 I C 601

(*r*) *Kulada* v *Ramananda* (1921) 48 Cal 1036, *Jogendra* v *Satyendra* (1925) 29 C W N 640, 90 I C 350 (25) A C 790

O. 34, rr. 5, 6.

from an order absolute made on such an application' (s) See notes above, "Final decree for sale limitation,' p 859

An adjudication dismissing an application under this rule for a final decree for sale is not an order under s 47, but a decree and is appealable as decree under s 96 (t), and is therefore not open to revision (u)

Dekkhan Agriculturists Relief Act 17 of 1879.—As to the applicability of this rule to cases under the above Act, see the undermentioned case (v)

Court-fees Act.—An appeal from a final decree for sale under this rule requires an *ad valorem* Court fee and cannot be stamped as an appeal from an order (w)

Costs ordinarily recoverable from mortgaged property.—In a mortgage decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property, and not personally from the mortgagor unless the decree itself so directs (x)

Recovery of balance due on mortgage

6. [*New* **Act 4 of 1882, s. 90.**] Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Decree against mortgagor personally.—Where after the sale of the mortgaged property, there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor, the mortgagee can ask for and obtain a decree under this rule for realization of the balance from other properties of the mortgagor (y) A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (z) The object of the rule is to obviate the necessity of the mortgagee having to bring a fresh suit to recover the balance (a) Such a suit, in fact, could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O 2, r 2 (b) In several cases decided under the corresponding s 90 of the Transfer of Property Act, it was held by the Indian Courts that a personal decree for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient to pay the mortgage debt, in other words, that a Court could not while passing a decree for sale under s. 88 of that Act (now r 5) pass a personal decree for the balance and that a personal decree could only be passed when the proceeds were found to be insufficient to satisfy the mortgagee's claim (c) In a recent case however the Judicial Committee held that a decree for sale under s. 88 (now r 4) could validly provide that if the proceeds of sale were not sufficient to pay the

(s) *Murlidhar* v *Vishnudas* (1916) 40 Bom 321 327 33 I C 749

(t) *Subbalakshmi* v *Ramanujam* (1919) 42 Mad 52 48 I C 293

(u) *Kumar Ganganand* v *Pirthichand* (1920) 5 Pat L J 342

(v) *Kashinath* v *Rama* (1916) 40 Bom 492 37 I C 255 *Sullya* v *Suklal* (1924) 48 Bom 172 81 I C 634 ('24) A B 169

(w) *Bajrangi Lal* v *Mahabir* (1913) 35 All 476 1 I C 498 [F B], *Jankibai* v *Chimna* (1920) 22 Bom L R 811 57 I C 579

(x) *Matukdhari* v *Ramdas* (1917) 2 Pat L J 51, 38 I C 214 *Dambar Singh* v *Kalyan Singh* (1918) 40 All 109 43 I C 557 *Maqbul* v *Lalta* (1898) 20 All 523 *Muhammad* v *Banke Lal* (1924) 45 All 630 73 I C 950 ('24) A A 104 but see *Amina* v *Pan* (1919) 41 All 473, 50 I C 730

(y) *Sonatun Shah* v *Ali Newaz* (1889) 16 Cal 423

(z) *Raj Singh* v *Parmanand* (1889) 11 All 486 *Musaheb* v *Inayat ul-lah* (1892) 14 All 513

(a) *Mallikarjunadu* v *Lingamurti* (1902) 25 Mad 244 256

(b) *Ibid* p 257

(c) *Lal Behary Singh* v *Habibur Rahman* (1899) 26 Cal 166 *Ram Ranjan* v *Indra Narain* (1906) 33 Cal 590 *Damodar* v *Lyanku* (1907) 31 Bom 244, *Badri Das* v *Inayat Khan* (1900) 22 All 404, *Aiyasamier* v *Venkatachela* (1917) 40 Mad 959 966 37 I C 741, *Karmulla* v *Mirza Muhammad* (1918) Pat L J 649, 43 I C 603

mortgage debt, the mortgagor should pay the balance personally though the personal decree could not be executed until after the sale had failed to satisfy the debt (*d*) There is no reason why the same interpretation should not be put upon the present rule The addition of the words "found to be" in the present rule do not affect that interpretation (*e*) This case seems to have been overlooked by the Bombay High Court in *Janardhan* v *Krishnaji* (*f*) In any event the decree holder cannot execute the personal decree until he has exhausted his remedy against the property mortgaged, though if he does so without objection by the mortgagor the latter will be estopped (*g*) When the decree only gives the mortgagee a remedy against the mortgaged property, the personal remedy having become time barred, the mortgagee can only recover against the property mortgaged (*h*) See App A, Form No 45, and App D, Form No 4

A personal decree cannot be passed under this rule unless *all* the properties directed to be sold under rr 4 and 5 have been sold The reason is that the remedy of the mortgagee in the first instance is against the properties mortgaged, and such properties should in the first instance be exhausted before a personal liability can be imposed upon the mortgagor But this does not mean that if a portion of the properties is destroyed or has ceased to be available for sale through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor (*j*) It has similarly been held that the omission to include in the plaint a portion of the mortgaged property does not debar the mortgagee from obtaining a personal decree under this rule provided the omission was not intended to prejudice, and has not prejudiced the mortgagor (*k*) In the case of a mortgage by the father of a joint Hindu family not binding on the sons, the Madras High Court made a decree for sale of the father's share with a personal decree for the deficit against the father and the rest of the family property (*l*)

Where net proceeds of "any such sale" are found insufficient.—The expression 'any such sale' refers to a sale under a decree absolute passed under r 5 above It therefore follows that a personal decree under this rule can only follow *the mortgage decree under which the sale is held* Therefore, if a sale has taken place under a decree on a prior mortgage, that would not entitle a subsequent mortgagee, who has also obtained a decree for sale, to apply for and obtain a decree under this rule The reason is that the sale was not held under *his* decree (*m*) Similarly, where a person holding two mortgages over the same property brings two suits on those mortgages and obtains two decrees, and the mortgaged property is sold under one of those decrees, the fact that the sale proceeds, after discharging that decree, are not sufficient to pay the

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(19..) 24 Bom L R 843, 75 I C 183, (.23) A B 32

(*e*) (1919) 46 I A 294, 298, 49 I C 620, line 13

v *Mercantile Bank of India Ld* (1918) 45 Cal 702 48 I C 322 *Ram Ranjan* v *Indra Narain* (1906) 33 Cal 890, *Badri Das* v *Inayat Khan* (1900) 22 All 404, explained in (1917) 45 Cal 702, 716, 48 I C 3.2 *Samanta* v *Lokenath* (1921) 6 Pat L J 106 61 I C 635

(*k*) *Gopal* v *Baikuntha* (1917) 2 Pat L J 538, 42 I C 56

(*l*) *Kandasami* v *Kuppu Mooppan* (1920) 43 Mad 421, 55 I C 3.0

(*m*) *Badri Das* v *Inayat Khan* (1900) 22 All 104 *Durbari Mal* v *Moola Singh* (1920) 42 All 519 56 I C 132

O. 34, rr. 5, 6.

from an order absolute made on such an application (s) See notes above, ' Final decree for sale limitation p 859

An adjudication dismissing an application under this rule for a final decre for sale is not an order under s 47, but a decree and is appealable as decree under s 96 (t), and is therefore not open to revision (u)

Dekkhan Agriculturists Relief Act 17 of 1879.—As to the applicability of this rule to cases under the above Act see the undermentioned case (v)

Court-fees Act.—An appeal from a final decree for sale under this rule requires an *ad valorem* Court fee and cannot be stamped as an appeal from an order (w)

Costs ordinarily recoverable from mortgaged property.—In a mortgage decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property, and not personally from the mortgagor unless the decree itself so directs (x

Recovery of balance due on mortgage

6 [*New* **Act 4 of 1882, s. 90.**] Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount

Decree against mortgagor personally.—Where after the sale of the mortgaged property, there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor, the mortgagee can ask for and obtain a decree under this rule for realization of the balance from other properties of the mortgagor (y) A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (z) The object of the rule is to obviate the necessity of the mortgagee having to bring a fresh suit to recover the balance (a) Such a suit, in fact, could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O 2, r 2 (b) In several cases decided under the corresponding s 90 of the *Transfer of Property Act*, it was held by the Indian Courts that a personal decree for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient to pay the mortgage debt, in other words, that a Court could not while passing a decree for sale under s 88 of that Act (now r 5) pass a personal decree for the balance and that a personal decree could only be passed when the proceeds were found to be [illegible] to satisfy the mortgagee's claim (c) In a recent case however the Judicia[illegible] under s 89 (now r 4) could validly provide that if the [illegible] the

(s) *Murlidhar* v *Vishnudas* (1916) 40 Bom 321 327, 33 I C 749

(t) *Subbalakshmi* v *Ramanujam* (1919) 42 Mad 52 48 I C 298

(u) *Kumar Gangananl* v *Pirthichand* (1920) 5 Pat L J 342

(v) *Kashinath* v *Rama* (1916) 40 Bom 492 37 I C 453 *Sukiya* v *Suklal* (1924) 48 Bom 174 81 I C 881 [illegible] A R 169

21 [illegible]
Bk [illegible]

38 [illegible]
40 [illegible]
2[illegible]
6[illegible]

[illegible] *Ram* (1919) 41 All 473 50 I C 730

(y) *Sonatun Shah* v *Ali Newaz* (1889) 16 Cal 423

(z) *Raj Singh* v *Purmanand* (1889) 11 All 486 *Musaheb* v *Inayat ul-lah* (1892) 14 All 513

(a) *Mallarjunadu* v *Lingamurti* (1902) 25 Mad 244 236

(b) *Ibid* p 237

(c) *Lal Behary Singh* v *Habibur Rahman* (1893) 26 Cal 160 *Ram Ranjan* v *Indra Narain* (1906) 33 Cal 830 *Damodar* v *Vyinda* (1907) 31 Bom 244 *Badri Das* v *Inayat Khan* (1900) 22 All 404 *Avasamier* v *Venkatachela* (1917) 40 Mad 989 996 37 I C 741 *Karimulla* v *Mirza Muhammad* (1915) Pat L J 649 48 I C 603

Costs against puisne mortgagee —A prior mortgagee is not entitled to a decree under this rule against a puisne mortgagee for the amount of his costs The present rule does not apply to such a case (x)

Insolvency of mortgagor —No decree can be passed under this rule against an insolvent mortgagor (y) See Provincial Insolvency Act 1907, s. 16 A mortgagee who has sold under rule 5 the property mortgaged by an insolvent can prove for the deficit without obtaining a personal decree (y 2)

Limitation —See notes above, Legally recoverable

Appeal —An appeal from a decree under this rule lies to the District Judge and not to the High Court notwithstanding that the decree be for a sum exceeding Rs 5 000 if the original mortgage suit was valued at less than Rs 5 000 (z) See notes to s 96, Forum of appeal , p 261 above

Preliminary decree in redemption suit

7. [*New* Act 4 of 1882, s 92.] In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

(*a*) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(*b*) declaring the amount so due at the date of such decree,

and directing—

(*c*) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(*d*) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff

(x) *Ram Lal* v *S I Chand* (1901) 23 All 439 *Mola Anber* v *Sri Dhar* (1904) 26 All 507

(y) *Mamraj* v *Brij Lal* (1912) 34 All 106, 12 I C 587

(y 2) *Babu Lal* v *Krishna Prashad* (1925) 4 Pat 123 85 I C 543 (25) A P 438

(z) *Badr-un-Nissa* v *Shankar* (1919) 41 All 384 49 I C 637

O. 34, rr 7, 8.

shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

Preliminary decree for redemption—This rule, excepting cl (d), corresponds with r 2 above which relates to a preliminary decree for foreclosure The notes to that rule on p 850 above apply *mutatis mutandis* to this rule. For the form of preliminary decree for redemption, see Appendix D, form No 5

Sub-rule (c): "pays into Court the amount due on a day within six months"—If no day is fixed in the decree for payment, the period of limitation for execution of the decree is governed by art 182 of the Limitation Act, 1908, that is, three years from the date of the decree (*a*)

Sub-rule (d) —This sub rule seems inconsistent with rule 8 (2) which makes the bar to the right of redemption and the order of sale both depend upon an order made on the defendant s application in the final decree (*b*) A preliminary decree in a redemption suit ought to direct no more than this—that in default of payment the plaintiff will have a right to apply either for foreclosure or sale See notes to r 2 under the heads Right to foreclosure or sale and Right to redemption p. 850 above

Final decree in redemption suit

8 [*New* **Act 4 of 1882, s. 93**] (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, *together with such subsequent costs* as are mentioned in rule 10, the Court shall pass a decree—

(*a*) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree,

and also, if necessary,—

(*c*) ordering him to put the plaintiff in possession of the property

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary ordering the plaintiff to put the defendant in possession of the property.

(*a*) *Narain Das* v *Udham Singh* (1913) Punj Rec no 68 p 254 18 I C 48

(*b*) *Kushaba* v *Budhaji* (1921) 46 Bom 3 8 61 I C 1004 (22) A B 127

O. 34, r. 8.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same:

Power to enlarge time

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for payment.

Sub-rule (1): decree for mortgagor.—Sub rule (1) of this rule corresponds with sub rule (1) of rules 3 and 5 See notes to rules 3 and 5 Where the amount declared due in a decree for redemption is paid by the mortgagor into Court, the mortgagor does not lose his right to a decree under sub rule (1), because he has attached and withdrawn from Court a portion of the sum so paid in execution of that portion of the decree which awarded him costs against the mortgagee (*c*) The mortgagee is not entitled under O 21, r 1 (c) to notice of payment into Court (*d*)

Sub-rule (2): decree for foreclosure.—The mere fact that the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed does not disentitle the mortgagee to a decree for foreclosure or sale as the case may be The omission of the Court to draw up the proper decree under r 7 does not deprive the mortgagee of the relief provided by this rule (*e*) The decree for foreclosure or sale under this rule should be passed by the Court which passed the preliminary decree for redemption, notwithstanding that the latter decree has been varied by the appellate Court (*f*)

Final decree.—See notes to r 5, "Final decree for sale Limitation," p 859 above

Application for sale by mortgagor.—There is nothing to preclude a mortgagor in a suit for redemption of a mortgage in which he fails to pay the mortgage amount according to the decree from himself applying for a decree for sale Sub-rule (4), while enabling the mortgagee to apply for such a decree, does not take away the right of the mortgagor to ask for such a decree If it were otherwise, a mortgagee may not apply for sale, in which case the relation of mortgagor and mortgagee would continue until the mortgagee chose to apply for sale (*g*)

Application for sale by the mortgagee.—The period of limitation for the mortgagee's application for sale is under article 182 It has been held that an appli-

(*c*) *Parmanand* v *Lokman Das* (1905) 27 All 392
(*d*) *Ambi* v *Valia* (1923) 45 Mad L J 637, 75 I C 508 (24) A M 102
(*e*) *Murlidhar* v *Parsharam* (1901) 25 Bom 101.
(*f*) *Venkata* v *Thiyagaraya* (1900) 23 Mad 521 *Sheonarain* v *Chunni Lal* (1901) 23 All 88
(*g*) *Govinda* v *Veeran* (1913) 36 Mad 32, 12 I C 432

O. 34, rr. 8-10.

cation by the mortgagor for enlargement of time is a step in aid of execution by the mortgagee (*h*)

Discharge of debt.—See notes to r 3 under the same head on p 856 above

Power to enlarge time.—The proper Court to which the application for enlargement of time should be made is the Court of first instance even though the decree for redemption was passed by the Court of Appeal (*i*) See notes to r 3 under the same head on p 856 above See also notes to s 148

The proviso as to enlargement of time applies even if the suit is originally one for sale provided the decree provides not only for sale, but for redemption of a prior mortgage *A* mortgages his property first to *B*, and then to *C* *C* sues *A* and *B* for a sale of the property A decree is passed providing *for redemption of B s mortgage by C*, and for sale The decree is a decree for redemption as between *B* and *C*, and the Court may allow further time to *C* for redemption upon good cause shown (*j*) But if *B* obtains a decree for sale on his first mortgage without impleading *C*, and sells the property in execution of the decree, and *C* thereafter brings a suit upon his mortgagee impleading the purchaser under *B* s decree, and gets a decree for sale conditional on his paying off the purchaser within a certain time, the proviso for enlargement will not apply The condition that *C* should pay off the purchaser does not make his decree a decree for redemption as the first mortgage had merged in the sale (*k*) Nevertheless when in a partition suit an alienation of part of the property was held binding for a certain amount only and the alienee was ordered to give possession on payment being made of that amount in a certain time, this was held to be in effect a decree for redemption and subject to the power of enlargement of time (*l*)

Appeal.—An appeal lies from an order under this rule refusing to extend the time for the payment of mortgage money [O 43, r 1, cl (o)] But no appeal lies from an order extending the time for payment (*m*)

9. [*New*] Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him, and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Decree where nothing is found due or where mortgagee has been overpaid

This rule is new It provides for cases where nothing is found due to the mortgagee and for cases where the mortgagee has been overpaid as may well happen where he is in possession There was no such provision in the Transfer of Property Act, but the practice followed under that Act was the same as that prescribed by this rule (*n*)

10 [*New.* **Act 4 of 1882, s. 94.**] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption,

Cost of mortgagee subsequent to decree

(*h*) *Sankara* v *Thangamma* (1922) 45 Mad 202 70 I C 333 (22) A M. 247

(*i*) *Ram Dhani* v *Lalit Singh* (1909) 31 All 323 2 I C 220 *Dharmaraja* v *Srinivasa* (1916) 39 Mad 876 31 I C 240 *Beni Prasad* v *Harnam Das* (1917) 39 All 396 39 I C 630

(*j*) *Kalian* v *Sadho Lal* (1913) 35 All 116 18 I C 14

(*k*) *Nand Kunwar* v *Sujan Singh* (1920) 18 All L J 771 57 I C 1006

(*l*) *Idumba Narayan* v *Pethi Reddy* (1920) 43 Mad 357

(*m*) *Dharmaja* v *Srinivasa* (1916) 39 Mad 876 31 I C 240

(*n*) See *Kachu* v *Lakshmansingh* (1901) 25 Bom 115, *Vinayak* v *Dattatraya* (1902) 26 Bom 661

O. 34, rr. 10-12

the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs subsequent to decree.—This rule provides for costs incurred by the mortgagee subsequent to the decree See the first part of rr 3 5 and 8 If costs of an appeal from a preliminary decree have by mistake been omitted in the final decree the court of execution cannot include them (*o*) Subsequent interest not mentioned in the final decree must be taken as refused (*p*)

Right of mesne mortgagee to redeem and foreclose

11. [*New*] Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

This rule is new It has been inserted in compliance with the suggestion of the Judicial Committee in the undermentioned case (*q*)

Sale of property subject to prior mortgage

12. [*New* Act 4 of 1882, s. 96] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold

Sale of property free from prior mortgage.—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r 1] In such a case as also where the prior mortgagee is joined as a party and his mortgage is admitted (*r*) the prior mortgagee may consent to the property being sold free from his mortgage in which case he acquires the right to have *his claim satisfied first out of the proceeds of the sale of the mortgaged property* [see r 13 below]

Where the prior mortgage is a usufructuary mortgage.—A holds two mortgages on the same property the first a usufructuary and the second a simple mortgage Can A sue for sale of the mortgaged property on the simple mortgage *free from* the usufructuary mortgage, *and claim to be paid out of the sale proceeds the amount due upon the usufructuary mortgage under this and the next rule?* Yes, according to the Madras rulings (*s*) No, according to the Allahabad rulings unless the two mortgages are in favour of different persons (*t*)

(*o*) *Ram Sarup v. Narain Das* (19--) 45 All 198 69 I C 944 (23) A A 141
(*p*) *Tekait Krishna v. Surendra* (1920) 5 Pat L J 598 58 I C 2 3
(*q*) *Gopi Narain Khanna v. Bansidhar* (1905) 27 All 3 5 32 I A 123
(*r*) *Srinivasa v. Yamunabai* (1906) 29 Mad 84
(*s*) *Rengasami v. Subbaroya* (190) 30 Mad 408.
(*t*) *Bhagwan Das v. Bhawani* (1904) 26 All 14

O. 34, rr. 12, 13.

It has been held by the High Court of Patna that where a person holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage, he is entitled to sue for the sale of the mortgaged property on the simple mortgage *subject to* his prior usufructuary mortgage, and further, he is entitled to have the prior mortgage notified at the sale in execution of the decree obtained on the subsequent mortgage for the information of bidders at the sale though he did not mention the prior mortgage in his plaint The omission to mention the prior mortgage in the plaint does not preclude him from keeping alive that mortgage by notifying it at the sale (u)

Application of proceeds

13. [*New* Act 4 of 1882, s 97.] (1) Such proceeds shall be brought into Court and applied as follows —

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale,

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith,

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed and of the costs of the suit in which the decree directing the sale was made,

fourthly, in payment of the principal money due on account of that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882

Application of proceeds —Compare s 73 proviso (c), which relates to subsequent and not prior incumbrances See notes to s 73 Clauses (a) (b) and (c),' on p 215 above

Whatever is due to the prior mortgagee.—This includes interest on the mortgage up to the date of the confirmation of the sale (v)

" Persons interested in the property sold "—It is provided by the last clause of sub r (1) that the residue of the sale proceeds should be paid to *persons interested in the property sold* This expression includes subsequent incumbrances (w)

(u) *Jagernath* v *Mohra Kuvar* (1917) 2 Pat L J 118 39 I C 76

(v) *Benode* v *Harish* (1910) 15 C W N 783 8 I C 4

(w) *See Padmanabh* v *Khemu* (1894) 18 Bom 684 687 688

But it does not include unsecured creditors who cannot be said *to be interested in* the property sold, they are at liberty, however, to enforce their claims against any surplus payable to the mortgagor (*x*)

Usufructuary mortgage.—See notes to r 12 above.

14. [*New.* Act 4 of 1882, s. 99.] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

Scope and object of the rule.—This rule corresponds with s 99 of the Transfer of Property Act except that the words "claim arising under the mortgage" have been substituted for the words "any claim, whether arising under the mortgage or not." The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the *mortgage-debt* In such a case the rule provides that the mortgagee shall not be entitled to bring the *mortgaged property* to sale *in execution of the decree* he can have the property sold only by instituting a *regular suit for sale* (*y*) and obtaining a decree for sale under rules 4 and 5. It is clear that where a mortgagee brings a regular suit for sale, and a decree is passed in such suit, what would be sold is the mortgaged property free from the mortgage, while in the other case where the suit is not for sale, but on the mortgage debt only what would be sold is the mortgaged property subject to the mortgage, in other words it is only the mortgagor s equity of redemption that would be sold The object of the present rule is to prevent mortgages from suing their mortgagors on the mortgage debt as such and in execution selling the bare equity of redemption, thereby depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (*z*) [see r 4 above] *A* mortgages his property to *B* to secure repayment of Rs 5,000. *B* sues *A* to recover Rs 5,000, and obtains a personal decree against *A* *B* then applies for attachment and sale of *A* s interest in the mortgaged property in execution of the decree The property may be attached, for there is nothing in this rule to bar the attachment (*a*), but the sale must be refused under this rule *B* cannot bring the property to sale except by means of a regular suit for sale Suppose now that *B* sues *A* on a *debt unconnected with the mortgage*, and obtains a decree against *A* Is he entitled to have *A*'s interest in the mortgage sold in execution of such decree? Yes, for the rule only precludes *B* from bringing the mortgaged property to sale in execution of a decree for the payment of money in satisfaction of a *claim arising under the mortgage* Under s. 99 of the Transfer of Property Act, however, *B* could not bring the mortgaged property to sale even if the decree was for a debt unconnected with the mortgage debt (*b*)

290, 32 I A 23, *Chauran* v *Bhagan* (1923) 1 780, 30 I C 958 ... 144, (24) A P 20 ... *A* v *Lurroda* (1895) 22 Cal. ... *B* u *Ujam* (1905) 32 Bom 205. ... v *Bhubaneswar* (1915) 42 Cal.

O. 34, r. 14. The provisions of that section were sweeping. they precluded a mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of *any claim whether arising under the mortgage or not* It may here be stated that the present rule is a rule of procedure, and not a rule of substantive law, it has, therefore, a retrospective operation (c)

Sale made in contravention of this rule is voidable, not void.—It was at one time thought that a sale made in contravention of this rule was absolutely void (*d*) and that the purchaser at such sale was not therefore entitled to recover possession from the mortgagor (*e*), and that if he did acquire possession, he was bound to account for the rents and profits realized from the mortgaged property during the term of his possession (*f*) But this view is no longer tenable, and it has been held in recent cases that a sale in contravention of this rule is not void, but voidable at the instance of the mortgagor or any other person interested in the equity of redemption (*g*) The sale, in other words, is valid until it is set aside The procedure to set aside the sale is by way of application under s 47, a separate suit is barred under that section The application must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale The sale cannot be set aside after it is confirmed by the Court (*h*) Nor is it open to the mortgagor after confirmation of the sale to redeem the mortgage, whether the property has been purchased by a third person (*i*) or by the mortgagee himself (*j*)

"Decree."—An order directing a person who has stood surety on behalf of a judgment debtor for the performance of a decree to pay the amount specified in the surety bond is not a decree within the meaning of this rule It is therefore competent to the decree holder to have the property secured by the bond for the performance of the decree sold in execution under s 145 without instituting a regular suit for sale (*k*)

"Decree for the payment of money in satisfaction of a claim arising under the mortgage."—This rule does not apply unless the decree obtained by the mortgagee is "for the payment of money *in satisfaction of a claim arising under the mortgage*" The "mortgage" referred to in this rule must be a mortgage existing *prior* to the date of the decree, and not one *created* by the decree [ills. (1) and (2)] Further, it must be a *subsisting* mortgage, and not one which by reason of the efflux of time or any other like circumstance has ceased to be enforceable at law [ill. (3)] Again the rule is not applicable when a usufructuary mortgagee has leased to the mortgagor and sues for rent (*l*), unless the lease was part of the mortgage transaction (*m*) Nor does the rule prevent a mortgagee purchasing with leave of the Court the equity of redemption at a Court sale in execution of his money decree on a claim independent of the mortgage (*n*)

(c) *Bai Ganga* v *Rajaram* (1911) 35 Bom 248.

Izhuvan v *Izhuvan* (1907) 30 Mad 313, *Mehr Bakhsh* v *Sanjhe Khan* (1916) Punj Rec no 18, p 44, 33 I C 802 *Bhaichand* v *Panchhoddas* (1920) 22 Bom L R 670, 58 I C 231

(i) *Izhuvan* v *Izhuvan* (1907) 30 Mad 313.

82 I C 504, (23) A M 127

(n) *Raja Jagadish Chandra* v. *Bhubaneswar* (1922) 27 C W. N. 38, 76 I C 241, (23) A C 121

Further, the rule does not prevent a mortgagee who has two distinct mortgages, one on property *A* and another on property *B* from selling *B*, in execution of a money decree on a claim arising out of the mortgage on *A* and selling *A* in execution of a money decree on a claim arising out of the mortgage on *B* (*o*)

Illustrations

(1) *A* mortgages certain property to *B* which was then in the possession of *X*, and agrees to deliver possession thereof to *B* after recovering possession thereof from *X*. *A* recovers possession of the property from *X*, but does not deliver possession thereof to *B* *B* sues *A* for possession, and a decree is made in *B*'s favour for possession and for costs In execution of the decree for costs, *B* applies for attachment and sale of the mortgaged property Is *B* entitled to the order applied for? Yes, for the claim in respect of cost is not a claim arising under the mortgage ' within the meaning of this rule It arises under the decree passed for costs (*p*)

(2) In a suit for money a decree is passed by consent whereby the defendant is *directed to pay to the plaintiff Rs 35 000 It is further declared by the decree that the* plaintiff should have a first charge on certain immoveable property belonging to the defendant Is the plaintiff entitled to have the property sold in execution of the decree without instituting a regular suit for sale on the charge? Yes, because there being no mortgage or charge prior to the decree, the decree cannot be said to have been obtained " for the payment of money *in satisfaction of a claim arising* under the mortgage within the meaning of this rule The immoveable property must have been made security for the payment of the money *before* the decree was obtained, otherwise the provisions of this rule do not apply (*q*)

(3) *A* mortgages two properties *X* and *Y* to *B* Subsequently by reason of the wrongful act of *A*, *B* is deprived of part of his security, namely, property *Y* *B* thereupon sues *A* under s 68 of the Transfer of Property Act, and obtains a personal decree for the mortgage debt against *A* In execution of the decree *B* applies for sale of property *X* At this date *B*'s remedy on the mortgage had become barred by limitation The mortgage not being a *subsisting* mortgage [and *A* not having to redeem it], *B* is entitled to have property *X* sold in execution without bringing a regular suit for sale on the mortgage (*r*)

(4) *A* executes a usufructuary mortgage in favour of *B* to secure a debt of Rs 8 000 whereby he mortgages a fixed rate holding and his right to receive offerings at a temple By a subsequent agreement between him and *B* *A* binds himself to pay annually Rs 700 to *B* in lieu of the offerings Subsequently *B* sues *A* on that agreement and obtains a decree against *A* for Rs 3 200 being the arrears of the annual payments This is a decree for the payment of money in satisfaction of a claim arising under the mortgage within *the meaning of this rule, and B is not entitled to bring the mortgaged property to* sale in execution of the decree *B*'s right to receive the money rested on his position as mortgagee (*s*)

"He may institute such suit notwithstanding anything contained in O. 2, r. 2.'—See notes to O 2, r 2, under the head Exceptions to the rule against the splitting of reliefs, p 406 above

(*o*) *Rai Noorjan* v *Hansraj* (1924) 49 Bom. 208 86 I C 870 (25) A R 239

(*p*) *Harbans Rai* v *Sri Nivas* (1913) 35 All 518, 20 I C 896

(1926) A I 31 (charge created by a decree in a suit for maintenance) *Lamaswami* v *S bbara a* (1925) 49 Mad L. J 490, 88 I C 648 (25) A M 1101.

63 I C 445

(*s*) *Kalma* v *Muhammad Ali* (1919) 41 All 399 50 I C 134 *Bhaichand* v *Ranchhoddas* (1920) 22 Bom L. R 670 58 I C 231

O. 34, rr. 14, 15.

Charge.—This rule applies to charges as well as mortgages (*t*), see rule 15 below When a creditor who has a charge on properties obtains a *money decree* with a declaration of charge he is not entitled to sell the property in execution but must file a suit to enforce the charge (*u*) In *Kashi Chandra* v *Priya Nath* (*v*) it was said that the rule did not apply if the decree directs the sale of the property, but this could only happen if the decree were a consent decree or a decree passed in a suit for enforcement of the charge

Security bond.—A security bond given during the pendency of an appeal creating a charge on the sureties property can be enforced by summary procedure and this rule does not apply when no person is named as mortgagee for the Court is not a juridical person (*w*) See note under O 41, r 5 *post*, Security for the performance of the decree and s 145

Consent-decree—This rule does not apply to consent decrees, for the mortgagor can waive the benefit of the rule (*x*)

Transferee of money-decree from mortgagee.—It has been held by the High Courts of Bombay and Madras that the transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by this rule and that he cannot therefore bring the mortgaged property to sale in execution of the decree (*y*) The contrary has been held by the High Court of Allahabad (*z*)

15 [*New Cf* Act 4 of 1882, s 100] All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882

Charges

Charge—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage the latter person is said to have a charge on the property [Transfer of Property Act, s 100] A charge for rent created by s. 65 of the Bengal Tenancy Act (*a*) or by s 5 of the Madras Estates Land Act, I of 1908 (*b*) is not a charge within the meaning of s 100 of the Transfer of Property Act See notes to r 14, charge on p 874 above See Ghose on Mortgage, 4th ed, pp 103, 104 837 840

Sale—The right of a party having a charge is a sale and not foreclosure (*c*)

...*Nugurain* (19..) 49 Mad L J 643 9. I C 497 (..6) A M 194

(*c*) *Tennant* v *Trenchard* (1869) L R 4 Ch ... per Hatherley L J

ORDER XXXV.

Interpleader.

O. 35, rr. 1-3.

Plaint in interpleader suits

1 [S 471.] In every suit of interpleader the plaint shall, in addition to the other statements necessary for plaints, state—

(*a*) that the plaintiff claims no interest in the subject matter in dispute other than for charges or costs,

(*b*) the claims made by the defendants severally, and

(*c*) that there is no collusion between the plaintiff and any of the defendants

Interpleader suits—See s 88 and notes thereto

Payment of thing claimed into Court

2 [S 472] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit

"May be required to so pay or place it"—These words have been substituted for the words must so pay or place it in view of the addition of the words immoveable property in s 88 The procedure by payment or deposit is plainly not applicable to immoveable property

Procedure where defendant is suing plaintiff

3 [S. 47] Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him, and his costs in the suit so stayed may be provided for in such suit, but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit

Alteration in the rule.—The words on being informed by the Court in which the interpleader suit has been instituted have been substituted for the words on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stakeholder that such decree has been passed Under the old section proceedings in other litigation relating to the same subject matter could only be stayed on the *passing of a decree* in the interpleader suit Under the present rule they can be stayed on the very *institution* of the interpleader suit

Appeal.—An appeal lies from an order under this rule [O 43, r 1, cl (p)].

O. 35, rr. 4, 5.

Procedure at first hearing

4 [S 473, R.S C., O. 57, r. 7.] (1) At the first hearing the Court may—

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(*b*) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(*a*) that an issue or issues between the parties be framed and tried, and

(*b*) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

Non-appearance of claimant-defendants.—Where the claimants do not appear at the first hearing the Court may, if the suit is properly instituted declare under sub r (1) *that the plaintiff is discharged from all liability to the defendants* in respect of the money claimed, award him his costs and dismiss him from the suit (*d*)

Sub-rule 3 —This sub rule has been taken from O 57, r 7, of the English Rules

Appeal —An appeal lies from an order under this rule [O 43, r 1, cl (p)]

Agents and tenants may not institute interpleader suits

5 [S. 474] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations

(a) *A* deposits a box of jewels with *B* as his agent *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B* *B* cannot institute an interpleader suit against *A* and *C*

(b) *A* deposits a box of jewels with *B* as his agent He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C* *A* afterwards alleges that *C*'s debt is satisfied and *C* alleges the contrary Both claim the jewels from *B* *B* may institute an interpleader suit against *A* and *C*

(*d*) *Khemchand* v *Khairuddin* (1919) 21 Bom L R 948

Interpleader suit by Agents.—In ill (a), *C* does not claim through *A* (principal), but *adversely* to him, hence no interpleader suit cna be brought. In ill (b) *C* claims *through A*, hence *B* may institute an interpleader suit against *A* and *C*.

Interpleader suit by tenants.—*A* lets certain lands to *B* *C* alleges that the lands never belonged to *A*, and claims the rent from *B* *B* cannot institute an interpleader suit against *A* and *C*, the reason is that *C* claims *adversely* to *A* (land lord) But if *C* claims the rent, alleging that the lands were sold to him by *A* after the same were let to *B*, *B* may institute an interpleader suit against *A* and *C*, the reason is that in this case *C* claims *through A*, that is, as purchaser from *A* The result is that an interpleader suit by a tenant can only be maintained if the defendant other than the landlord claims *through* the landlord (e) The following is a peculiar case *A grants* a perpetual lease of certain villages to his wife *B* *B* sub lets the villages to *C* *A*, alleging that the lease granted by him to *B* was executed by him *benami* in the name of *B*, gives notice to *C*, claiming the rents of the villages *B* denies that the transaction was *benami*, and she also claims the rents from *C* *C* can maintain an interpleader suit against *A* and *B* The reason given is that *A* must be deemed to claim *through B* (f) See Indian Evidence Act, s. 116

Interpleader suit by a Railway Company.—A Railway Company is not an "agent" of the consignor within the meaning of this rule, so as to preclude it from filing an interpleader suit against the consignor and a third party claiming adversely to the consignor (g)

6. [S. 475.] Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Charge for plaintiff s costs

Appeal.—An appeal lies from an order under this rule [O 43, r 1, cl. (p)]

ORDER XXXVI.

Special Case.

O. 36, r. 1.

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court s opinion

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them , or

(e) *Shelly Bonnerjee v Raj Chandra Dut* (1910) 37 Cal 5 I C 5
(f) *Orr v Chida baran* (1910) 33 Mad 0 4 I C 319
(g) *Chhaganlal v B B & C I Ry* (1915) 17 Bom L R 339, 3 I C 948.

O. 36, rr. 1-5.

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the questions raised thereby.

Where value of subject matter must be stated

2. [S. 528] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement

Agreement to be filed and registered as suit

3. [S 529] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject matter of which is the same as the amount or value of the subject matter of the agreement

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants, and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented

Parties to be subject to Court's jurisdiction

4. [S 530] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein

Hearing and disposal of case

5. [S. 531.] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable

O. 36, r. 5.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow

Birth after case set down —In the case of the subsequent birth of an infant the former order to set down should be discharged and the special case amended by making the infant a party (h) So also when an infant born a few days before was accidentally omitted to be made a party (i)

ORDER XXXVII

Summary Procedure on Negotiable Instruments

O. 37, rr. 1, 2.

Application of order

1 [S 538] This Order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay,

(b) the Chief Court of Lower Burma,

(c) the Court of the Judicial Commissioner of Sind, and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied

Courts of Small Causes in Calcutta, Madras and Bombay —The corresponding Chapter of the Code of 1882 applied also to Presidency Small Cause Courts Cl (c) of s 538 of the Code which expressly mentioned those Courts has been omitted in this rule the reason given being that its appropriate place would now be in rules under the Presidency Small Cause Act See O 51 r 1

Institution of summary suits upon bills of exchange etc

2 [S 532] (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be

(h) *Savage* v *Snell* (18[illegible]0) L R 11 Eq [illegible]61 | (i) *Barnaby* v *Tassell* (1[illegible]0) L. R. 11 Eq 363

O. 37, r. 2. in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend, and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith

Old section —This rule corresponds with s 532 of the Code of 1882 except in the following particulars —

1 The explanation to s 532 has been omitted and in lieu thereof the words the allegations in the plaint shall be deemed to be admitted have been added into sub r (2) See notes below under the head The allegations in the plaint shall be deemed to be admitted

2 The fourth paragraph of s 532, which provided that the Court should not require the defendant to pay the amount claimed into Court or to give security therefor unless the Court thought that the defendant had not a *prima facie* case or that the defence was not made in good faith has been omitted See r 3, sub r (2), below

Points of difference between summary suit and ordinary suit on negotiable instruments:

(1) A plaintiff proposing to sue upon a negotiable instrument may either bring a *summary* suit or he may bring a suit in the *ordinary* manner The advantage of a summary suit is that the defendant is not, as in a suit brought in the ordinary manner entitled as of right to defend the suit. The defendant in a summary suit must *apply for leave* to defend within 10 days from the service of the summons upon him (see Limitation Act, 1908 sch I art 159) and such leave will be granted only if the affidavit filed by the defendant discloses such facts as would make it incumbent on the plaintiff to prove consideration, or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree

(2) A summary suit must be brought within one year from the date on which the debt becomes due and payable [Limitation Act, 1908, sch I, art 5]. The period of limitation for a suit brought in the ordinary manner on a negotiable instrument is 3 years Article 5 of the Limitation Act, 1908 as it originally stood referred to suits under the summary procedure referred to in section 128 (2) (f) of the Code, and this was construed

as not including suits under O 37 (j) That article was accordingly amended by Act 30 of 1925 by adding to the entry in the first column the words ' where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under O 37 of the said Code ' *At the same time the period of limitation was extended from six* months to one year

(3) A summary suit can only be brought in the Courts mentioned in r 1

A negotiable instrument means a promissory note bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person or to the bearer thereof or to a specified person or the bearer thereof (Negotiable Instruments Act 26 of 1881, s 13)

A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument (Negotiable Instruments Act, s 5)

A promissory note is an instrument in writing (not being a bank note or a currency note) containing an *unconditional* undertaking, signed by the maker, to pay a *certain* sum of money only to, or to the order of, a certain person, or to the bearer of the instrument (Negotiable Instruments Act, s 4)

Illustrations

(a) *A* executes an instrument whereby he promises to pay Rs 5 000 to *B* on demand By the *same* instrument it is provided that *B* should not be entitled to call for payment of the said sum *unless* *A* failed to deliver certain goods to *B* within six months The instrument is not a promissory note, for the undertaking to pay Rs 5 000 is *conditional* upon *A* s failure to deliver the goods *Simon* v *Hakim Mahomed* (1896) 19 Mad 308

(b) *A* executes an instrument whereby he promises to pay Rs 5 000 to *B* on demand At the same time a *separate* agreement is made between the parties whereby *B* agrees not to demand payment of the sum of Rs 5 000 unless *A* failed to deliver certain goods to him within six months The instrument is a promissory note *Simon* v *Hakim Mahomed* (1896) 19 Mad 308

Limitation for suit.—See notes above, " Points of difference between summary suit and ordinary suit on negotiable instruments

Limitation for application for leave to defend.—The period of limitation for an application for leave to appear and defend is 10 days from the date when the summons is served, Limitation Act sch 1, art 159 The Court has no power to extend the time (k), unless the Court has by a rule framed in that behalf made sec 5 of the Limitation Act applicable to such applications as has been done by the High Court of Bombay See App IV below [Rules made by the High Court of Bombay]

Form of summons in a summary suit.—The summons in such a suit requires the defendant to obtain leave from the Court within 10 days from the service thereof *to appear* and defend the suit and within such time *to cause an appearance to be* entered on his behalf, see Appendix B, Form No 4

" Unless he obtains leave."—See r 3 below

" Together with interest at the rate specified (if any)".—In one case the High Court of Calcutta held that in a suit under this Order the plaintiff is not entitled

(j) *Rabindra* v *Abdul* (1925) 52 Cal 904, 63 I C 400, (25) A C 781

(k) *Mahmudar* v *Sarat Chandra* (1900) 5 C W N 259

O. 37, rr. 2, 3.

to recover any interest unless the interest is specified in the promissory note itself (*l*) [See Negotiable Instruments Act, 1881 ss 79 80] In a later case the same High Court held that if no rate of interest is specified in the note the holder is entitled to the statutory rate of six per cent till the date of the decree (*m*) The rule is silent as to interest after date of decree, but it would be extraordinary if the Legislature intended that mercantile instruments should be exempted from the discretionary power and the Court may therefore allow interest at the statutory rate after decree until realisation (*m1*) A plea of an oral agreement to pay interest will not be entertained (*m2*)

The allegations in the plaint shall be deemed to be admitted.—These words have been substituted for the explanation to the old section The explanation was inserted to negative the effect of a Calcutta decision (*n*) But the Explanation was characterized as wholly unintelligible and meaningless by Amir Ali, J, in the undermentioned case (*o*) and it has accordingly been replaced by the words cited in the head note The effect of those words is to enable the plaintiff to succeed on his own allegations though the allegations may be of such a nature that if the defendant appear and denied them they would have to be proved by the plaintiff

Defendant showing defence on merits to have leave to appear

3. [S 533] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit

Alterations in the rule.—Under the old section it was obligatory upon the Court to grant leave to the defendant to appear and defend if he paid into Court the amount claimed by the plaintiff and mentioned in the summons It is no longer so under the present rule The words upon the defendant paying into Court the sum mentioned in the summons or which occurred in s. 533 after the word suit in the third line have been omitted

Limitation.—The application for leave to appear and defend must be made within 10 days from the date of service of the summons on the defendant The date shown in the Sheriff's return as the date of service is the only date to which reference could be made to determine the question of limitation arising on an application under this section (*p*)

***Sub-rule* (2).**—As a rule leave to defend should be given unconditionally if the defendant shows a *prima facie* case or raises a triable issue Leave should be made conditional if the Court doubts the *bona fides* of the defendant or thinks the defence is only put in to gain time (*q*)

(*l*) *Bhupat* v *Sourendra* (1903) 30 Cal 446

(*m*) *Kadar Buksh* v *Shaik Serajuddin* (1922) 49 Cal 716 70 I C 130 (22) A C 512

(*m1*) 49 Cal 716 70 I C 130 (22) A C 512 *supra*

(*m2*) 49 Cal 716 70 I C 130 (22) A C 512 *supra*

(*n*) *Remfry* v *Shillingford* (1876) 1 Cal 130

(*o*) *Bhupati* v *Sourendra* (1903) 30 Cal 446

(*p*) *Madhub Lall* v *Woopendranarain* (1896) 23 Cal 573

(*q*) *Roulet* v *Fetterle* (1894) 18 Bom 717 *Periya Virana* v *Subramania Iyer* (1924) 46 Mad L J 235 78 I C 505 (24) A M 612

O. 37, rr. 3-7.

Appeal —*No appeal is allowed under the Code from an order under this rule* It has been recently held by the High Court of Calcutta that an order under this rule directing a defendant to give security as a term on which leave to defend should be given is not a judgment within the meaning of cl 15 of the Letters Patent, and not therefore appealable as such (r)

Power to set aside decree

4 [S 534] After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit

Power to order bill etc to be deposited with officer of Court

5 [S 535] In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs, thereof

Recovery of cost of noting non acceptance of dishonoured bill or note

6 [S 536] *The holder of every dishonoured bill of* exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non acceptance or non payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note

Procedure in suits

7 [S 537] Save as provided by this order the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner

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ORDER XXXVIII

Arrest and Attachment before Judgment

Arrest before judgment

O. 38, r. 1.

Where defendant may be called upon to furnish security for appearance

1. [Ss 477, 478] Where at any stage of a suit other than a suit of the nature referred to in section 16, clauses (*a*) to (*d*), the Court is satisfied, by affidavit or otherwise,—

(r) *Sukhlal v Eastern Bank Ltd* (1915) 42 Cal 735 31 I C 233

O. 38, r. 1.

(*a*) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(*i*) has absconded or left the local limits of the jurisdiction of the Court, or

(*ii*) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(*iii*) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(*b*) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

The proviso to the rule is new

Scope of the Order—Order 21 deals with the arrest of a judgment debtor and the attachment of his property *in execution of a decree* passed against him The present Order lays down rules for the arrest of a defendant and the attachment of his property *before judgment* The object of these rules is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him

"Reasonable probability."—Where the defendant is about to leave British India it is not necessary to prove any intent on his part to obstruct or delay the execution of any decree that may be passed against him It is enough if the circumstances under which he is about to leave British India afford a reasonable probability that any decree that may be passed against him in the suit will thereby be obstructed or delayed in execution (*s*).

The suit must be bona fide.—In every case where an application is made under this rule the Court must be satisfied that the suit is *bona fide* Where the plaintiff

(*s*) *Goulcree* v *Robert* (15 U) 2 N W P 353

is indisputably entitled to a part of the relief claimed in the plaint, the mere circumstance of the rest of the plaintiff's claim being of a disputable character does not render the suit *mala fide* (t)

Consequences of obtaining arrest on insufficient grounds—See s 95

Form—For form of warrant of arrest before judgment, see App F, form no 1

2. [S 479.] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

Security

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Deposit in Court—Where money is deposited by the defendant in Court under this rule, it is a payment into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour Where after payment into Court other judgment creditors of the defendant attach the money or the defendant becomes an insolvent, the plaintiff on obtaining his decree is entitled to priority over the claims of the attaching creditors and the Official Receiver The reason is that the amount so paid cannot be taken to have been ordered and levied as security for the defendant's appearance (u)

Payment by surety—Money paid by a surety after decree is liable to rateable distribution (v) See notes to 73 above

Appeal—An appeal lies from an order under this rule [O 43, r 1, cl (q)]

Form—For form of security, see App F, form no 2

3. [S. 480.] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender,

(t) *Probode Chunder v. Dowey* (1887) 14 Cal 695
(u) *Tamiah v. Gopaler* (1918) 41 Mad 1053
(v) *Chunilal v. Tulsiram* (1921) 26 C W N 169, 70 I C 539 (2) A C 19

O. 38, rr. 3-5.

the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Appeal.—An appeal lies from an order under this rule [O 43, r 1 cl (q)]

Form—For form of summons to defendant see App I, form no 3

Procedure where defendant fails to furnish security or find fresh security

4. [S 481] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees

Provided also that no person shall be detained in prison under this rule after he has complied with such order

Appeal—An order for arrest is appealable (u) under section 104 (h) though it is not specified under O 43 r 1

Form—For form of order for committal see App F, form no 4

Attachment before Judgment

Where defendant may be called upon to furnish security for production of property

5. [Ss 483, 484] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy

(u) Syed Hoosein v Chettiar (1924) 2 Rang 362 84 I C 270 (24) A R 361

the decree, or to appear and show cause why he should not furnish security. O. 38, r. 5.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Alterations in the rule.—The words "or has quitted the jurisdiction of the Court leaving therein property belonging to him which occurred in the old section after cl (b) of sub r (1) have been omitted.

Object of the rule.—*The main object of an attachment before judgment is* to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually passed, from the defendant's property (x)

The Court is satisfied.—Vague allegations are insufficient (y) The power to attach is not to be exercised lightly and without clear proof of the mischief aimed at (z)

"Is about to dispose of the whole or any part of his property."—The expression "property" includes property of every description whether moveable or immoveable (a) The expression "his property" refers to the property of the defendant It does not refer to property which is the joint property of the plaintiff and the defendant Thus where *A* sued *B* for partnership accounts, and applied for an attachment before judgment of the *partnership* property on the allegation that *B* was about to dispose of the same, it was held that the case was not one for an attachment before judgment, but for the appointment of a receiver under O 40 below (b) A man is not debarred from dealing with his property because a suit is filed against him and an attempt to sell a small portion of a large estate does not warrant the inference that the defendant *intends to obstruct or delay execution* (c)

Effect of vesting order on attachment before judgment.—See notes to r 10 below under the same head

Money paid into Court.—There is nothing in the language of this rule to give the plaintiff a charge on the money furnished by the defendant as security *Hence* if the defendant becomes an insolvent, the money vests in the Official Assignee The reason is that the money must be taken to have been ordered and levied *as security* to do what is specified in the rule, namely, to produce and place at the disposal of the Court, when required, the property referred to therein or the value thereof (d)

Surety for defendant.—Where the defendant dies pending the suit and the cause of action survives against his legal representatives and the legal representatives are brought on the record, the death of the defendant does not operate as a discharge of the surety (e)

(x) *Ganu Singh* v *Janji Lal* (1899) 26 Cal 531 at p 533

(y) *Senaji* v *Tannaji* (1921) 46 Bom 431 64 I C 580 ('2-) A B -76

(z) *Chintrlal Prasad* v *Hiralal* (1923) 73 I C 721 ('24) A I 312

(a) *Chedi Lal* v *Kuarji* (1895) 17 All 82 *Bishambar* v *Sukhdei* (1894) 16 All 186

(b) *Damodar* v *Panalal* (1907) 9 Bom L. R 540

(c) *Narroji* v *Deccan Bank* (1921) 45 Bom 1256, 63 I C 958

(d) *Frrulubijpa* v *The Official Assignee* (1916) 39 Mad 903 32 I C 190

(e) *Chandumal* v *Jeshanjbhai* (1917) 41 Bom. 402 33 I C 83

O. 38, rr. 3-5.

the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Appeal.—An appeal lies from an order under this rule [O 43, r 1, cl (q)]

Form —For form of summons to defendant, see App F, form no 3

Procedure where defendant fails to furnish security or find fresh security

4. [S 481] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Appeal —An order for arrest is appealable (w) under section 104 (h) though it is not specified under O 43 r 1

Form —For form of order for committal see App. F, form no 4

Attachment before Judgment

Where defendant may be called upon to furnish security for production of property

5. [Ss. 483, 484] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(*a*) is about to dispose of the whole or any part of his property, or

(*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy

(w) *Syed Hoossein* v *Chettiar* (1924) 2 Rang 362 84 I C 2 0 (24) A R 361

Appeal—An appeal lies from an order under this rule in so far as it directs an attachment The portion of the order which demands security is not appealable (*k*) See O 43, r 1, cl. (q)

Form—*For form of attachment before judgment, see App F, form no 7*

7. [S. 486.] Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of making attachment

Mode of attachment—See O 21

8. [S. 487.] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

Investigation of claim to property attached before judgment

Investigation of claim—The claim is investigated as under O 21, r 58, and the property is either released from attachment or the claim disallowed The party *against whom such summary order is passed may institute a suit as under O 21, r 63* Limitation is under article 120, but if the claim is preferred in execution proceedings article 11 applies (*l*)

9. [S. 488.] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed

Removal of attachment when security furnished or suit dismissed

Removal of attachment where suit dismissed—The latter part of the rule which requires that the attachment shall be removed when the suit is dismissed is no more than directory Hence even if no order is made withdrawing the attachment, the attachment falls to the ground on dismissal of the suit *A sues B and obtains an attach*ment before judgment The suit is dismissed but the Court omits to make an order withdrawing the attachment *A* then appeals from the decree Pending the appeal *B* sells the property that was attached before judgment to *C* Thereafter the suit is decreed on appeal *A* then applies for execution of the decree by the sale of the property on the footing that the attachment before judgment subsisted and that it was not therefore necessary to re attach it. *A* is not entitled to have the property sold. The attachment before judgment came to an end on the dismissal of *A*'s suit though no order was made withdrawing the attachment (*m*) Thus the reversal of the dismissal of the suit does not revive the attachment and in this respect the rule differs from that in regard to attachment after judgment. For in the case of attachment in execution

(*k*) [illegible]

(*l*) [illegible]

(*m*) *Abdul Rahman* v *Amin* (1918) 45 Cal. 780 44 I C 229 *Ram Chand* v *Pitam Mal* (1888) 10 All 506, *Sunrama* v *Meherban* (1911) 13 Cal L J 243, 9 I C 918

O. 38, rr. 9-11.

a decree in a suit under O 21, r 63, setting aside a release from attachment operates to revive the attachment and a private transfer made after release from attachment under O 21, r 60 will be void under s 64 if the right to attach is subsequently established by suit (n) See notes to O 21, r 60, Effect of order of release, on pp 668 669 above

Attachment before judgment not to affect rights of strangers nor bar decree holder from applying for sale

10. [S. 489] *Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.*

Effect of vesting order on attachment before judgment—Attachment before judgment does not confer any priority as against the Official Assignee, though the plaintiff at whose instance the attachment was made may ultimately obtain a decree in the suit *A* sues *B* and attaches *B*'s property before judgment. A decree is then passed for *A* Between the date of the attachment and the date of the decree *B*'s property vests in the Official Assignee under a vesting order The Official Assignee applies to the Court for removal of the attachment on the ground that the property has vested in him *A* contends that the attachment being prior to the date of the vesting order, his claim has a priority over that of the Official Assignee *A*'s contention will not be upheld, and the attachment will be removed (o) See notes to s. 64 under the head Effect of vesting order on attachment p 188 above

Attachment before judgment not to affect rights of persons not parties to the suit—*A* and *B* are members of a joint Hindu family *C* sues *A*, and obtains an attachment before judgment of *A*'s interest in the joint family property *C* then obtains a decree against *A* *A* dies after the decree On *A*'s death, his interest in the property passes by survivorship to *B*, and *C* is not entitled to have *A*'s share sold in execution of the decree (p) But according to the Madras High Court attachment before judgment followed by a decree does operate to defeat the right of survivorship (q)

Attachment before judgment not to bar rights of other decree-holders.—*A* institutes a suit against *B* and obtains an attachment before judgment of *B*'s property Subsequently *C*, another creditor of *B*, obtains a decree against *B* *C* is entitled to have the property attached and sold in execution of this decree The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (r)

Property attached before judgment not to be re-attached in execution of decree

11. [S 490] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

(n) *Protapchandra v Sarat Chandra* (19 1) 25 C W N 544 62 I C 348
(o) *Shib Kristo v Miller* (1884) 10 Cal 150 *Sidayappa v Poorana* (1885) 8 Mad 554 *Turner v Pestonji Fardunji* (1896) 20 Bom 403 *Krishnasamy v Official Assignee of Madras* (19 3) 26 Mad 673
(p) *Subrao v Mahadevi* (1914) 38 Bom 105 21 I C 330 *Sunderlal v Raghunandan* (1924) 3 Pat 250 83 I C 413 (4) A P 465
(q) *Sankaralinga v Official Receiver* (1925) 49 Mad L J 616 9? I C 504 (6) A M 7–
(r) *Basheshar Das v Ambika* (1915) 37 All [illegible] 29 I C 662

Scope of the rule—The effect of this rule is merely to take away the necessity for a re attachment of the property But it does not exempt the plaintiff, when a decree follows the attachment, from making the usual application for execution under O 21, r 11 (2) (s) This is now made clear by the substitution of the words "it shall not be necessary *upon an application for execution* of such decree to apply for re attachment of the property, for the words it shall not be necessary to re attach the property in execution of such decree Nor does the rule give the decree holder at whose instance the property was attached before judgment any right to preferential treatment over other decree holders who may have applied for a rateable distribution under s 73 (*t*) Again if the execution application is dismissed O 21, r 57, applies and the attachment ceases (*u*)

Objection that property attached before judgment is not saleable—An omission on the part of the defendant to take objection that the property sought to be attached before judgment is not saleable within the meaning of s 60, at the time when the application is made for attachment before judgment does not preclude the defendant from raising that objection when an application is made for execution of the decree passed in the suit (*v*)

Agricultural produce not attachable before judgment

12. [*New*] Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce

Small Cause Court not to attach immoveable property

13. [*New*] Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property

This rule was added by the Amending Act I of 1926 See notes to Sec 7 above

ORDER XXXIX

Temporary Injunctions and Interlocutory Orders.

Temporary Injunctions

Cases in which temporary injunction may be granted

1. [S 402] Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

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(*s*) *Pallanji v Jordan* (1888) 12 Bom 400 *Arunachellam v Haji Sheck Meera* (1911) 34 Mad 25 7 I C 856

(*t*) *Sendal Roy v Sree Canto* (1906) 33 Cal 6 9

(*u*) *Meyyappa v Chidambaram* (1924) 47 Mad 4 3 9 I C 144 ('24) A M 494 overruling *Venkatasubbiah v Venkata* (1919) 42 Mad 1 48 I C 3

(*v*) *Iswaram v Kattyayani* (1911) 35 Cal 418 10 I C 305

O. 39, r. 1.

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Temporary and perpetual injunctions.—Injunctions are of two kinds, temporary and perpetual. Temporary injunctions are regulated by rr. 1 and 2 of this Order; perpetual injunctions are regulated by ss. 55-57 of the Specific Relief Act I of 1877. A party against whom a perpetual injunction is granted is thereby restrained *for ever* from doing the act complained of. A perpetual injunction can only be granted by *final decree* made at the hearing and upon the merits of the suit. A temporary or *interim* injunction, on the other hand, may be granted *on an interlocutory application* at any stage of the suit. The injunction is called *temporary*, for it endures only *until* the suit is disposed of or *until* the further order of the Court (*w*). Thus if *A*'s neighbour commences to build on a plot of land belonging to him a house which, if completed, would obstruct the access of light and air enjoyed by *A* over the said plot to the windows of his house in respect of which he claims an easement, he (*A*) may sue his neighbour for a *perpetual* injunction restraining him from building so as to disturb the easement claimed by him (*A*), and may at any time after the institution of the suit apply to the Court under r. 2 below for a *temporary* injunction restraining the defendant from building *until the suit is disposed of*. Interference with *A*'s easement is an "injury" within the meaning of r. 2 below.

Principles governing temporary injunction.—"The granting of a temporary injunction under the powers conferred by this [rule] is a matter of discretion. True it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion" (*x*). One of those principles is that the Court in granting a temporary injunction must first see that there is a *bona fide* contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue (*y*). Or, as stated in the judgment of Cotton, L.J. in *Preston* v. *Luck* (*z*), to entitle a plaintiff to an interlocutory injunction the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. The real point, upon an application for a temporary injunction, is not how the question ought to be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *statu quo* until that question can be finally disposed of (*a*). Another principle is that where a perpetual injunction is sued for, and the plaintiff applies for a temporary injunction, the Court should grant a temporary injunction if the effect of not granting such an injuction will

(*w*) Specific Relief Act 1877, s. 53.

(*x*) *Per* White, C.J. in *Subba* v. *Haji Badsha* (1903) 26 Mad. 168, 174.

(*y*) *Doherty* v. *Allman* (1878) 3 App. Cas. 709; *Subba* v. *Haji Badsha* (1903) 26 Mad. 168, 175.

(*z*) (1884) 27 C. D. 497, 506.

(*a*) *Israil* v. *Shamser* (1914) 41 Cal. 436, 442-443, 21 I. C. 861.

be to deprive the plaintiff for ever of the right claimed by him in the suit (b) See notes to r. 2, "Principles governing temporary injunction to restrain breach of contracts" **O. 39, r. 1.**

Duration of temporary injunction.—A temporary injunction may be granted *until* the suit is disposed of or *until* the further order of the Court When a temporary injunction is granted "until the further order of the Court," and the injunction is not dissolved pending the suit, it comes to an end when the suit is disposed of *After* the decree is passed, the Court that passed the decree has no power to grant a further temporary injunction (c) But if an appeal is preferred from the decree, the Appellate Court, it would seem, may grant a temporary injunction under this rule (d) In an appeal from an order refusing a temporary injunction, the Appellate Court granted a temporary injunction "pending final decision of the suit," and this was held to terminate with the decree of the lower Court (e)

Illustration

A sues *B* in the Court of a Subordinate Judge for a declaration of his title to certain property, and obtains a temporary injunction restraining *B* from selling the property, which *B* was about to sell, "until the suit is disposed of *A* fails to prove his title to the property, and the suit is dismissed *A* appeals from the decree to the High Court [The suit being dismissed, the injunction is dissolved, and *B* can therefore sell the property] *A* then applies to the Court of the Subordinate Judge for a further injunction restraining *B* from selling the property until the appeal to the High Court has been heard The Subordinate Judge has no power to grant the injunction *Gossain Money* v *Guru Pershad* (1885) 11 Cal 146 In the above case, the Court said "If any Court has a right to grant an injunction now, we presume it would be the Court of Appeal"

Effect of temporary injunction.—The effect of a temporary injunction granted under this rule is not to make a subsequent alienation of the property void Hence if a party, against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void. The only penalty *A* incurs by alienating the property in spite of the injunction is that prescribed by r 2 (3), namely, that his other property may be attached and sold for awarding out of the sale proceeds compensation to the party on whose application the injunction was granted, and he may also be detained in the civil prison In this respect a temporary injunction has a different effect from an attachment, for it will be seen on referring to s 64 that when property is *attached*, any private transfer of the property contrary to the attachment is *void* against all claims enforceable under the attachment (f)

"Property in dispute in a suit."—Note that the property in respect of which

a plaintiff who is out of possession claims possession, the Court will not grant an injunction against the defendant in possession under a claim of right unless the threatened injury will be irreparable, and an injunction may be granted as to the

(b) *Nanabhai* v *Janardhan* (1888) 12 Bom 110 *Hemanta* v *Baranagore* (1914) 19 C W N 442, 24 I C 313

(c) *Shaikh Moheeooddeen* v *Shaikh Ahmed* (1870) 14 W R 384 *Gossain Money* v *Guru Pershad* (1885) 11 Cal 146

(d) *Gossain Money* v *Guru Pershad* (1885) 11 Cal 146 149 *Chando Bibi in the matter of the petition of* (1904) 26 All 311

(e) *Madho* v *Draupadi* (1921) 43 All 383, 61 I C 417

(f) *Delhi and London Bank* v *Ram Narain* (1887) 9 All 497 *Manohar Das* v *Ram Autar* (1903) 25 All 431 *Beli Ram* v *Ram Lal* (1925) 6 Lah 350 90 I C 952 (25) A L 644

(g) *Joynarain* v *Shibpersad* (1866) 6 W R Mis 1

(h) *Sundar Singh* v *Ram Saran* (1923) 5 Lah L J 262 81 I C 322 (23) A L 227

O. 39, r. 1. user of premises which the plaintiff has leased to the defendant (i) In any event the plaintiff must show a *prima facie* case in support of the title asserted by him (j) For this reason the Court will as a rule refuse interim injunctions to protect patents of recent origin (k) See notes to r 7 below

An application for an injunction restraining a party to the suit from interfering with the applicant s right to worship in, and to free access to, a temple which was the subject matter of the suit, pending the disposal of the suit, does not fall either under cl (a) or cl (b) of this rule (l)

Disposal of property in fraud of creditors.—The threat or intent to remove or dispose of property with a view to defraud creditors must be proved by definite evidence (m)

"Property in danger of being wrongfully sold in execution of a decree.—Certain property attached in execution of a decree obtained by *A* against *B* is notified for sale at the instance of *A* C, alleging that the property belongs to him and not to *B*, sues *A* and *B* for a declaration of his title to the property, and applies for an injunction under this rule to restrain *A* from bringing the property to sale until the suit is disposed of Has the Court power to grant the injunction under this rule? Yes for the case is one in which the property in dispute in the suit is "*in danger* of being wrongfully sold in execution of the decree" It is immaterial that the Court in which the suit is brought is different from the Court executing the decree, or, so long as it has jurisdiction to entertain the suit, that it is a Court of lower grade than the Court executing the decree Thus if the Court executing the decree is the Court of a District Judge and the Court in which the suit is brought is the Court of a Subordinate Judge, the latter Court though a Court of inferior grade, has power under this rule to stay the sale and execution proceedings pending before the District Court (n)

Injunction against a person not a party to the suit.—No injunction can be granted under this rule against a person who is not a party to the suit (o)

Appeal.—An appeal lies from an order refusing, as well as from one granting, a temporary injunction (p) An appeal also lies from an order purporting to be made under iths rule, though not warranted by it (q) See O 43, r 1, cl. (r)

Revision.—No appeal lies to the High Court from an order made by the lower Appellate Court under this rule [s. 104, sub s (2)] In two recent cases where a temporary injunction was refused by the lower Appellate Court, the High Court of Calcutta, without deciding whether it had power to revise the order, made an order granting an injunction in the exercise of powers conferred upon High Courts by s 15 of the Charter Act (r)

Breach—Disobedience of an injunction can be punished by the High Court as a contempt of Court (s)

Power of Chartered High Courts "to restrain a party" from proceeding with a suit pending in another Court.—As regards Chartered

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Bengal (1896) 23 Cal 351, *Abdullah Khan* v *Banke Lal* (1910) 33 All 79 7 I C 183 [F B]

(o) *Ram Sunder* v *Ram Dheyan* (1918) 3 Pat L J 456 458, 46 I C 244

(p) *Lachmi* v *Ram Charan* (1913) 35 All 425, 20

(q)

(r)

(s)

High Courts, it has been held that the powers of these Courts to grant an injunction are not confined to the terms of rules 1 and 2 of this Order *A* carrying on business at *D*, sues *B* in the Court of the Subordinate Judge of *D* to recover from *B* a sum of Rs 1,100 as balance due to him in respect of certain goods sent by him from *D* to *B* in Calcutta for sale as commission agent *B* then sues *A* in the High Court of Calcutta to recover from *A* a sum of Rs 2,300 as balance due to him in respect of the same transactions, and applies to the High Court of Calcutta for a temporary injunction to restrain *A* from proceeding with the suit in the Court at *D* until the disposal o the suit in the High Court It is clear that this case is not covered either by r 1 or r 2 of this Order Has the High Court power to grant the injunction ? It has been held by the Calcutta High Court that the powers of High Courts to grant a temporary injunction are not confined to the terms of rr 1 and 2, and that these Courts have *inherent* power under their general equity jurisdiction to grant such an injunction independently of the provisions of the Code, and, further, that such power can be exercised by a single Judge sitting on the Original Side of the High Court (*t*) The same view has been recently taken by the High Court of Bombay, but the injunction granted in that case was rather peculiar in form, namely, that *A* should be restrained from proceeding with the suit in the Court of the Subordinate Judge at *D* in such a way as to delay or embarrass the trial of the suit in the High Court (*u*) The Calcutta decisions, however, are not uniform as to whether this power can be exercised if *A* did not reside within the local limits of the ordinary original civil jurisdiction of the Calcutta High Court, it being held by Sale, J , that the power can be exercised even if *A* did not reside within the limits of the jurisdiction (*v*), while by Fletcher, J , (*w*) and Stephen, J , (*x*), that it cannot be exercised unless *A* resided within those limits The point arose in a Bombay case but it was there held that as *A* had been served and had appeared in the suit without protest, he must be deemed to have submitted to the jurisdiction of the Bombay Court and the Court had therefore power to grant the injunction (*y*), so also in a Patna case (*z*)

It has also been held by the High Court of Bombay that it has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the High Court suit relates (*a*)

The next question to consider is, whether the power of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court is confined to suits pending in a *Court subordinate thereto*, or whether it extends to suits pending in *any Court in British India* In one of the cases cited above (*b*), the High Court of *Calcutta* made an order restraining a party from proceeding with a suit pending in the Court of the Subordinate Judge of Bareilly, a Court subordinate to the High Court of *Allahabad* In a recent Bombay case, Macleod, J , expressed the opinion that though the High Court has power to restrain a party from proceeding with a suit pending in a Court subordinate to it, it has no such power in respect of a suit pending in a Court *not* subordinate to it (*c*) In support of the above view, the learned Judge relied on the provisions of s 56, cl (b), of the Specific Relief Act, 1877, by which it is enacted that an injunction cannot be granted to stay proceedings in a Court not subordinate to that from which the injunction is sought

(*t*) *Mungle Chand* v *Gopal Ram* (1907) 34 Cal 101 *Rash Behary* v *Bhowani Churn* (1907) 34 Cal 97

(*u*) *Mulchand* v *Gill & Co* (1920) 44 Bom 283 53 I C 515

(*v*) (1907) 34 Cal 101 *supra*

(*w*) *Vulcan Iron Works* v *Bishumbhur* (1909) 36 Cal 233 1 I C 927

(*x*) *Jumna Das* v *Harcharan Dass* (1911) 38 Cal 405, 11 I C 416

(*y*) *Mulchand* v *Gill & Co* (1920) 44 Bom 283 294 53 I C 518

(*z*) *Kumar Ganga* v *Prithichand Lal* (1922) 1 Pat 356 69 I C 891 (22) A P 34

(*a*) *Uderam* v *Hyderally* (1909) 33 Bom 469, 3 I C 900 distinguishing *Jairamdas* v *Zamonal* (1903) 27 Bom 357

(*b*) (1907) 34 Cal 101 *supra*

(*c*) *Narayan* v *Janibai* (1915) 39 Bom 604, 30 I C 560

O. 39, r. 1. A furtl er question that arises in this connection is whether a British Indian Court has power to restrain a party from proceeding with a suit pending in a Court of a Native State It has been held by the High Court of Allahabad that it has not (*d*) The contrary however was assumed by the High Court of Bombay in the undermentioned case (*e*) The Calcutta High Court will grant such an injunction if applied for promptly and before time and trouble has been expended in the foreign suit (*f*) In England an injunction is granted to stay an action commenced in a foreign jurisdiction only if the applicant proves a substantial case of vexation resulting from the identity of proceedings remedies and benefits or from the existence of some motive other than a *bona fide* desire to determine disputes (*g*)

Appeal.—No appeal lies from an order of a High Court refusing to restrain a defendant from prosecuting his suit in another Court Such an order is not appealable under the Code Nor is it a judgment within the meaning of cl 12 of the Charter (*l*)

Power of High Court "to stay proceedings" pending in a subordinate Court.—We have dealt in the preceding paragraph with the power of a Chartered High Court to *restrain a party* to a suit pending before it from proceeding with a suit pending in another Court The question we have now to consider is whether a Chartered High Court has power in a suit pending before it to issue a *prohibition to a subordinate Court* in the mufassal from proceeding with a suit pending before the latter Court and if so whether that power can be exercised by a single Judge sitting on the *Original* Side of the High Court It has been held by a Full Bench of the Bombay High Court that a Chartered High Court has power to make an order directing a Subordinate Court not to proceed further with a suit pending in the latter Court but that such an order appertains to the *Appellate* and not to the *Original* Side of the High Court, and that it can therefore only be made by those Judges to whom the Appellate Side work so assigned by Rules made under s 13 of the Charter Act that is by a Division Court consisting of two Judges and that it cannot be made by a single Judge sitting on the

to the *Ratnagiri Court* and not merely to the *parties* from proceeding with the suit in that Court and it was held that Macleod J had no jurisdiction to make the order On the other hand Macleod J who was one of the Judges constituting the Full Bench declined to read his order as a *direct prohibition to the Ratnagiri Court* and held that a single Judge sitting on the Original Side was competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge s Court in the mufassal, *and so in effect stay the proceedings* within the meaning of s 56 cl (b) referred to above As to transfer of suits from Presidency Small Cause Courts to High Court see notes to cl 13 of the Letters Patent

This rule does not apply to probate proceedings—An injunction cannot be granted under this rule in a probate proceeding The reason is that the only question in controversy in such a proceeding is that of *representation* of the estate of the deceased there is no question of *title* in such a proceeding and it cannot therefore be said that there is any property in dispute in such a proceeding as contemplated by this rule

(*d*) *Maqbul* v *Amir Hasan* (1915) 37 All 1 25 I C 193

(*e*) *Vanichand* v *Lakhmichand* (1919) 44 Bom 272 53 I C 395

(*f*) *Tarachand* v *Sautoke Chand* (1920) 24 C W N 735 59 I C 218

(*g*) *Cohen* v *Rothfield* [1919] 1 K B 410 414

(*h*) 44 Bom 272 53 I C 395 *supra*

(*i*) *Narayan* v *Jankibai* (1915) 39 Bom 604 30 I C 560

If the Court is satisfied that the estate of the deceased is in danger of being wasted or wrongfully alienated, it may appoint an administrator *pendente lite*, and it may also make an order under r 7 below, but it cannot grant an injunction under this rule (j)

Form.—For form of temporary injunction, see App F, form no 8

Injunction to restrain repetition or continuance of breach

2 [S. 493] (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release

(4) No attachment under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto

Alterations in the rule —

1 The words of any kind after the word injury in sub r (1) are new See notes below under the head Scope of the rule

2 The words unless in the meantime the Court directs his release in sub-r (3) are also new See in this connection the undermentioned case (k)

Scope of the rule—Rule 1 enables the Court to grant temporary injunctions in the cases specified in cls. (a) and (b) thereof The present rule enables the Court to grant temporary injunctions to restrain a defendant from committing the breach of a contract or other injury *of any kind* The words of any kind are new They

(j) *Nirod v Chamalarani* (1914) 19 C W N 205 27 I C 617

(k) *Advocate-General of Bombay v Gangji* (1895) 19 Bom 152.

O. 39, r 2. have been added to supersede an Allahabad decision where it was held that the words "other injury" in the old section did not include acts of trespass upon property (l) Such acts are now within this rule In a Bombay case a lessee sought to execute a decree to evict his sub lessee But at the date of the decree the term of the head lease had expired and the head lessor sued to restrain the lessee from taking possession Macleod, C J, held that neither rule 1 nor rule 2 applied (m) A Court hearing an election petition under rules framed under the Madras District Municipalities Act cannot grant a temporary injunction restraining the candidate from taking his seat (n)

Principles governing temporary injunction to restrain breach of contract.—*Temporary* injunctions to restrain the breach of a contract are regulated by the present rule *Perpetual* injunctions to restrain the breach of a contract are regulated by the Specific Relief Act, 1877, s 56, cl (f), and s 57 Section 56, cl (f), of the Specific Relief Act, provides that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced Now the performance of a contract is not specifically enforced where damages would afford adequate relief Hence no injunction can be granted where damages afford adequate relief "The very first of principle of injunction law is that you do not obtain injunctions for actionable wrongs [or for breach of contracts] for which damages are the proper remedy" (o) In the Bombay case of *Nusserwanji* v *Gordon* (p), it was observed by Sir Charles Sargent that the issue of a *temporary* injunction is governed by the same principles as the granting of a *permanent* injunction at the trial of a case Referring to these observations, Sir Arnold White in a Madras case said "Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision, and that the law with regard to the granting of a temporary injunction is to be found in the Code of Civil Procedure and is declared to be a matter for *discretion*, if it were necessary to consider the point, I am not sure I should be prepared to go quite so far as Sir Charles Sargent" (q) However that may be, the following two rules seem to govern all cases on the subject now under consideration —

1 If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract, and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of, the Court will decline to grant a temporary injunction if the plaint and the affidavits filed by the parties show *on the face of them* that the case is not one for a

rain (v), may be referred to this rule In the first case, the suit was by an *association* of artisans consisting of 57 members for an injunction against one of them to restrain him from committing the breach of a contract which provided that all the members of the association should bring the business of working and carving in wood into one shop and should divide the profits among them and *that no member should take any order on his own account.* The plaintiffs applied for a temporary injunction against the defendant to prevent the breach of the contract until the disposal of the suit, but the injunction

(p) (1882) 6 Bom 266, p 379

(q) *Subba* v *Haji Badsha* (1903) 26 Mad 168 175
(r) (1877) 1 Bom 550
(s) (1882) 6 Bom 5
(t) (1882) 6 Bom 266
(u) (1889) 13 Bom 56
(v) (1876) 1 Cal 74

was refused, for the agreement being on the face of it illegal (as the association, though it consisted of 57 members was not registered as a Company), no specific performance or injunction could be granted In the second case, the suit was for a perpetual injunction to prevent the breach of an *agreement* for a charter party The Court refused to grant a temporary injunction to restrain the breach on the ground that a perpetual injunction could not be granted to restrain the breach of such an agreement though a perpetual injunction might be granted to prevent the breach of an *actually completed charter party* In the third case an application for a temporary injunction was made by the agents of a company as plaintiffs to restrain the company from employing a firm of solicitors in contravention of an agreement between the company and the agents whereby the plaintiff s firm were appointed agents of the company for 25 years and the agents were empowered to employ solicitors for the company during that period The Court refused the application on the ground that since a perpetual injunction could not be *granted to restrain the company from employing persons other than the plaintiff s firm* as agents of the company a temporary injunction should not be granted to restrain the company from employing solicitors other than those of the plaintiff s choice In the fourth case the Court refused to grant a temporary injunction to restrain a Hindu widow from adopting a son in breach of an agreement entered into by her not to adopt a son The order of refusal was based on the ground that the Court could not grant a perpetual injunction to prevent the breach of such a contract In the last of the cases cited above the parties were Hindus and the suit was brought by the plaintiff against the defendant for specific performance of a contract whereby the defendant agreed to give his minor daughter in marriage to the plaintiff The plaintiff applied for an interim injunction to restrain the defendant from giving away the girl in marriage to another person to whom the defendant was about to marry the girl, but the application was refused on the ground that the contract was not one of which specific performance could be enforced or the breach of which could be restrained by a perpetual injunction

2 The converse of rule (1) is not always true that is the Court will not grant a temporary injunction before the hearing in every case where a perpetual injunction might fitly be granted at the hearing for to justify a temporary injunction not only must the case be such that an injunction is the appropriate relief but there must be the further ingredient that unless the defendant is restrained *forthwith* by a temporary injunction irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits (w) But if a case is a proper one for specific performance and irreparable injury is likely to be caused to the plaintiff unless the breach of the contract is forthwith restrained the Court will grant a temporary injunction to restrain the breach of the contract Thus where A sued B for specific performance of a contract whereby in consideration of A having advanced money to B to working certain mica mines, B agreed to deliver all the mica produced from the mines to A, *and not to deliver any portion thereof to any other person* and also for an injunction to restrain the breach thereof and *applied for a temporary injunction to restrain B from delivering any portion of the mica* to another firm to whom B had arranged in breach of his contract to consign a portion the Court held that the case was a fit one for a temporary injunction, and the injunction was granted (x) But if the existence of the contract itself is denied no temporary injunction can be granted (y)

(w) See Collett s Specific R ll f Act 263 264 *Nanabhai* v *Janardhan* (18) 12 Bom 110

(x) *Subba* v *Haji Badsha* (1903) 26 Mad 168

Madras Ry Co v *Rust* (1891) 14 Mad 18

(y) *Manohar* v *Jai Narayen* (1920) 2 Lah L J 253 2 I C 403

O. 39, rr. 2-5.

Sub-rule (3).—The *powers conferred by this sub rule can only be exercised if the Court is set in motion by a party who deems himself aggrieved, hence where a District Court committed a defendant to jail of its own motion for disobeying an injunction of the Court, it was held that the order of committal was ultra vires.* Note, however, that a High Court has inherent power to commit a defaulting party for contempt, hence a High Court can commit a defendant to jail *of its own motion* for disobeying an injunction issued by such Court (z) See s 151 above

Under sub r (3) the Court can in its discretion order either arrest or attachment of property, it is not bound in the first instance to make an order of attachment and then order imprisonment There is no foundation for the proposition that the Court can only make an order of imprisonment after an order of attachment

If the application to commit was made while the suit was pending, the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for disobedience to the injunction (a)

A Court to which the business of the Court granting the injunction is transferred can exercise powers of punishment under this sub rule (b)

Temporary mandatory injunction.—The Courts in England have the applications (c) And so have original civil jurisdiction (d)

Appeal.—An appeal lies under O 43 r 1 (r) from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction granted under this rule, and the Appellate Court may on appeal pass the order which the lower Court should have passed (f)

3 [S. 494] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party

Before granting injunction Court to direct notice to opposite party

4 [S 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order

Order for injunction may be discharged varied or set aside

Appeal—An appeal lies from an order under this rule (O 43 r 1, cl (r))

5 [S 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain

Injunction to corporation binding on its officers

(z) Kochappa v Sachi Devi (1903) 26 Mad 494

(a) Suppi v Kunhi (1916) 39 Mad 907 34 I C 588

(d) Champsey v Jamna Flour Mills (1914) 16 Bom L R 566 23 I C 121

(e) 445 21 I C 861 (F.B.)

(f) Suppi v Kunhi (1916) 39 Mad 907 34 I C 588 Diwan Chand v Jharia Coal Co (1923) 5 Lah L J 14.

Interlocutory Orders.

O. 39, rr. 6, 7.

Power to order interim sale

6 The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once

The words "or which for any other just and sufficient cause it may be desirable to have sold at once" have been added so as to empower the Court to order a sale of securities where the state of the market requires such a course

Detention preservation inspection etc of subject matter of suit

7 [S. 499, S. C R., O. 50, r. 3.] (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit—

(*a*) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein,

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and

(*c*) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule

The words "or as to which any question may arise therein" in sub r 1 cl. (a) are new

Inspection of property which is the subject-matter of the suit.—In a suit by A against *B* for damages for injury alleged to have been caused to A's house by the erection of *B*'s house, the Court may make an order on *B*'s application for inspection of A's house to determine the alleged injury, A's house being in such a case "the subject matter of the suit" (*g*)

(*g*) *Dhorensy* v *Lodha* ([illegible]) 21 Cal [illegible]

O. 39, rr. 8-10.

8 [S. 500] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit

Application for such orders to be after notice

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance

9 [S 501] Where land paying revenue to Government, or a tenure liable to sale, is the subject matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure,

When party may be put in immediate possession of land the subject matter of suit

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

10 [S 502] Where the subject matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

Deposit of money etc in Court

Deposit of money in Court—Suppose *A* sues *B* to recover a sum of Rs 5 000 Suppose *B* admits Rs 4 000 to be due to *A* and contests *A*'s claim as to the balance of Rs. 1 000 In such a case, *A* may apply to the Court to direct *B* to deposit Rs 4 000 in Court or to deliver the same to him (*A*)

Holds.—This rule applies only when the party making the admission *holds* the property or other thing which the party in whose favour the order is made seeks to have delivered to him (*h*)

" Appeal "—An appeal lies from an order under this rule [O 43, r 1, cl. (r)]

(*h*) *Rajah Parthasaradhi* v *Rajah Rangiah* (1904) 27 Mad 168

ORDER XL

Appointment of Receivers

Appointment of receivers

O. 40, r. 1

1. [S 503] (1) Where it appears to the Court to be just and convenient, the Court may by order—

(*a*) appoint a receiver of any property, whether before or after decree,

(*b*) remove any person from the possession or custody of the property,

(*c*) commit the same to the possession, custody or management of the receiver, and

(*d*) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove

Alterations in the rule—

1 The words "to be just and convenient" have been substituted for the words "to be necessary for the realization, preservation or better custody or management of any property moveable or immoveable the subject of a suit or attachment" The result is that the Court may now appoint a receiver not only in the particular cases specified in the old section but in every case in which it appears to the Court to be *just and convenient* to do so Thus a receiver may be appointed in a suit for partition (*i*) See notes below under the head "Just and convenient" As to execution of decrees by appointment of a receiver see s. 51 cl. (d)

2 The words "whether before or after decree" in cl. (*a*) are new They give effect to the undermentioned decision under the old section (*j*)

3 The words "subject matter of a suit" which occurred in the corresponding s. 503 of the Code of 1882 have been omitted. See notes below under the head "Receiver in proceedings other than a suit"

(*i*) *Ramji Lam* v. *Salgram* (1909) 14 Cal W N [illegible] 43 S I C. 96 *Govind* v. *Baladohrao* (19[illegible]) [illegible] Bom L R 21[illegible] 55 I C. 8 7

(*j*) *Shunmugam* v. *Moidin* (1884) 8 Mad [illegible]

O. 40, r. 1. **Receiver in proceedings other than a suit.**—Sec 503 of the Code of 1882 contained the words 'subject matter of a suit" The result was that under that section a receiver could only be appointed in a suit Those words have been omitted in the present rule so that a receiver may now be appointed even in proceedings other than a suit (k) A Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificates Act (l), but may appoint a receiver in a testamentary suit (m), or proceedings under the Guardian and Wards Act (n) If no suit or litigious proceeding is pending with reference to the property, the Court has no jurisdiction to appoint a receiver of it A receiver therefore cannot be appointed after the suit is compromised (o)

Courts empowered under this order.—Under the Code of 1882 (s 505), a receiver could only be appointed by High Courts and District Courts, and not by the Courts subordinate to District Courts This bar has been now removed by the omission of s 505 A receiver may now be appointed by Subordinate Judges also

A receiver is an officer of the Court.—"The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject matter of the litigation pending a judicial determination of the rights of the parties thereto (p) The receiver is appointed for the benefit of all concerned' he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed (q) The appointment [of a receiver] is the act of the Court and made in the interests of justice [A receiver] is an officer or representative of the Court, and subject to its orders His possession is the possession of the Court by its receiver and the tenants in possession, when he is appointed to receive rents and profits of immoveable property, become virtually tenants *pro hac vice* of the Court, their landlord His possession is the possession of all the parties to the proceedings according to their titles The moneys in his hands are in *custodia legis* for the person who can make a title to them (r)

Legal consequences arising from the fact that a receiver is an officer of the Court:—

(1) *Attachment*.—Property in the hands of a receiver cannot be attached without the leave of the Court first obtained. Thus if a receiver is appointed of certain property in a suit between *A* and *B*, and *C* obtains a decree against *A* or *B*, *C* cannot in execution of his decree attach the property in the hands of the receiver without the leave of the Court such an attachment is an interference with the Court's possession through its officer, the receiver (s) But if a receiver is appointed of certain property in a suit between *A* and *B* and the property was mortgaged by *A* to *C* before the receiver was appointed, and *C* obtains a decree for sale of the mortgaged property, *C* may bring the property to sale, though it may be in the hands of the receiver, without the leave of the Court. The reason is that no attachment is necessary before sale in the case of a mortgage-decree and no attachment being necessary, there cannot be any interference with the possession of the receiver (t)

(k) *Asadali v Mahomed* (1916) 43 Cal 986 36 I C 177

[illegible]

Pat L J 513 58 I C. 403

(p) *Jagat Tarini Dasi v Naba Gopal* (1907) 34 Cal 305 316

(q) *Ib* p 317

(r) *Orr v Muthia* (1894) 17 Mad 501 503 *Administrator-General v Prem Lall* (1895) 22 Cal 1011 1015 22 I A 203 *Dwijendra v Jogesh* (1924) 39 Cal L J 40 79 I C 520 ('24) A C [illegible]

(s) *Kahn v Ali Mahomed* (1892) 16 Bom 377

(t) *Jogendra v Debendra* (1899) 26 Cal 127

(2) *Suit by or against receiver Leave of Court* —A receiver cannot sue or be sued **O. 40, r. 1** except with the leave of the Court by which he was appointed receiver (u) A party feeling aggrieved by the conduct of a receiver may seek redress against him in the very suit in which he was appointed receiver, or he may bring a separate suit against the receiver in which case he must obtain the leave of the Court (v) The application in the suit is for an examination *pro interesse suo* (w) The Court will dispose of the matter summarily in simple cases (x) and if the applicant has shown diligence (x1) But if questions of title are involved, the Court will authorize a suit to be brought against the receiver (x2) No appeal lies against an order granting leave to sue a receiver (y) There is no *statutory* provision which requires a party to take the leave of the Court to sue a receiver The rule has come down to us as a part of the rules of equity, binding upon all Courts of Justice in this country It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of the Court is not to be obstructed by suits designed to disturb the possession of the Court The institution of such suits is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a *suit is required to take the leave of the Court so as to absolve himself from that charge* The grant of such leave is made not in exercise of any power conferred by statute, but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority (z) In *Pramatha Nath* v *Khetra Nath* (a) Bodilly J, held that the leave of the Court to sue a receiver was a condition precedent to the right to sue, and that if the leave was not obtained before suit, it could not be granted subsequent to the institution of the suit and the suit should be dismissed This decision was dissented from in subsequent Calcutta cases where it was held that the leave may be granted even after the institution of the suit (b) In a recent Bombay case (c) Pratt, J, after an exhaustive review of the case law on the subject, came to the same conclusion, the learned judge held that failure to obtain leave prior to the institution of the suit was cured by subsequent leave As regards suits by a receiver it has been recently held by the High Court of Calcutta that if the suit is instituted without the leave of the Court the Court may grant leave after the institution of the suit to continue the suit (d) So also by the Madras High Court (e)

It may here be noted that a receiver is not a necessary party to a suit for a declaration of title and possession of property of which he is appointed receiver (f) nor can he *be made a party to a proceeding under sec 145 of the Criminal Procedure Code merely* in his capacity of receiver (g) There is no right of action against a Tahsildar or manager appointed by a receiver (h)

(3) *Debts incurred by receiver in business* —If a receiver is appointed of the estate of a deceased person with authority to continue the business carried on by the deceased, and in the course of such business debts are properly incurred by the receiver, the persons to whom the debts have become due may proceed not only against the receiver

(u) *Miller* v *Ram Ranjan* (1884) 10 Cal 1014 *Dinna* v *Kumar Chandra* (1903) 30 Cal 593 *Fink* v *Corporation of Calcutta* (1903) 30 Cal 721

(v) *Kamatchi* v *Sundaram* (1903) 26 Mad 497

(w) *Sreedhar* v *Kalimoni* (1925) 41 Cal L J 197 86 I C 677, (25) A C 681

(x) *K K Secunder* v *J A N Kanyar* (1923) 1 Rang 133 76 I C 441 (23) A R 308

(x1) (1925) 41 Cal L J 197 86 I C 677 (25) A C 681, Supra

(x2) (1925) 41 Cal L J 197, 86 I C 677 (25) A C 681, Supra

(y) *Shrinivas* v *Wasa* (1920) 45 Bom 92 59 I C 421

(z) *Braja Bhusan* v *Sris Chandra* (1919) 4 Pat L J 20 53 47 I C 719

(a) (1905) 32 Cal 2 0

(b) [illegible]

(c) [illegible] 58 I C 411

(d) *Rustomjee* v *Frederic Gaebele* (1919) 46 Cal 352 51 I C 486

(e) *Ammukutty* v *Manavikraman* (1920) 43 Mad 793 59 I C 568

(f) *Sattya* v *Golap* (1900) 5 Cal W N 27 *Rodger* v *Ashutosh* (1902) 6 Cal W N 853 *Moos* v *Abdul Husain* (1925) 27 Bom L R 1117, 90 I C 600 (25) A B 523

(g) *Dunne* v *Kumar Chandra* (1903) 30 Cal 593

(h) *Harihar* v *Jaharuddin* (1922) 26 C W N 992.

O. 40, r 1. personally but *also against the estate of the deceased* for the recovery of their debts, and they are entitled to payment of their debts in priority to other creditors of the estate The right to proceed against the estate is founded on the just and equitable principle that as the acts of a receiver acting within his authority are the acts of the Court the estate cannot be permitted to enjoy the benefits of those acts without being held liable for the obligations arising out of them (*i*)

(4) *Loss occasioned by receiver's default*—If any loss is occasioned to the property by the wilful default or gross negligence of the receiver the loss is to be borne not by the party on whose application the receiver was appointed (for a receiver is not an agent of such party) but by the estate in the first instance The party damnified by the loss may then proceed against the receiver (*j*) See r 4 below

( ) *Agreement controlling receiver's powers*—A receiver being an officer of the Court it is contempt of Court on the part of any of the parties to enter into an agreement with him restricting and controlling his powers The Court alone has the power to determine the powers of a receiver (*k*)

(6) *Remuneration*—A receiver being an officer of the Court, the Court alone has to determine his fees or remuneration (r 2 below) Hence a promise by a party to pay the remuneration of a receiver without leave of the Court is against law, and is not binding on the promisor (*l*)

(7) *Criminal Procedure Code s 145*—Where a receiver is appointed by a Court of property the subject of a suit a Magistrate has no jurisdiction under sec 145 of the Code of Criminal Procedure to interfere with him in respect of his possession of the property without the sanction of the Court his possession being the possession of the Court ( ) It may here be noted that a Civil Court has no power under this rule to appoint a receiver *in s persession of* a receiver appointed by a Magistrate under sec 146, cl (2), of the Criminal Procedure Code (*n*) See sub rule (2)

(8) *Prosecution of receiver*—A receiver appointed by the High Court who has under its orders taken possession of property cannot be prosecuted for criminal breach of trust in respect thereof without first obtaining the leave of the Court (*o*)

"Just and convenient."—These words have been taken from the Judicature Act 18 3 s 25 sub s (8) The words in that Act are just *or* convenient but they have been construed to mean just *and* convenient (*p*) The words just and convenient do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient they mean that the Court should appoint a receiver for the protection of rights or for the prevention of injury *according to legal principles* (*q*) Hence the Court should not appoint a receiver of property in the possession of the defendant who claims it by a *legal* title unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property (*r*) On the other hand where property is shown to be *in n l o i e* in the enjoyment of no one the Court can hardly do wrong in appointing a receiver for it is the common interest of all parties to prevent a scramble (*s*) The mere circumstance that the appointment of a receiver will do no harm to

(*i*) *Mo an I bi* v *Slyan a L b* (1903) 30 Cal 937 *Slo t* v *Pickeri g* (1883) 6 Mad 135

(*j*) *Orr* v *Mutt a* (1894) 17 Mad 501 *Mu hia* v *Orr* (1897) 20 Mad 274

(*k*) *Ma i ck Lal* v *Surrat Coo naree* (1895) 22 Cal 648

(*l*) *Prokash Chandra* v *Adi m* (1903) 30 Cal 696

(*m*) *Dunne* v *Ku nar Chandra* (1903) 30 Cal 593

(*n*) *B dy prasad* v *Ashrafi* (1913) 40 Cal 86 ..D I C 69

(*o*) *Sa tok C and* v *Emperor* (1919) 46 Cal 43..

(*p*)

(*q*)

(*r*) ... *Cl and dat* v *Pad nanand* (189.) .. Cal 459

(*s*) *O ren* v *Hom an* (1853) 10 H L C 997 *All na B bi* v *Syed Islak* (19..) .. C W N 836 ... I C 153 (..) A C 9 0

any one is no ground for appointing a receiver (t), and a receiver cannot be appointed merely for the purpose of ascertaining the income of an estate in order to fix the amount of maintenance to be paid out of it (u). See notes "alterations in the rules," No 1, p 897 above, and notes below "Cases in which a receiver may be appointed." See also Specific Relief Act 1 of 1877, s 44.

Which Court may appoint a receiver.—The power to appoint a receiver rests only with the Court in which the suit is brought in which it is sought to appoint a receiver. Hence a District Judge has no power to appoint a receiver of property which is the subject of a suit in *another* Court, even though such Court may be subordinate to his own (v).

Whether a receiver can be appointed when an executor is in possession.—In England the rule is that the Court will not appoint a receiver against an executor unless gross misconduct is shown and the same rule, it is submitted, applies to the case of an executor of the will of a person subject to the provisions of the Indian Succession Act. This rule however, does not apply in the case of an executor of the will of a Mahomedan. The reason is that while in the case of persons governed by the Succession Act, a testator can dispose of the *whole* of his property by his will, a Mahomedan testator cannot dispose of more than one third of his property by his will (w).

Where a receiver is appointed of the estate of a deceased person, and the estate is being administered by the Court, the Court may authorize the receiver to pay out of the estate in his hands pressing claims against the estate (x).

Company.—The Court has no jurisdiction to appoint a receiver of a company (y). If it is necessary to protect the assets recourse must be had to the provisions of the Companies Acts.

Temporary injunctions and appointment of receiver.—The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that while in either case it must be shown that the property should be preserved from waste or alienation in the former case it is sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case a good *prima facie* title to the property over which the receiver is sought to be appointed has to be made out (z).

Cases in which a receiver may be appointed.—A and B constitute members of a trading joint family. A sues B for partition of the joint family property, and applies for the appointment of a receiver alleging that B has misappropriated large sums of money and thrown the accounts into confusion. Here it is *just and convenient* that a receiver should be appointed, for the object is the preservation of the property which is the subject of the suit (a). But in a partition suit where the joint family property consists of land, a receiver will not be appointed unless the plaintiff shows that he has an excellent chance of succeeding and that the property is in danger of being wasted (b). Nor is it sufficient, in a suit for the possession of land and mesne profits, that the defendant is a man of no substance from whom it would be impossible to recover mesne profits (c). A receiver should not be appointed in supersession of a

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(t) *Srimati v. Tem Madhub* (1883) 5 All 556. *Harris v. Beauchamp* [1894] I Q B 801. *Kunhin v. Minnan* (1924) 46 Mad L J 113, 79 I C 561, ('24) A M 482.
(u) *Tayimnal v. Tyaru* (1925) ('25) A M 1243, 89 I C 943.
(v) *Lalaful v. Anun* (1896) 23 Cal 517.
(w) *Hafizabai v. Kazi Abdul Karim* (1895) 19 Bom 83.
(x) *Motiraku v. Premraku* (1892) 16 Bom 511.
(y) *Kailash Chandra v. Sadar Munsif* (19—) 52 Cal 513, 88 I C 8—6 ('—) A C 817.
(z) *Chandidat v. Padmanand* (1895) 22 Cal 459. See also *Sham Chand v. Bhaya Lal* (1900) 5 Cal W N 365.
(a) *Hanumayya v. Venkatasubbayya* (1895) 18 Mad 23.
(b) *Govind Narayan v. Vallabhrao* (1920) 22 Bom L R 417, 55 I C 827.
(c) *Muhammad Askari v. Nisar Husain* (1921) 43 All 311, 60 I C 901.

O. 40, r. 1. *bona fide* possession unless there is some substantial ground for interference (*d*) The removal of a large amount of property by the defendant under circumstances which might fairly give rise to suspicion during the pendency of a suit in which the question of title to that property would be determined, is a good ground for the appointment of a receiver (*e*) The anxiety of a life tenant to transfer lands to a stranger is a danger to the interests of the reversioner, and it has been said that this is a matter that the Court will take into consideration with reference to the appointment of a receiver (*f*) Likewise a receiver may be appointed of mortgaged property in a suit for foreclosure or sale, is a proper case is made out (*g*) The circumstances under which a receiver may be appointed in a mortgage suit are explained in the undermentioned cases (*h*) The possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who procured the appointment If a receiver is appointed at the instance of a first mortgagee without objection by the second mortgagee the fact that the latter has obtained a decree on his mortgage and purchased the equity of redemption does not entitle him to dispossess the receiver (*i*) A receiver may also be appointed in a testamentary suit (*j*), or in a suit under s 92 for the administration of a trust (*k*)

Partnership suits —In considering the question of the appointment of a receiver in partnership suit a distinction has to be drawn between cases in which the contest is between partners and cases in which the contest is between partners on the one hand and non partners on the other

In the first class of cases that is where one partner seeks to have a receiver appointed against his co partners it is necessary to distinguish cases in which the partnership has already been dissolved from those in which the partnership is still subsisting If the partnership is already dissolved, the Court usually appoints a receiver, almost as a matter of course (*l*) The jurisdiction of the Court to appoint a receiver is not ousted by an arbitration clause providing for a reference to arbitration of all matters in dispute between the parties (*m*) But if the partnership is still subsisting, no receiver will be appointed unless some special grounds for the appointment can be shown There must be fraud or gross misconduct of some kind (*n*) or wilful denial of the complaining partner s rights (*o*), or persistence under cover of right in conduct endangering the assets (*p*)

In the second class of cases, that is where the contest is between partners on the one hand and non partners on the other, *e g*, legal representatives of a late partner a receiver will not be granted *against a member of the firm* at the instance of the legal representatives, unless some special grounds for the interference of the Court can be established But it is a matter of course to appoint a receiver where such appointment is sought by a partner *against the legal representatives* of his late co partner, or where all the partners are dead and an action is pending between their representatives (*q*)

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(i) *Ra eshwar Singh* v *Chuni Lal Sitala* (1920) 47 Cal 418 56 I C 839 citing *Penney* v

Decree for maintenance.—Where a decree is passed for maintenance and a charge is created on a specified property to secure payment of the allowance, it is desirable, in order to avoid difficulty in executing the decree and to make a fresh suit unnecessary in case of default of payment, to appoint a receiver by the decree itself with directions, in case of default of payment to take possession of the property and sell the same, and out of the sale proceeds to pay the allowance (*r*)

Criminal Procedure Code, sec 145.—The fact that there exists in respect of any immoveable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by this rule to appoint a receiver in respect of the same property (*s*) It is, however, different where a receiver is appointed by a Magistrate under s 146, cl (2) of that Code See p 906, case (7)

Receiver and administrator pendente lite.—A receiver may be appointed under this rule in a testamentary suit governed by the Probate Act, 1881 (*t*) The Chancery Division of the High Court of England may appoint a receiver of the estate of the deceased, though proceedings have been commenced by the defendant in the Probate Court and though the defendant is prepared to apply at once in that Court for an administrator *pendente lite* (*u*)

Remove any person.—This refers to a person other than the receiver (*v*). The Court should inquire into any claims made by persons not parties to the suit before appointing a receiver (*w*) A usufructuary mortgagee who has obtained a decree for sale is not entitled to possession as against the receiver on an agreement made with the mortgagor (*x*)

Where security not furnished by receiver.—Where the order whereby a person is appointed receiver requires him to give security so that the order is *conditional* upon his giving the security, he cannot be receiver until the security is given (*y*) It is otherwise where the order is not conditional but absolute in its terms in such a case the order takes effect immediately it is made (*z*)

Receiver of future earnings of judgment-debtor.—The Court has no jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor Unless a man has assigned or charged his future earnings or has made a sum payable out of them they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable (*a*) Similarly, a receiver cannot be appointed of future allowances of maintenance payable to a judgment debtor (*b*) See notes to s 51 above

Receiver in execution proceedings.—See notes to s 51 See also notes to O 21, r 46, 'Procedure where garnishee denies debt,' p 649 above

Receiver after decree.—A receiver may be appointed even after a decree has been passed (*c*) See cl. (*a*) of the rule

(*r*) *Hemangini* v. *Kumode Chander* (1899) 26 Cal 441

(*s*) *Farid-un-nissa* v. *Abdul Aziz* (1900) 22 All 214

(*t*) *Yeshwant* v. *Shanker* (1892) 17 Bom 388

(*u*) *Oakes In re* (1917) 1 Ch 230

(*v*) *Ramaswami Naidu* v. *Ayylu* (1924) 46 Mad L J 106 78 I C 625 ('24) A M 614

(*w*) *Hamida* v. *Jamila* (1921) 34 Cal L J 123, 65 I C 837

(*x*) *Hitendra* v. *Sir Rameshwar* (1923) 6 Pat L J 37 61 I C 67 on appeal (1924) 26 Bom L R 1161 82 I C 794 ('24) A I C 206 [P C] See note on this case at p 860 *ante*

(*y*) *Edwards* v. *Edwards* (1876) 2 Ch D 291 See also *Srinivas* v. *Kesho* (1911) 14 Cal L J 480 12 I C 745

(*z*) *Bhairab* v. *Nandiram* (1919) 46 Cal 70, 43 I

(*b*) *Kandaswamy* v. *Krishnan* (1917) 40 Mad 302 34 I C 381

(*c*) *Shunmugam* v. *Moidin* (1885) 8 Mad 229

O. 40, r. 1. **"All such powers as to bringing and defending suits as the owner himself has".**—These words are wide enough to empower the Court to authorise a receiver to sue *in his own name*, hence where a receiver is authorised in that behalf, he may sue in his own name (*d*) And it has been held by the High Court of Calcutta that where a receiver is appointed with full powers under sub r (1), cl (d), that is, with such powers as to bringing suits *as the owner himself has*, the receiver is entitled to sue in his own name though not expressly authorized to do so (*e*) As regards suits for *possession*, it is to be noted that though ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it, yet if a receiver is appointed under this rule with such powers as to bringing suits *as the owner himself has*, he is entitled *to sue for possession* (*f*) *But a receiver takes such title as the owner himself had* in the property and he cannot therefore sue for possession in a case in which the owner himself could not have done so (*g*) A receiver empowered to collect outstandings and do all things necessary for the realization and preservation of the assets of a firm has no power to mortgage the property of the firm (*h*) But a receiver of mortgaged properties on whom has been conferred 'the same powers of realization, management and protection as the owners themselves have, has a discretionary power of sale (*i*)

"Realization of property."—*After* the dismissal of a suit in which a receiver has been appointed, the Court has no power to give the receiver any fresh power, as for instance, liberty to sell (*j*)

"All such powers as to the execution of documents which the owner himself has."—This includes a power to the receiver to execute a conveyance including the share of a minor defendant (*k*)

Suit by or against receiver—leave of Court.—See notes under the same head, p 905 above

Contempt proceedings.—Where a receiver is appointed of property the subject of a suit, and the property is forcibly taken possession of by any person, not only the parties interested in the property, but also the *receiver may proceed* against such person for contempt There is nothing to prevent the receiver from himself applying *for a rule for contempt* (*l*)

Appointment of new receiver in place of old receiver.—Where a receiver appointed under this rule institutes civil proceedings, and is then replaced by another receiver, it is necessary that the new receiver should be made a party to the proceedings (*m*)

Continuance of office.—A Court appointing a receiver may by *its order* provide that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so (*n*)

A sues *B* in the Court of a Subordinate Judge The suit is dismissed on a preliminary ground *A* appeals to the High Court, and pending the appeal *R* is appointed receiver of the property in dispute in the suit The High Court sets aside the decree of the lower Court, and the case is remanded to the lower Court for trial on the merits.

(*d*) *Oriental Bank Corporation* v *Gobinloll* (1884) 10 Cal 713, 732-733

(*e*) *Fink* v *Maharaj Bahadur Singh* (1898) 25 Cal 642, *Jagat Tarini Dasi* v *Naba Gopal* (1907) 34 Cal 305

(*f*) *Haji Cassim* v *Dutt* (1914) 19 C W N 45, 27 I C 459

(*g*) *Mahomed* v *Panchapakesa* (1912) 35 Mad 678 17 I C 233

(*h*) *Subramonian* v *Lutchman* (1923) 50 I A 77, 1 Rang 66, 71 I C 650 ('23) A PC 50

(*i*) *Sir Rameshwar* v. *Hitendra* (1924) 26 Bom L R 1153, 81 I C 576 ('24) A PC 202, (P C).

(*j*) *Rabeholme* v *Smith* (1907) 34 Cal 336

(*k*) *Basir Ali* v. *Hafiz* (1916) 43 Cal 124, 30 I. C. 406

(*l*) *Grey* v *Woogramohun* (1901) 28 Cal 790

(*m*) *Akula* v *Dhelli* (1905) 28 Mad 157

(*n*) *Mothura* v *Mathura* (1896) 19 Mad 120 23 I A 28

After the appeal is over, *T* forcibly enters into possession of the property in the possession of *R* as receiver *R* applies to the High Court that *T* may be committed for contempt It is contended for *T* that the appeal being over, *R* must be decreed to have been discharged from the office of receiver when the appellate decree was passed. This contention will not prevail, for though the appeal may be over, *R* must be regarded as receiver of the property until he is finally discharged by the Court Hence *R* is entitled to make the application to commit *T* for contempt (*o*)

A receiver in a partition suit is not discharged merely by the passing of a preliminary decree for partition (*p*)

Receiver's liability to account.—The Court appointing a receiver in a suit has authority incidental to its jurisdiction to order him to account although the suit may be no longer pending (*q*) Although the dismissal of a suit may in some cases mean the discharge of the receiver still the Court has jurisdiction over the receiver who is an officer of the Court The Court has jurisdiction to require accounts from a receiver, to allow parties to examine accounts and to deal with all matters connected with the management of the receiver (*r*) See r 3 (b) below

Suit by subsequent against former receiver—A suit cannot be maintained by a present receiver of an estate against the former receiver for the recovery of money alleged to be due by the former receiver to the estate (*s*)

Receiver's lien.—*A receiver though discharged is entitled to a lien on the estate* for all his just claims and allowances Hence the Court will not compel a receiver, who has been discharged, to make over the property in his possession, until his lien has been satisfied or provided for by a sufficient indemnity (*t*)

Joint receivers—As a general rule appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable (*u*)

Appeal.—An appeal lies not only from an order granting an application to appoint a receiver, but from an order rejecting such application (*v*) [O 43, r 1 cl. (s)] But no appeal lies from directions given by a Court in passing receiver s accounts Such directions do not come within any of the four clauses of sub r (1) (*w*) No appeal however lies to the *Privy Council* from an order refusing to appoint a receiver (*x*) An order refusing to *remove* a receiver is not appealable (*y*)

It has been held by the High Courts of Calcutta ( ) Bombay (*a*) and Allahabad (*b*) that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for so appointing one is not an order within the meaning of this rule and it is not therefore appealable under O 43, r 1, cl (s) The contrary has been held by a Full Bench of the Madras High Court (*c*)

(*o*) *Grey* v *Woogra mohun* (1901) 28 Cal 790

(*p*) *Shankar Das* v *Belari* (1925) 6 Lah 442, 89 I C 932 (1925) A L 443

(*q*) *Administrator-General* v *Prem Lal* (1895) 22 Cal 1011 22 I A 203

(*r*) *Chandreshwar Prasad* v *Bisheshwar* (1925) 5 Pat L J 513 58 I C 405

(*s*) Jer Bhtbh r J in *Dutt* v *hanal* (1914) 41 Cal 9- -4 I C 65

(*t*) *Prem Lal* v *Sumbhoonath* (1895) 22 Cal 9 0 9 3

(*u*) Woodroffe on Receivers p 78

(*v*) *Venkataswami* v *Stridevamma* (1886) 10 Mad 179 *Narsappa* v *Shidbasappa* (1 93) 8 Bom 35 *Cursetji* v *Cowasji* (1912) 17 Bom L R 1 649 20 I C 542 *Brojendra Nath* v *Makhan Lal* (1888) 17 Cal 540 *Krishna* v *Nandkishor* (1906) 31 Cal 403 *Sant Ram* v *Ram Chand* (1910) Punj Rec no 56 p 9 8 I C 659 Cf *Lachmi* v *Ram Charan* (1913) 35 All 455 20 I C 653 (Injunction)

(*w*) *Keshoboti* v *Macgregor* (1905) 33 Cal 658 *Nathulia* v *Bhagwati* (19) 5 Pat L J 97 53 I C 15

(*x*) *Chunder Dutt* v *Padmanund* (1895) 22 Cal 9

(*y*) *Ramaswami* v *Ayyalu* (1924) 46 Mad L J 1 6 73 I C 655 (24) A M 614

( ) *Upendra Nath* v *Bhupendra Nath* (1911) 14 Cal L J 157

(*a*) *Narbadashankar* v *Tecruldas* (1915) 17 Bom L R 510 29 I C 504

(*b*) *Pemji* v *Roman* (1924) 13 All L J 79, 27 I C 646

(*c*) *Palaniappa* v *Palaniappa* (1917) 40 Mad 1 431 C 1 5

O. 40, rr. 1, 2.

and by the Patna High Court *(d)* No appeal lies from an order merely expressing an intention of appointing a receiver and calling upon parties to suggest names *(e)*

A receiver is appointed of *B's* property in a suit by *A* against *B*, *C* claims to be in possession of the property under an agreement between him and *B*, and he objects to the appointment of the receiver, but the objection is dismissed The order comes within this rule though *C* is not a party to the suit and is therefore appealable *(f)* An order appointing a receiver pending an application for the appointment of a common manager under s 93 of the Bengal Tenancy Act 8 of 1885 also falls under this rule, and is therefore appealable under O 43, r 1, cl (s) *(g)*

Letters Patent appeal.—An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a minor defendant is not a judgment within the meaning of cl 15 of the Letters Patent, and no appeal lies therefrom *(h)*

Revision.—Where a Court appoints a receiver in a case in which it has no jurisdiction to do so as where a receiver is appointed in a proceeding under the Succession Certificate Act 1889 the Court acts without jurisdiction, and the High Court may interfere in revision *(i)*

A receiver cannot delegate his powers to others.—Where a receiver is appointed to collect the rents of an estate it is his duty to collect the rents himself, or where the rents are collected by a clerk on his behalf to receive the rents and to keep proper accounts thereof If the rents received by the clerk are misappropriated, the receiver is bound to make good the loss He is not justified in delegating or entrusting to another a duty entrusted to him by the Court *(j)*

Summary jurisdiction.—Where the matter complained of rests on an agreement which has not been carried out the Court may interfere to prevent its receiver giving effect to the proposal agreement and this it may do on the mere *application* of a party to the suit *(k)* But where the matter has passed out of the stage of agreement as where a lease has already been granted by the receiver, no summary order could be passed to set aside the lease but the party aggrieved must proceed by *suit* against the receiver *(l)*

Form.—For form of appointment of receiver, see App F, no 9

2 [S 503, cl. (d).] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver

Remuneration

Remuneration.—See notes under the same head on p 906 above See also notes to r 1 Receiver's lien p 911 above It has been held that the Court has inherent jurisdiction to order a plaintiff to refund to a party whom he has wrongly impleaded in a suit, the commission and charges incurred by a receiver of the property of that party when the suit as against him is dismissed and the receivership cancelled *(m)*

(d) *Gobind Ram v Ganesh Ram* (1922) 1 Pat 625 69 I C 920 ('22) A I 577
(e) *Muhammad Askari v Nisar Husain* (1920) 42 All 227 54 I C 520
(f) *Hudson v Morgan* (1909) 36 Cal 713 1 I C 356 *Ayubeg v Sundari* (1918) 3 Pat L J 573 48 I C 133
(g) *Asadali v Mahomed* (1916) 43 Cal 986 36 I C 177
(h) *Kuppusami v Rathnavelu* (1901) 24 Mad 511
(i) *Kanhaiya v Kanhaiya* (1924) 46 All 37 79 I C 363 ('24) A A 376
(j) *Balaji v Ramchandra* (1895) 19 Bom 660
(k) *Surendro Keshub Roy v Durgasoondery* (1888) 15 Cal 253
(l) *Krista Chandra Ghose v Krishta Sakha Ghose* (1909) 36 Cal 52 1 I C 470
(m) *M S Naikwara v Ma Aye Byu* (1923) Rang 770 79 I C 724, ('24) A R 181

O. 40, rr. 3, 4

Duties

3 **[S. 503, 2nd part.]** Every receiver so appointed shall—

(*a*) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property,

(*b*) submit his accounts at such periods and in such form as the Court directs,

(*c*) pay the amount due from him as the Court directs, and

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence

Submit his accounts—The accounts should be supported by vouchers which will be admitted as evidence of payment unless reasonable ground for impeaching them is shown (*n*) Objections to the system of management adopted by the receiver cannot be heard as exceptions to the receiver's accounts but may be the subject of a scheme to be submitted for the orders of the Court (*o*) See notes *Receiver's liability to account* on p 911 above and notes to r 4 below

Appeal—There is no right of appeal from the orders of the Court giving directions in passing a receiver's accounts (*p*)

Form—For form of bond to be given by receiver see App F form no 10

Enforcement of receiver's duties

4 [*New*] Where a receiver—

(*a*) fails to submit his accounts at such periods and in such form as the Court directs, or

(*b*) fails to pay the amount due from him as the Court directs, or

(*c*) occasions loss to the property by his wilful default or gross negligence

the Court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver

Loss to property occasioned by wilful default of receiver—Property includes the income of property (*q*) See notes to r 1 Loss occasioned by receiver's default p 906 above

Removal of receiver—A receiver should not be allowed to continue in office if he fails to comply with the order of the Court to submit his accounts. Application for removal should be made to the Court which appointed him (*q1*)

(*n*) *T* [illegible] *Colan* (19[illegible]) 40 Cal L J [illegible] I C 419 ([illegible]) A I C 1063
(*o*) [illegible] *Shanti* [illegible] *Das* (19[illegible]) 7 Lah L J 6 88 I C [illegible] A L [illegible]
(*p*) *Keshobati* v [illegible] (19[illegible]) 35 Cal [illegible]
(*q*) [illegible] v *Gopala* (1916) [illegible] Mad [illegible] I C 353
(*q1*) (19[illegible]) Lah L J 6 88 I C [illegible] A L [illegible]

O. 40, rr. 4, 5.

The Court may direct his property to be attached.—The property may be attached even after the receiver's death in the hands of his legal representatives (r)

Appeal.—An appeal lies from an order under this rule [O 43, r 1, cl (s)] But no appeal lies from an order declaring a receiver liable in respect of a sum of money unless the order includes a direction for the attachment of his property (s) Nor does an appeal lie from an order deciding that a receiver is liable to submit accounts (t), or to pay a sum of money into Court (u), or to pay damages (v)

5. [S 504] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

When Collector may be appointed receiver

ORDER XLI

Appeals from Original Decrees

O. 41, r. 1.

1. [S 541] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded

Form of appeal What to accompany memorandum

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and such grounds shall be numbered consecutively.

Contents of memorandum

Appeal from original decree —See s 96 and notes thereto

Defective vakalatnama —A memorandum of appeal cannot be said to be properly presented if it is presented by a vakil whose name does not appear in the vakalatnama though by an oversight In such case the appeal should be dismissed though the objection to its validity is taken at a very late stage of the proceedings (w) A power of attorney expressly authorising presentation of the appeal is sufficient (x)

(r) P[illegible] n v Gopala (1916) 39 Mad 584 30 I C 353

(s) Ganesh Lal v Kumar Satya Narayan (1919) 4 Pat L J 636 44 I C 207

(t) Sonaha ttal Singh v Bhagwati Singh (1920) 5 Pat L J 97 55 I C 15

( ) Palaniappa v Palaniappa (1921) M W N 856

(v) Arunachellam v Polu (1925) ('25) A I R '66 9 I C 631

(w) Muhammad v Jai Ram (1914) 36 All 46 23 I C 461 (objection taken after the order of remand)

(x) Fura v Udmi (1925) 7 Lah L J 29 86 I C 209 ('25) A L 331

Signed.—If the memorandum of appeal is signed, it matters not that the grounds of appeal are set forth in an unsigned annexure (*y*)

Memorandum shall be accompanied by a copy of decree and of judgment.—O 41, r 1, makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accompanied by a copy of the *decree* The Court cannot dispense with it for the rule is imperative (*z*) A copy merely of the judgment is not sufficient even if the decree has not yet been drawn up (*a*) nor will a copy of a translation suffice (*b*) If a copy of the decree is filed after the expiration of the period of limitation prescribed for the appeal, the appeal is time barred the reason is that there is no valid appeal until a copy of the decree is filed The same rule applies where an appeal is preferred from an order in such a case the memorandum should be accompanied by a copy of the order (*c*) see O 43 r 2 On the same principle if the memorandum is not accompanied by a copy of the *judgment* the appeal must be dismissed as time barred unless the appellate Court dispenses with such copy (*d*) When the judgment incorporated by reference an interlocutory order the omission to annex copy of that order was excused (*e*)

Grounds of objection.—The grounds of objection must be such as arise from the pleadings and evidence and are necessary for the decision of the case (*f*) The appellant must not be allowed in appeal to make out a new case (*g*) or a case inconsistent with the case set up by him in the lower Court (*h*) Nor could an appellate Court make an entirely new case for a plaintiff which he never made for himself at any period of the trial (*i*)

In drawing up the grounds of appeal it should be remembered that no subsequent event of devolution of interest can affect the decision of a question as it stood at the time the decree appealed against was pronounced To give effect to these some supplementary proceeding and not an appeal is the right procedure (*j*)

Grounds of objection which may be taken for the first time in appeal.—There are certain points which, though not taken in the lower Court may yet be taken for the first time before the appellate Court Thus an objection to the jurisdiction of the lower Court to entertain the suit may be taken for the first time in appeal (*k*) Similarly a point of law arising out of admitted facts and which does not take the opponent by surprise (*l*) or an objection on the score of a defect fatal to the suit, may be taken for the first time in appeal *e g* that a person interested in the mortgaged property was not joined as a party to the suit as required by O 34 r 1 (*m*) or that a notice required to be given by a zamindar to a putnidar under s 8 of Regulation 18 of 1819 was defective in some essential particulars (*n*) But the defect in each case must appear on the face of the proceedings, otherwise the objection will not be entertained (*o*) Similarly

(*y*) *Karman* v *Bishna* (1920) 2 Lah L J 507
(*z*) *Sundaram* v *Muthura alinga* (1923) 44 Mad L J 2 9 72 I C 303 (..3) A M 482 *Mubarak* v *Secretary of State* (192.) 6 Lah 218 (.25) A L 438

[illegible]

540 .58
(*g*) *Indur Chunder* v *Radhakisore* (189.) 19 Cal 507 19 I A 90 *Annamalay* v *Pichu* (1905) 28 Mad 122 123, *Ramchand* v *Ramchand* (1921) 3 Lah L J 392 63 I C 227, *Basant Ram* v. *Muhammad* (19..2) 4 Lah L J 293
(*h*) *Gajapathi* v *Vasudera* (1892) 15 Mad 503 19 I A 1.9, *Ilahi Khan* v *Sher Ali* (1904)

(*i*) *Iraigowda* v *Sesl apa* (1893) 17 Bom 772 7.3 *Basant Ram* v *Muhammad* (19..2) 4 Lah L J 293
(*j*) *Anundmoyee* v *Sheeb Chunder* (186) 2 W R 1 C 19
(*l*) *Ramayya* v *Subbarayudu* (1890) 13 Mad

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(*n*) *Ahsanulla* v *Harichasan* (1893) 20 Cal 86 19 I A 191
(*o*) *Ib*

O. 41, rr. 2-4.

rest its decision on a ground not set forth in the memorandum of appeal, it has no power to do so where a particular point taken in the pleadings has been *deliberately abandoned* by a party at the trial of the suit before the lower Court (c)

New questions of fact.—In this connection we may note the following observations made in the course of a judgment in a Madras case. "Though we may perhaps consider in appeal any *question of law* arising from facts which are either admitted or undisputed, we cannot allow without any satisfactory reason new *questions of fact* to be raised for the first time in appeal" (d)

Making a new case in appeal.—A court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit (e)

Rejection or amendment of memorandum

3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

Returned for amendment.—When a memorandum of appeal is returned for amendment, the Court should fix a time for its return (f) See s 107

Appeal.—A decision rejecting a memorandum of appeal on the ground that it is barred by limitation (g), or that it is insufficiently stamped (h), or that it was not duly presented (i), has the force of a decree within the meaning of s 2, and is therefore appealable

Appellate Court to have same power as Courts of original jurisdiction.—It is important to note at this stage the provisions of s 107. That section provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on Courts of original jurisdiction in respect of suits instituted therein

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all

4. [S. 544.] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plain-

(c) *Govindrav* v *Babu* (1892) 16 Bom 586
(d) *Narayana* v *Chengalamma* (1887) 10 Mad 1, 8
(e) *Nathu* v *Umedmal* (1909) 33 Bom 35, 1 I C 456
(f) *Jagan Nath* v *Lalman* (1876) 1 All 200
(g) *Gulab Rai* v *Mangli Lal* (1885) 7 All 42, *Raghunath* v *Nilu* (1885) 9 Bom 452 *Gunga Dass* v *Ramjoy* (1886) 12 Cal 30
(h) *Rup Singh* v *Mukhraj* (1885) 7 All 887
(i) *Ayyanna* v *Nagabhooshanam* (1893) 16 Mad 285.

tiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

O. 41, r.

Ground common to all defendants.—This rule provides that where there are more defendants than one, and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of *all* the defendants (j) The rule will not apply to different appeals on a common ground unless they have been consolidated (k) It is not necessary for the application of this rule that the decree should proceed on *every* ground common to all the plaintiffs or to all the defendants it is quite sufficient if it proceeds on *any* ground common to all the plaintiffs or to all the defendants *A* sues *B* *C* and *D* for recovering possession of certain lands on declaration of title thereto alleging that he was dispossessed by all the defendants together in pursuance of a conspiracy between them. *B*, *C* and *D* file separate written statements denying *A*'s title and also denying dispossession *and each claiming to hold separate parcels of land from third parties* The Court of first instance finds in favour of the title and the possession of *A* and that *A* was dispossessed by *B*, *C* and *D* *B* alone appeals from the decree The appellate Court finds that *A* had failed to prove the title set up by him or that he was in possession of the land Should the appellate Court reverse the decree of the lower Court in favour of *B* alone who appealed from the decree, or should it reverse the decree of the lower Court in favour also of *C* and *D* though they did not join in the appeal? The answer is that if the decree of the lower Court proceeded on a ground common to all the three defendants, the decree should be reversed under this rule not only in favour of *B* but also in favour of *C* and *D* Now the ground of defence common to all the defendants was that *A* had no title to the lands and the decree of the lower Court proceeded on the ground that *A* had a title to the lands The decree therefore proceeded on a ground common to all the defendants The appellate Court should therefore reverse the decree not only in favour of *B* but also in favour of *C* and *D* It is quite immaterial that the defendants claimed to be interested by different titles in *separate* portions of the lands It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (l) But the provisions of this rule do not apply, unless the lower Court whose decree is appealed from has proceeded upon some ground common to all the plaintiffs, or all the defendants If the *lower Court* has not proceeded upon any such ground, it is not competent to the appellate Court to reverse the decree as to all the plaintiffs or all the defendants *upon a ground which the appellate Court considers to be common to all the plaintiffs or all the defendants* (m)

If in the case put above the appellate Court while reversing the decree in favour of *B*, refuses to reverse it in favour also of *C* and *D* on the ground that it has no power to do so, the decree of the appellate Court will be subject to revision for failure of exercise of jurisdiction (n) See s. 115, cl (b) If the decree appealed from proceeds on a ground

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Bhuttaloor v *[illegible]* (1907) 30 Mad 470, *Annamalay* v *Pichu* (1905) 23 Mad

192 *Ambika Prasad* v *Pardip Singh* (1914) 42 Cal 451 23 I C 448 *Salaludin* v *Afzal Begum* (1924) 39 Cal L J 520 84 I C 69 ( ) A C 23

(m) *Puran Mal* v *Kirat Singh* (1898) 20 All. 8 *Chajju* v *Umrao* (1900) 22 All 356

(n) *Seshadri* v *Krishnan* (1885) 8 Mad 192.

O. 41, rr. 4, 5.

common to all the defendants, the appellate Court may reverse the decree in favour of *all* the defendants even if some of the defendants suffered the decree to be passed *ex parte* against them (o)

Ground common to all the plaintiffs.—*A* and his son *B* jointly sue *C* to recover Rs 2,000 A decree is passed for the plaintiffs for Rs 500 only *A* alone appeals from the decree *C* files cross objections under r 22 below The appellate Court rejects the plaintiff's claim *in toto*, and reverses the decree of the lower Court Subsequently *B*, who did not join in the appeal, applies for execution of the original decree against *C* *B* is not entitled to take out execution, for although he was not a party to the appeal, he is bound under this rule by the decree of the appellate Court (p)

See notes to r 22 below, "A respondent may urge cross objections against the appellant but not as a rule against a co respondent"

May reverse decree in favour of all plaintiffs or defendants.—The word may shows that the appellate Court is given a discretion in the matter It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants It is not bound to do so in favour of *all* of them (q)

Death of one of several appellants or respondents in cases where the *decree appealed from proceeds on a ground common to all of them*.—Where a preliminary decree had been passed in favour of two appellants jointly in ignorance of the fact that one was dead, the Court allowed the heirs of the deceased appellant to be substituted as parties in the final decree (r) See notes to O 22, rr. 3 and 4

Stay of proceedings and of execution

5 [S 545] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate Court may for sufficient cause order stay of execution of such decree

Stay by appellate Court

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

Stay by Court which passed the decree

(3) No order for stay of execution shall be made under sub rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(o) *Ram Tahal v Sukeswar* (1916) 1 Pat L. J 143 35 I C 547

(p) *Babaji v Collector of Salt Revenue* (1887) 11 Bom. 596

(q) *Narain v Binaik* (1914) 36 All. 510, 24 I C 439

(r) *Appanna v Gavaroppadu* (1925) 48 Mad L J 601, 87 I C 748 ('25) A M 910

O. 41, r. 5

(b) that the application has been made without unreasonable delay, and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application

Alterations in the rule—

1 The first part of sub r. (1), namely, "An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order" is new The object is to make express provision for a stay of proceedings from a decree pending an appeal from the decree Thus if a preliminary decree is passed in a suit for accounts between a principal and an agent [O 20, r 16], and an appeal is preferred from the decree the appellate Court may under this rule stay the inquiry into the accounts pending the appeal from the decree Under the Code of 1882 the Court directed a stay in cases like these in the exercise of its *inherent power*, as there was no express provision in the Code in that behalf (s)

2 Sub r (4) is new It authorizes an *ex parte* stay The need for such an order constantly arises in practice

"Stay of proceedings."—Under this part of the rule the Bombay High Court in appeal suspended a sentence of imprisonment for an offence under s 43 of the Provincial Insolvency Act (1907) the provisions of the Code of Civil Procedure being applicable to such appeal (t) See notes above Alterations in the rule

Stay of execution—Once an appeal is preferred from a decree it is the *appellate* Court alone that is seized of the matter, and an application for a stay of execution should be made to that Court Where no appeal is preferred the appellate Court has no jurisdiction not having seized of the case and cannot stay execution even on the assurance of a pleader that an appeal will be filed (u) and so the application for a stay should be made to the Court *which passed the decree* But the application will not be entertained unless the decree is one from which an appeal lies and the application is made before the expiry of the time allowed by law for appealing therefrom (v) It should be made to the Judge who decided the case and without unreasonable delay (w)

Though the appellate Court may under this rule stay proceedings in execution when *an appeal is preferred from a decree* it has no power to stay execution of a decree when an appeal is preferred from an *order* appealable under s 104 A obtains a decree *ex parte* against *B* *B* applies under O 9 r 13 to have the decree set aside but the application is rejected, *B* appeals from the *order* rejecting the application under O 43 r 1 cl (d) and applies to the appellate Court to stay execution of the *ex parte decree* against him. It is not competent to the appellate Court to stay execution of the *decree* there being no appeal preferred from the decree (x) Contrast r 8 below

(s) *Balkishen Sahu v. Khugnu* (1904) 31 Cal 722
(t) *Nagindas v. Chelabhai* (1920) 44 Bom 643, 56 I C 449
(u) *Purshotam v. Hargu* (1921) 43 All 198, 60 I C 131 *Purshotam v. Hargu* (1921) 43 All 513, 63 I C 837
(v) *Amir Hasan v. Ahmad Ali* (1887) 9 All 36 *Ishan Chunder v. Ishanoollah* (1884) 10 Cal 817
(w) *Chaturbhuj v. Bandeo Das* (1921) 48 Cal 796, 66 I C 198
(x) *Bhagwat v. Sheo Golam* (1904) 31 Cal 1031

O. 41, r. 5.

Where decree has been executed.—An order for a stay of execution implies that the decree has not been executed Therefore where a decree has been executed, no order can be made under this rule (*y*). See r. 6 below.

Circumstances under which stay of execution may be granted.—The Court has the power under this rule to make an order for a stay of execution for "sufficient cause" But no order should be made for a stay of execution unless the Court is satisfied that substantial loss may result to the party applying for a stay of execution if the execution is not stayed (*z*) And even if the Court is satisfied that substantial loss may result, no order should be made unless the application has been made without unreasonable delay, and, further, unless the Court is satisfied that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him [sub r (3)]. The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation (*a*)

Notice to decree-holder.—It has been held by the High Court of Bombay that a final order staying execution should not be made without notice to the decree-holder if it is made without notice, it is illegal and it may be set aside under s 115 above (*b*) The High Court of Patna has held differently (*c*) An *interim* stay, however, may be granted *ex parte* [see sub r (4)]

Application of the rule.—*A* obtains a decree against *B* for the recovery of certain immoveable property, and applies for execution of the decree If *B* has preferred an appeal from the decree, *B* may apply to the appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to *A*, *A* may do away with the property which may result in substantial loss to him If the appellate Court is satisfied that substantial loss may result if the execution is not stayed, and if the application has been made without unreasonable delay, the appellate Court may order execution to be stayed under this rule upon security being given by *B* that if the decree of the lower Court is confirmed, he will deliver possession of the property to *A*. If the decree of the lower Court is confirmed, and if *B* fails to deliver possession of the property to *A*, *A* may proceed against the surety.

Security for performance of decree.—The nature and extent of the liability of a surety under this rule depends on the words of the security bond (*d*) Thus where the bond was to perform all orders and decrees passed in appeal, it was held that the obligation under the bond extended to the final decree passed in second appeal (*e*) When immoveable property is given by a judgment debtor as security for the due performance of a decree under sub-r. (3) (c), it can be realized in execution without attachment The provision of O 34, r 14, do not apply to such a case, and, further, the matter being one relating to execution within s 47, a separate suit does not lie (*f*) As to the mode of enforcing a security bond given under this rule, see notes to s 145 under the head ' security for the performance of any decree," p. 347 above

(*y*) *Dharram Singh* v *Kishen Singh* (1883) 12 C L R 532
(*z*) *Gaikwar Sirkar* v *Ghandi* (1901) 25 Bom 243 *Dhera Mal* v *Haidar Shah* (1921) 2 Lah 61, 61 I C 77
(*a*) *Srinibash Prasad* v *Kesho Prasad* (1911) 38 Cal 751, 755 [illegible]
[illegible] n 536. [illegible] L J
[illegible] W. R.
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(*e*) *Shivlal* v *Apaji* (1878) 2 Bom 654, 3 Bom
[illegible]
[illegible] Act, 1882, now O 34, r 14.

A security bond given under this rule mortgaging immoveable property exceeding Rs. 100 in value requires registration under the Transfer of Property Act, s. 59, and the Registration Act, s. 17, in order to make it effective against the property (g)

[illegible]

the event of the success of the appeal (h)

Effect of uncommunicated order staying execution.—It has been held by the High Court of Calcutta (i), that where an order is made by an appellate Court staying execution of a decree, but before the order is communicated to the Court executing the decree, the property of the judgment debtor is sold in execution, the sale is invalid and cannot stand the reason given being that when an unconditional order for stay of execution is made the order becomes operative *the moment it is made* and suspends the power of the lower Court to continue the proceedings in execution. On the other hand it has been held by the Madras High Court (j) that such sale is valid, the reason given being that the Court of first instance still retains jurisdiction to execute its decree notwithstanding an appeal from it, and that the power to execute the decree can only be taken away by some *communication* to it of the order of the appellate Court. The latter view, it is submitted is correct.

Costs.—The applicant who asks for stay of execution should, as a rule, pay the costs of the application, even if the application is successful The reason is that an applicant asking for stay of execution asks for an indulgence which will have the effect of interfering for the time being with the enforcement of the decree, and he who seeks such an indulgence should in the absence of special circumstances pay for it (k)

Appeal.—No appeal lies from an order by the appellate Court refusing to stay execution under this section. Such an order is not a "decree" within the meaning of s 2, cl. 2 (l) It is now agreed by the Calcutta (m), Madras (n), and Lahore (o) High Courts, that such an order is a 'judgment' within the meaning of cl. 15 of the Letters Patent and therefore appealable as such.

Where an order is made for stay of execution on security being furnished by the judgment debtor, and such security is furnished, no appeal lies from the order at the instance of the decree holder Such an order cannot be said to conclusively determine any question relating to the rights and liabilities of parties with reference to the relief granted by the decree, and it does not therefore come within s. 47 and s 2, cl. (2) (p) Nor is it a "judgment" within the meaning of cl. 10 of the Letters Patent of the Rangoon High Court (p 2) See notes to s 47, "Appeal," p 144

Review.—The Court making an order under this rule may cancel or vary it at any time (q)

Form.—For form of security bond, see App G, form no 2

(g) *Tokhan Singh* v *Girwar Singh* (1905) 32 Cal 494, *Nagaruru* v *Tangatur* (1908) 31 Mad

[illegible]

71 *Malamal* v *Kavalappara* (1914) 27 Mad L J 171, 25 I C 47

(m) *Brij Coomaree* v *Ramrick Dass* (1900) 5 C W

[illegible]

20 I C 70

(p2) *Mooljee Dharsee & Co* v *Moolla* (1125) 3 Rang 255

(q) *Amir Hasan* v *Ahmad* (1887) 9 All. 36

O 41, r. 5

Where decree has been executed.—An order for a stay of execution implies that the decree has not been executed Therefore where a decree has been executed, no order can be made under this rule (*y*) See r. 6 below

Circumstances under which stay of execution may be granted.—The Court has the power under this rule to make an order for a stay of execution for "sufficient cause" But no order should be made for a stay of execution unless the Court is satisfied that substantial loss may result to the party applying for a stay of execution if the execution is not stayed (*z*) And even if the Court is satisfied that substantial loss may result, no order should be made unless the application has been made without unreasonable delay, and, further, unless the Court is satisfied that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him [sub r (3)] The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation (*a*)

Notice to decree-holder.—It has been held by the High Court of Bombay that a final order staying execution should not be made without notice to the decree holder if it is made without notice, it is illegal and it may be set aside under s 115 above (*b*) The High Court of Patna has held differently (*c*) An *interim* stay, however, may be granted *ex parte* [see sub r (4)]

Application of the rule.—*A* obtains a decree against *B* for the recovery of certain immoveable property and applies for execution of the decree If *B* has preferred an appeal from the decree *B* may apply to the appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to *A*, *A* may do away with the property which may result in substantial loss to him If the appellate Court is satisfied that substantial loss may result if the execution is not stayed and if the application has been made without unreasonable delay, the appellate Court may order execution to be stayed under this rule upon security being given by *B* that if the decree of the lower Court is confirmed, he will deliver possession of the property to *A* If the decree of the lower Court is confirmed, and if *B* fails to deliver possession of the property to *A* *A* may proceed against the surety

Security for performance of decree.—The nature and extent of the liability of a surety under this rule depends on the words of the security bond (*d*) Thus where the bond was to perform all orders and decrees passed in appeal, it was held that the obligation under the bond extended to the final decree passed in second appeal (*e*) When immoveable property is given by a judgment debtor as security for the due performance of a decree under sub r (3) (c), it can be realized in execution without attachment The provision of O 34, r 14, do not apply to such a case, and, further, the matter being one relating to execution within s 47, a separate suit does not lie (*f*) As to the mode of enforcing a security bond given under this rule, see notes to s 145 under the head "security for the performance of any decree," p 347 above

(*y*) *Dharam Singh* v *Kishen Singh* (1883) 12 [illegible]

[illegible] 403

(*e*) *Shiulal* v *Apaji* (18[illegible]) 2 Bom. 654, 3 Bom

[illegible] 201

[illegible] no longer [illegible] language of s 99 of the Transfer of Property Act, 1882, now O 34 r 14

A security bond given under this rule mortgaging immoveable property exceeding Rs. 100 in value requires registration under the Transfer of Property Act, s. 59, and the Registration Act, s. 17, in order to make it effective against the property (g)

When respondent insolvent.—In an application for stay of execution for costs when the respondent was insolvent, the Madras High Court directed the appellant to pay the costs to the respondent's solicitor on his personal undertaking to return them in the event of the success of the appeal (h)

Effect of uncommunicated order staying execution.—It has been held by the High Court of Calcutta (i), that where an order is made by an appellate Court staying execution of a decree, but before the order is communicated to the Court executing the decree, the property of the judgment debtor is sold in execution, the sale is invalid and cannot stand, the reason given being that when an unconditional order for stay of execution is made, the order becomes operative *the moment it is made* and suspends the power of the lower Court to continue the proceedings in execution On the other hand, it has been held by the Madras High Court (j) that such sale is valid, the reason given being that the Court of first instance still retains jurisdiction to execute its decree notwithstanding an appeal from it, and that the power to execute the decree can only be taken away by some *communication* to it of the order of the appellate Court. The latter view, it is submitted is correct

Costs.—The applicant who asks for stay of execution should as a rule, pay the costs of the application, even if the application is successful. The reason is that an applicant asking for stay of execution asks for an indulgence which will have the effect of interfering for the time being with the enforcement of the decree, and he who seeks such an indulgence should in the absence of special circumstances pay for it (k).

Appeal.—No appeal lies from an order by the appellate Court refusing to stay execution under this section. Such an order is not a "decree" within the meaning of s. 2, cl. 2 (l) It is now agreed by the Calcutta (m), Madras (n), and Lahore (o) High Courts, that such an order is a 'judgment' within the meaning of cl. 15 of the Letters Patent and therefore appealable as such

Where an order is made for stay of execution on security being furnished by the judgment debtor, and such security is furnished, no appeal lies from the order at the instance of the decree holder Such an order cannot be said to conclusively determine any question relating to the rights and liabilities of parties with reference to the relief granted by the decree, and it does not therefore come within s. 47 and s. 2, cl. (2) (p) Nor is it a "judgment" within the meaning of cl. 10 of the Letters Patent of the Rangoon High Court (p 2). See notes to s. 47, "Appeal," p 144

Review.—The Court making an order under this rule may cancel or vary it at any time (q)

Form.—For form of security bond, see App G, form no 2.

(g) *Tokhan Singh* v *Girwar Singh* (1905) 32 Cal. 494, *Nagaruru* v. *Tangatur* (1908) 31 Mad 330

71, *Malamal* v *Katalappara* (1914) 27 Mad L J 171, 25 I C 47

(m) *Brij Coomaree* v *Ramrick Dass* (1900) 5 C W.

20 I C. 70

(p2) *Mooljee Dharsee & Co* v. *Moolla* Rang 255

(q) *Amir Hasan* v. *Ahmad* (1887) 9 All.

O. 41, r. 6.

Security in case of order for execution of decree appealed from

6. [S. 546] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate Court, or the appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

Alterations in the rule —

1 The words or has been taken have been added in sub r (1) to make it clear that security may be required though the property has already been taken in execution These words give effect to a Calcutta decision (r)

2 The words of money which occurred in the old section after the words in the execution of a decree have been omitted.

3 The words to the Court which made the order in sub r (2) are new These words show that an application for a stay of sale is to be made to the Court which made the order for sale

Application of the rule —This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree (s) A judgment debtor whose application for a stay of execution is refused under r 5 may apply under this rule The application contemplated by sub r (1) is an application by the judgment debtor (who has appealed from the decree) for security to be given by the decree holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the lower Court is reversed in appeal Thus if *A* obtains a decree against *B* for the recovery of certain immoveable property and an order *is made* for execution of the decree, *B* may *after* filing an appeal from the decree, apply for an order requiring *A* to give security for the restitution of the property to him (*B*) or for the payment of the value thereof if the appeal is decided in his favour The application may be made to the Court which passed the decree or to the appellate Court (t) If the application is made to the Court *which passed the decree* such Court *shall* on sufficient cause being shown by *B* for requiring the security, direct A to give the security But if the application is made to the *appellate* Court, that Court *may in its discretion* require security to be given.

(r) *Hukum Chand* v *Kamalanand* (1906) 33 Cal 927

(s) *Janardan* v *Nilanth* (1901) 25 Bom 583

(t) *Lakshmanan* v *Palaniappa* (1918) 41 Mad 813 45 I C 30

Enforcement of security bond given under this rule.—See notes to s. 145 under the head "Security for restitution of property taken in execution of a decree," p 318 above

Appeal.—No appeal lies from an order under this rule

Form.—For form of security bond, see App G, form no 3

7. [S. 547.] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer in certain cases

8. [*New*] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree

Exercise of powers in appeal from order made in execution of decree

Scope and object of the rule.—This rule is new It [illegible] to meet particularly the case where the litigant does not quarrel [illegible] but appeals from an *order* passed in execution of that decree In [illegible] provides that the appellant may apply for a stay of execution of the *decree* [illegible] for security for restitution under r 6 A obtains a decree against B [illegible] execution B objects to the execution but the objection is disallowed [illegible] appeal from the *order* disallowing his objection B may apply [illegible] of the *decree* under r 5 pending the disposal of the appeal from the [illegible] accordance with the undermentioned decision under the Code of 1882 (v)

Procedure on admission of appeal

9 [S. 548] (1) Where a memorandum of appeal [illegible] admitted, the appellate Court or the proper officer of that Court shall [illegible] thereon the date of presentation, and [illegible] register the appeal in a book to be kept for the purpose

Registry of memorandum of appeal

(2) Such book shall be [illegible] Register of Appeals

Register of Appeals

10 [S 549] (1) The appellate Court may [illegible] discretion, either before the respondent [illegible] called upon to appear and [illegible] afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Appellate Court may require appellant to furnish security for costs.

(v) *Pasupati* v *Nanda Lal* (1901) 28 Cal 734

O. 41, r. 10.

Where an appellant resides out of British India

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal

Scope and object of the rule.—The object of the rule is to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant Under sub r (1) the appellate Court *may*, in its discretion require security for costs Under the proviso to that sub rule the Court *shall* demand security for costs If no security is furnished, the Court should reject the appeal whether the order for security is made under the sub rule or the proviso (*t*)

To what appeals the rule applies.—This rule applies not only to appeals from substantive decrees but also to appeals from interlocutory orders under s 104 and to appeals from orders in execution under s 47 (*u*) The Privy Council have recently decided that it applies also to appeals under cl 15 of the Letters Patent (*x*) The Madras High Court had held that it was not so applicable because the Code dealt with appeals from one Court to another of higher grade, while cl 15 of the Letters Patent dealt with a different class of appeals (*y*) This was a good reason for holding that the right of appeal under the Letters Patent was not excluded by the words "and from no other orders" occurring in section 588 of the Code of 1882 corresponding to section 104 of the present Code (*z*), but it does not follow that the procedure of the Court in dealing with an appeal under the Letters Patent (now expressly saved by the words "save as otherwise provided by any law" inserted in s. 104) is not regulated by the Code Where any part of the Code does not apply to High Court, specific provision is made to that effect There is no such provision in respect of this rule However a Charter
rule inconsistent with O 41, r
Bombay High Court rule 736 pre
costs as a condition of filing the appeal, but this is not inconsistent with the present rule (*b*) Nor is rule 351 of the Madras High Court rules inconsistent (*c*)

Appeals in forma pauperis.—It has been held by the High Court of Madras (*d*) that this rule applies to pauper appeals, thus an appellant, who has presented his appeal in forma pauperis may be called upon to give security for costs under this rule, but very special grounds must be shown to support such an application On the other hand it has been held by the High Courts of Calcutta (*e*), Bombay (*f*), and Lahore (*g*), that this rule *does not apply to appeals preferred in forma pauperis*

1-1 See also *Sabhapathi* v *Narayanasami* (1902) 25 Mad 555 558

(*z*) *Chappan* v *Moidinkutti* (1899) 22 Mad 68, *Toolsee Money Dassee* v *Sudevi Dassee*, (1899) 26 Cal 361

(*a*) *Nawab Behram Jung* v *Haji Sultanali* (1913) 37 Bom 572 17 I C 739

(*b*) *Indanchand* v *Damji* (1923) 25 Bom L R 468 73 I C 474 (1923) A B 399

(*c*) *Veerpulsla* v *Narganayak* (1925) (1925) A M 113 87 I C 346

(*d*) *Seshayyangar* v *Jainulavad n* (1880) 3 Mad 66 *Srinivasa* v *Subramania* (1907) 17 Mad L J 583 *Sukhana* v *Hart* (1920) 43 Mad 902

(*e*) *Nusseeroodeen* v *Lyjul* (1871) 17 W R 63 See also *Mussamut Hafizan* v *Abdul Karim* (1908) 12 C W N 103 cited in the notes to O 25 r 1

(*f*) *Khetraj* v *Kishanlala* (1918) 42 Bom 5, 42 I C 67

(*g*) *Naim* v *Abdul Hamid* (1922) 3 Lah 50, 67 I C 336, (1922) A L 157

"In its discretion".—Except in the case referred to in the proviso to sub r (1) the power of the appellate Court to require security for costs is discretionary. The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs (h). Similarly mere non payment of the costs of the original suit is no ground for calling upon the appellant to furnish security under this rule unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs (i). On the other hand, when the respondent had failed to recover his costs in the lower Court, Macleod C J made an order for security observing that the Court's discretion was absolute and could not be fettered by cases (j). It is submitted that this was a misuse of the word absolute for the discretion is a judicial discretion to be exercised in accordance with legal principles expounded in the cases. But the Court will as a general rule demand security for costs from a poor or insolvent appellant if it is proved to the satisfaction of the Court that the appellant is not the real litigant but a mere puppet in the hands of others who are well able to furnish security (k) or if the merits of the case are plainly in favour of the respondent (l). See notes to O 25 r 1, Poverty of plaintiff on p 781 above.

At what stage respondent should apply for security.—The respondent should apply promptly, or else it might be urged that he had waived his right (m).

Order for security.—When an order is made under this rule for security for costs it is not necessary that any specific sum should be named in the order. It is sufficient if the order directs the appellant to furnish security for the costs of the original
inal
ided

Extension of time for furnishing security.—The appellate Court may under exceptional circumstances extend the time for furnishing security [see s 148]. Thus where the appellant alleged that he was unable on account of plague in Bombay to raise the money required for security within the time fixed by the Court the Court extended the time for giving security. The time for giving security may be extended either before its expiry or afterwards (p).

"Court shall reject the appeal".—The appeal should not be rejected if the order for security has been made without notice to the appellant (q).

Restoring of appeal.—An appeal although it may have been rejected by the appellate Court under this rule upon failure of the appellant to furnish security, may be restored on sufficient grounds at the Court's discretion (r). But no appeal lies from an order refusing to restore it (s). It is no excuse for not furnishing security in time that the appellant is a wandering fakir for it is the duty of every litigant to keep in touch with his case (t).

(h) *Jiwan Ali* v *Basa Mal* (1886) 8 All 203; *Hewetson* v *Deas* (1894) 21 Cal 526; *Maneklji* v *Goolbai* (1879) 3 Bom 241.
(i) *Ahmed* v *Shaik Essa* (1889) 13 Bom 458; *Ramsing* v *Balubhai* (1903) 5 Bom L R

O. 41, rr. 10, 11.

Appeal from order rejecting appeal under sub-rule (2) —An order rejecting an appeal under this rule is not appealable as an order under *O 43* for it is not one of the orders specified therein. Nor is it appealable as a decree for it does not conclusively determine the rights of the parties with regard to any of the matters in controversy in the appeal within the meaning of the definition of decree (s 2, cl (2)) (u)

Appeal from order dismissing petition praying Court to receive security for costs.—An order is made under sub rule (1) directing an appellant to furnish security for costs The order is indefinite in that it does not fix the exact date on or before which security is to be given The appellant, believing that the time for giving security has expired applies to the Court to receive the amount fixed by the order as security The Court holds that the time for furnishing security has expired and refuses the application The appellant is entitled to appeal from the order under cl 15 of the Letters Patent as the effect of the order would be to finally deprive the appellant of his power of prosecuting his appeal (v)

Insolvency appeal.—There is a conflict of decisions as to whether this rule applies to the case of an appeal from an order passed by a Judge in insolvency under the Presidency Towns Insolvency Act 3 of 1908, the High Court of Madras holding that it does not (w) while the High Court of Calcutta holding that it does (x) The latter view it is submitted, is the correct view See Act 3 of 1908, s 8 (2) (b)

Form —For form of security for costs of appeal see App G, form No 4

11 [S. 551] (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader

Power to dismiss appeal without sending notice to lower Court

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Alteration in the rule —

1 In [illegible] for the record if it thinks fit to do so [illegible] the Court to send [illegible]

2 T[illegible] that [illegible] dismissal.

(u) Lakha v [illegible] Mohendra [illegible] (1904) 27 Mad 121

(v) Vidhaypurna [illegible] 6) 43 Cal. 243 [illegible]

default," to make it clear that no appeal lies from an order of dismissal for default. See s. 2, cl (2), sub cl (b) Under the old section it was held that a decision dismissing an appeal for default was a decree and was therefore appealable (y)

O. 41, r. 11

Dismissal of appeal under sub-rule (1): whether judgment necessary —Under the corresponding section of the Code of 1882 it was held by the High Court of Calcutta that the dismissal of an appeal under sub r (1) did not relieve the lower appellate Court from the necessity of writing a judgment in the manner prescribed by s. 574 of that Code [now r 31 of this Order] (z) A different view, however, was taken by the High Court of Allahabad (a) The present Order is divided into distinct parts under appropriate headings, an arrangement which did not appear in the corresponding Chapter of the Code of 1882 Rule 11 comes under the heading Procedure on *admission* of appeal ' The next heading of the Order is ' Procedure on *hearing*, ' and r 31 comes under the next following heading *Judgment in appeal Relying upon this classification, it was held by the High* Court of Bombay in *Tanaji* v *Shankar* (b) that under the present Code it is not obligatory upon the lower appellate Court in dismissing an appeal under this rule to write a judgment as required by r 31 But this decision has since been overruled by a Full Bench of the same Court, on the ground that it was in conflict with the previous practice of that Court which was based on a Civil Circular being Circular 51, published in 1890 under the provisions of the High Courts Act, 1861, by which it is provided that when an appellate Court dismisses an appeal under s 551 [now r 11 of this Order] a judgment should be written and a formal decree drawn up In the course of the judgment Sir Basil Scott, C J, said ' There is nothing in the new Code of Civil Procedure which introduces any change in the law, except in so far as the rules commencing with rule 9 of Order XLI are headed ' Procedure on admission of appeal ' That change is not sufficient to abrogate the rule published under the High Courts Act which is quite consistent with the provisions of the Code (c) The result is that according to the Bombay High Court when an appeal is dismissed under this rule a judgment should be written and a formal decree drawn up The High Court of Calcutta has also held the same way under the present Code (d)

Dismissal of appeal for default under sub-r. (2) —Where an appeal is dismissed for default, it is the decree of the lower Court alone that can be enforced in execution (e) See notes to s 36, What decrees may be executed

Review —Dismissal of an appeal under this rule bars a review of the judgment appealed against see notes under O 47 r 1 The order under this rule dismissing the appeal is itself subject to review and the practice of the Calcutta High Court is to grant a review and order the rehearing of the appeal ex parte (f) When a second appeal is dismissed under this rule, the High Court has no power to review its judgment on the ground of the discovery of new and important matter (g) See notes to O 47 r 1 No review allowed on a question of fact after decision of second appeal

Re-admission of appeal dismissed for default under sub-rule (2) —An appeal dismissed under sub r (2) may be re admitted under r 19

(y) *U a Sundari* v *Bindu* (1897) 24 Cal 759
(z) *Rani Deka* v *Brojo Nath* (1898) 25 Cal 97
(a) *S n n Hasa* v *I ira* (1908) 30 All 319
(b) (191) 36 Bom 116 12 I C 564
(c) *Han a nt* v *4 aji* (1913) 37 Bom 610 20 I C 966 [F B]
(d) *Surend a Nath* v *R ghunath Das* (19 7) 27 C W N 501 6 I C 1052 (3) A C 558
(e) *Shyam Mandal* v *Sat nath* (1917) 44 Cal 954 ... I C 1..

.0 ... J 76 70 I C 408 (2) A C 165

O. 41, rr. 12-14.

12. [S. 552.] (1) Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal

Day for hearing appeal

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day

13. [S. 552.] (1) Where the appeal is not dismissed under rule 11, the appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred

Appellate Court to give notice to Court whose decree appealed from

(2) Where the appeal is from the decree of a Court, the records of which are not deposited, in the appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the appellate Court

Transmission of papers to appellate Court

(3) Either party may apply in writing to the Court, from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made, and copies of such papers shall be made at the expense of, and given to, the applicant

Copies of exhibits in Court whose decree appealed from

Alteration in the rule—*In sub-rule (1) the words ' where the appeal is not dismissed under r 11 have been substituted for the words ' when the memorandum of appeal is registered*

Form—*For form of intimation to lower Court of admission of appeal, see Appendix G, form no 5*

14. [S 553] (1) Notice of the day fixed under rule 12 shall be affixed in the appellate Court-house, and a like notice shall be sent by the appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the appellate Court in the manner provided for the service of a defendant of a summons to appear and answer, and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Publication and service of notice of day for hearing of appeal

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

Appellate Court may itself cause notice to be served

Form.—For form of notice to respondent, see Appendix G, form no 6.

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice

Procedure on hearing.

16. [S. 555.] (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Right to begin.—The mere fact that the respondent calls in question the right of the appellant to appeal does not give the respondent the right to begin (*h*)

It is the duty of the appellant to satisfy the Court of Appeal that the decision of the trial Court is erroneous (*i*) In every appeal it is incumbent upon the appellant to show some reason why the judgment appealed from should be disturbed. There must be some balance in his favour to justify the alteration of the judgment as it stands (*j*)

17. [S. 556.] (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Dismissal of appeal for appellant's default

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

Hearing appeal ex parte

Alteration in the rule.—The words 'the Court may make an order that the appeal be dismissed' have been substituted for the words the appeal shall be dismissed for default," to make it clear that no appeal lies from the order of dismissal for default (*k*) See s 2, cl (2), sub cl (b), and notes "Order of dismissal for default, p 8 above

(*h*) *Rustomji* v *Kessowji* (1884) 8 Bom 287
(*i*) *Secretary of State* v *Bejoy Kumar* (1924) 40 Cal L J 303 84 I C 732, (25) A C 24
(*j*) *Musst Fakrunissa* v *Moulvi Izarus* (1921) 25 C W N 866, 63 I C 898 (P C)
(*k*) *Rukminimayi* v *Paran Chandra* (1912) 39 Cal 341, 14 I C 823

O. 41, rr. 17, 18.

"Where the appellant does not appear."—See notes to O. 9, r. 9, "Appearance," *on p. 498 above.* The Patna High Court has held that mere physical presence is not sufficient, but that the party or his pleader must be present for the purpose of conducting the case. So when the appellant said his pleader was absent and that he would fetch him, this was held to be a default of appearance (*l*). If the pleader appears only to apply for an adjournment, this is not an appearance (*m*).

Re-admission of appeal dismissed under this rule.—See r. 19 below.

Order that the appeal be dismissed.—See notes above, "Alteration in the rule."

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

18. [S. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed :

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

"The Court may make an order that the appeal be dismissed."—The language of the rule clearly shows that the order of dismissal should not be made before *the day fixed for the hearing of the appeal* (*n*).

Re-admission of appeal dismissed under the rule.—See r. 19 below.

Appeal.—An order under this rule is not open to appeal. The proper remedy is an application under r. 19 below for re-admission (*o*).

Effect of dismissal of appeal against one or several respondents for non-service of notice.—*A, B* and *C* obtain a decree for *joint possession* against *D*. *D* appeals from the decree. *A* and *B* are served with the notice of appeal, but *C* is not. *The appeal is then upon dismissed as against C.* Is *D* entitled to proceed with the appeal as against *A* and *B*? No, for even if the appellate Court heard the appeal and reversed the decree of the lower Court as regards *A* and *B*, the decree of the lower Court *not being reverse as regards C, C could execute the entire* decree (the decree being a *joint* decree) so as to nullify the decree of the appellate Court (*p*). See notes to O. 22, r. 4, "Cases in which suit or appeal held to abate, as a whole," p. 741 above.

(*l*) *Ram Dein Tewari v. Bishun Prakash* (1920) 5 Pat. L. J. 17, 54 I. C. 715.

(*m*) *Muhammad v. Manavikrama* (1922) 45 Mad. 88, 69 I. C. 515, ('23) A. M. 15.

(*n*) *Chandra Nath v. Kaliprasanna* (1904) 35 Cal. 533.

(*o*) *Attar Singh v. Karm Chand* (1919) Punj. Rec. no 169, p. 448, 52 I. C. 170.

(*p*) *Laser v. Fazle* (1914) 19 C. W. N. 260, 25 I. C. 703.

O. 41, rr. 19, 20.

19. [S. 558.] Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of appeal dismissed for default

[illegible] ed for the [illegible] construed

"Sufficient cause."—The carelessness of an advocate's clerk does not constitute sufficient cause (r) But where the appellant's pleader appeared soon after the appeal was dismissed, it was restored on the ground that the failure to appear was unintentional (s).

Appeal.—An appeal lies from an order of *refusal to re admit* an appeal [O. 23, r 1, cl (t)] But no appeal lies from an order *re admitting* an appeal (t).

Dismissal of appeal for failure to deposit costs of paper book or to pay Court-fees.—Where an appeal is dismissed under the rules of a High Court for failure to deposit the costs of preparation of the paper book as required by the rules, the decree may be set aside not by an order under this rule, but by an order on an application for a review (u). So also if it is dismissed for failure to pay Court fees (v).

Inherent power to restore appeal dismissed for default.—Although a cause may not amount to a " sufficient casuse" within the meaning of this rule, the Court has inherent power to pass an order of restoration if it considers that a case for restoration has been made out (w) According to the Bombay High Court (x), the Court has inherent power to admit an application for re admission that is time barred under Art 168 of the Limitation Act, but the Lahore (y) and Madras (z) High Courts differ following *Seclaveni v Narayana* (a) *See note under O 9, r 9, " Inherent power to* restore suit dismissed for default on p 501 above

Other remedy.—The applicant is not confined to the remedy of restoration but may file another appeal if he still within the period of limitation (b)

20. [S. 559.] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court

Power to adjourn hearing and direct persons appearing interested to be made respondents

(q) *Samajya v Subbamma* (1903) 26 Mad 599 601
(r) *Maung Than v Zainat Bibi* (1925) 3 Rang 488 92 I C 508 (26) A R 50 See also *Ram Sukhal v Maharajah Kesho Prasad* (1918) 3 Pat L J 218 43 I C 925
(s) *Balmukand v Wazir* (1923) 5 Lah L J 89, 79 I C 279
(t) *Gulab Kunuar v Thakur Das* (1902) 24 All 464
(u) *Fatimunnissa v Deoki* (1897) 24 Cal 350
(v) *Surajpal Pandey v Utim Pandey* (1921) 6 Pat L J 625 *Anant v Manjal* (1925) 4 Pat 704, 91 I C 483, (26) A P 27
(w) *Gauran v Brij Raj* (1919) Punj Rec no 53, p 132 51 I C 607
(x) *Sonubai v Shivajirao* (1921) 45 Bom 648, 60 I C 919
(y) *Bissamal v Kesar Singh* (1920) 1 Lah 363, [illegible]

739, 75 I C 284, (23) A P 213

O. 41, r. 22. the other then, if *A* appeals, *B* may support the decree at the hearing of the appeal not only on the ground decided in his favour, *but also on the ground decided against him*, without filing any cross-objections (*p*). In the case put above the decree was *entirely* in *B*'s (respondent's) favour. Suppose now that *A*'s claim is decreed in part. In such a case *A* may appeal from the decree alleging that the decree ought to have been for the full amount claimed by him. And *B* also may appeal from the decree alleging that the suit ought to have been dismissed altogether. If *A* appeals from the decree and *B* also appeals, *B*'s appeal is called a cross-appeal. But *B* may not file a cross-appeal and he may file cross-objections under this rule. In the cross-objections filed by *B* under this rule *B* may take any objection to the decree which he could have taken by way of appeal (*q*). If no cross-objections are filed at all by a respondent, the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant (*r*), nor has it the power in the absence of cross-objections to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position (*s*). And in any event the Court cannot record a finding which does not affect the point at issue (*t*).

Sub-rule (4): where the appeal is withdrawn or dismissed for default.—The old section commenced with the words, "any respondent ... may *upon the hearing* not only support the decree," etc. It was accordingly held that a respondent can be heard in support of his cross-objections only *upon the hearing* of the appeal. If the appeal was withdrawn *before the hearing*, the respondent, it was held, had no right to be heard in support of his cross-objections (*u*), though the Court might in such a case allow him to prefer a regular appeal from the decree (*v*). But if the hearing had *once commenced*, the appeal, it was held, could not be withdrawn so as to prevent the cross-objections being heard and determined (*w*). This distinction has now been done away with by the omission of the words, "upon the hearing," in sub-r. (1) and by the addition of sub-r. (4). Under the present rule the *withdrawal* of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. Similarly the dismissal of an appeal *for default* is no bar to the hearing of cross-objections. This was correctly admitted in *B[illegible] v. [illegible]*, a Letters Patent appeal, but the reasoning so far as it proceeds on the assumption that O. 41 does not apply to Letters Patent appeals seems opposed to the Privy Council decision in *Sar[illegible] v. Sar[illegible]* (*y*). The dismissal of an appeal upon the appellant's failure to give security for costs is a dismissal for default within the meaning of sub-r. (4) (*z*). But if the appeal has abated the respondent is not entitled to have his cross-objections heard (*a*).

Under the old section it was held by the High Court of Allahabad that the dismissal of an appeal as *filed out of time* was a bar to the hearing of cross-objections (*b*). It has been held by a Full Bench of the Madras High Court that the law is the same under the present rule. The Lahore High Court has held that an appeal must be properly

(*p*) *Lala Ca[illegible] v. Janki [illegible]* (1890) [illegible] Cal [illegible] 13-14 [illegible]; [illegible] *v. [illegible] Prasad* [illegible] (19[illegible]) 13 Bom [illegible]; [illegible] *v. Musst. [illegible]* (19[illegible]) [illegible] (2[illegible]) [illegible]

(*q*) *Faiak v. Kaur [illegible]* (1[illegible]) [illegible]

(*r*) *Kau[illegible] lada v. [illegible]* [illegible] 229; *Carpere v. Kuken* [illegible] 3 Cal 9[illegible] 9[illegible]

(*s*) *C[illegible] Lal v. Bad[illegible]* [illegible]; [illegible] *v. D[illegible] Sah* [illegible] 9[illegible]; [illegible] *chandra v. [illegible]* [illegible] 4 [illegible] (2[illegible]) [illegible]; [illegible] *Kumar v. [illegible]* 41 [illegible] O. 6; *Ranjit [illegible]ngh* [illegible]

Ra[illegible] v. [illegible] Mal (1[illegible]) 10 All [illegible]; *Mal [illegible] v. Hasan* [illegible] All [illegible]

(*v*) *Hargovindas v. [illegible]* [illegible] 23 Bom 62[illegible]

(*w*) *Dhonai v. The [illegible]* [illegible] (18[illegible]) 9 [illegible]

(*x*) (19[illegible]) 43 Mad [illegible]

(*y*) (19[illegible]) 4[illegible] [illegible] *[illegible] Deyal*

(*z*) *Mo[illegible]* (1919) [illegible]

(*a*) *Mur[illegible]* (19[illegible]1) 44 Mad [illegible]

(*b*) *Ram[illegible] v. [illegible]* [illegible] All [illegible] 41 Mad [illegible]

(*c*) *[illegible]gappa v.* [illegible]

before the Court in order that cross objections may be heard (*d*); and it has been held that where an appeal is dismissed on the ground of insufficiency of Court fee stamp, the Court has no power to hear cross objections (*e*) The last mentioned decision is based on the ground that except in the case of the original appeal being "withdrawn or dismissed for default" as expressly provided for in sub r (4), the general rule that cross-objections cannot be heard unless the appeal is decided on the merits is still in force. But the dismissal of an appeal on the ground of *non-joinder* of a party in a mortgage suit has been held not to be a bar to the hearing of cross-objections, the reason

Who may file cross-objections.—Cross-objections under this rule can only be filed by a party who might have appealed from the decree of the Court below, but has not done so It is not open to the party who has appealed, and whose appeal has been dismissed, subsequently to prefer cross objections under this rule. *A* sues *B* for damages *A*'s claim is decreed in part *A* appeals from that part of the decree which is against him. *B* also appeals from that part of the decree which is against him. *A*'s appeal is heard and dismissed. Before *B*'s appeal is heard, *A* files cross-objections in *B*'s appeal setting up the very grounds upon which in his own appeal he had asked for relief. *A*'s cross objections should not be heard (*g*). Again *A* obtains a decree in a partnership suit which as against *B*, one of the defendants is *ex parte*. *B* does not apply under O 9, r 13, to set aside the *ex parte* decree. *B* cannot therefore file cross objections in *A*'s appeal that he should have been given a hearing (*h*) But in a case where *B* before the *ex parte* decree was passed presented a petition asking to be heard under the erroneous impression that the *ex parte* decree had already been passed, it was held that he was not barred from filing cross-objections on the ground that he was not heard (*i*) Cross-objections as to costs in the Courts below will not be entertained in second appeal (*j*).

***A respondent may urge cross-objections against the appellant but* not as a rule against a co-respondent.**—It has been held by the High Courts of Calcutta, Bombay and Allahabad, that as a general rule the right of a respondent to urge cross objections should be limited to his urging them only against the appellant, and that it is only by way of exception to this general rule that one respondent may urge cross objections as against other respondents, the exception holding good in those cases in which the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents (*k*) Thus in suits for dissolution of partnership and for accounts, it is open to any respondent to prefer cross objections against a co respondent on any item in dispute between them The reason is that in such suits accounts are taken not between the plaintiff on the one hand and the defendants on the other, but between all the partners. *A*, *B* and *C* constitute a partnership firm *A* sues *B* and *C* for dissolution of partnership and for accounts A decree is passed in the suit declaring the amount coming to the share of each partner on the taking of accounts *A* appeals from the decree *B*

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O. 41, rr. 22, 23.

and *C* are joined as respondents to the appeal. In such a case it is open to *B* to prefer cross objections against *C* in respect of an item in dispute between *B* and *C* (*l*). Similarly, when the decree appealed from proceeds on a ground common to all the parties against whom it is passed and the appeal is preferred by *some* only of such parties, *e g*, where the suit is—*A* v *B* and *C* and a decree is passed both against *B* and *C* and the appeal is—*B* v *A* and *C*, *A* who is the plaintiff respondent may prefer cross-objections not only against *B* the appellant but against *C* the co-respondent. *A* sues *B* and *C* to recover Rs 5,000 alleged to be his share of the profits of certain lands. A decree is passed for *A* for Rs 3,000 against *B* and *C*. *B* appeals from the decree. *C* does not join *B* in the appeal and he is therefore made a party respondent. The appeal thus is—*B* v *A* and *C*. In such a case it is open to *A* to prefer cross objections not only against *B* but also against *C* in respect of that portion of his claim that was disallowed by the Court of first instance, namely Rs 2,000 (*m*). According to the Madras (*n*), and Lahore (*o*) High Courts, a respondent may urge cross objections against a co respondent in any and every case. Note in this connection the substitution in sub r (3) of the words "the party who may be affected by such objection" for the words "the appellant" which occurred in s 561 of the Code of 1882.

"Or within such further time"—This rule requires that cross objections should be filed by the respondent within one month from the date of the service of notice of the appeal. But the time may be extended if sufficient cause is shown (*p*).

Application of the rule—Cross objections may be filed not only in first appeal but also in second appeal (O 42). They may also be filed in appeals from orders preferred under s 104 and O 43 [See O 43 r 2].

Second appeal—A second appeal will lie from a decree of the first appellate Court disallowing the cross-objections of a respondent (*q*).

Letters Patent appeal—The Allahabad and Calcutta High Courts have held that the provisions for respondents filing cross objections does not apply to Letters Patent appeals (*r*), but it is doubtful if this is correct in view of the Privy Council decision in *Sabitri* v *Savi* (*s*).

Form—As to form of memorandum of cross objections see App G, form no 8.

Remand of case by appellate Court

23 [S 562] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re admit the suit under its original number in the register of civil suits, and proceed to determine the suit,

(*l*) *Bidgobind* v *Ram Sarup* (1914) 36 All 503, 6 I C 83
(*m*) *Abdul Ghani* v *Muhammad* (1906) 28 All 95
(*n*) *Kulandai* v *Iswarandha* (1902) 26 Mad 229; *Muniammu* v *Abbu* (1915) 38 Mad 665, 7 I C 323 (F B); *Alagappa* v *Chockalingam* (1918) 41 Mad 904 91, 48 I C 203
(*o*) *Chhajju* v *Qutab Din* (1923) 5 Lah L J 9, 69 I C 3 0 ('23) A L 39
(*p*) *Suleman* v *Jooseb* (1890) 14 Bom 111
(*q*) *Ganapati* v *Sitharama* (1888) 10 Mad 292
(*r*) *Ir Mirza Himmat* (1866) 1 B L R F B 109; *Kausalia* v *Gulab* (1899) 21 All 297; *Brojendra* v *Prosanna* (1920) 24 C W N 1016, 59 I C 4 9
(*s*) (19 1) 48 I A 76, 48 Cal 481, 60 I C 2 4

and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

O. 41, r. 23

Alterations in the rule.—The words, "and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand," at the end of the rule are new.

Scope of the rule.—It is not competent to the appellate Court under this rule to remand the case for further evidence to the lower Court and to require that Court to *pass another decree* All that the appellate Court is empowered to do is to frame an issue and to send down that issue to the Court below for the return of a finding, and it is the duty of the appellate Court after receiving that finding to dispose of the appeal upon the evidence before it (t) The appellate Court cannot after finding on facts remand the case to the lower Court to pass a decree in accordance with that finding (u)

Preliminary point.—This rule enables the appellate Court to remand a case to the lower Court for determination on the merits, *if the lower Court has disposed of* the suit upon a *preliminary point*, and the decree of that Court is *reversed* in appeal. The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of a suit, but comprehends all points or issues *whether of fact or of law*, the *determination of which has precluded the necessity for determining other points or issues* and such other points or issues have therefore been left undetermined (v) A Full Bench of the Madras High Court defined it as any point whether of fact or of law, the decision of which avoids the necessity for a full hearing of the suit (w) Thus where the lower Court dismisses the plaintiff's suit on the ground that it is barred by *limitation*, or that the Court has no *jurisdiction* to hear the suit, or that the *necessary leave* has not been obtained or that the plaint does not on the face of it disclose any *cause of action* (x), or that it is barred by the events in an earlier suit (x1) and the appellate Court reverses the decree of the lower Court on those grounds it may remand the case to the lower Court to be proceeded with on the merits. Where several issues are raised in a suit one of which is that of undue influence, and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues, the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule (y) Similarly if *A* sues *B* to recover a sum of money on the basis of an award, and four issues are framed one of is which whether the award is valid and binding, and the Court after recording evidence on all the issues dismisses the suit on the ground that the award is invalid *leaving the other issues undecided*, the appellate Court may, if it finds that the decision of the lower Court on the issue as to the validity of the award is wrong, remand the case to the lower Court to be disposed of on the merits It does not matter that evidence has been recorded *on all the issues* (z) But where the first Court has decided a suit on the merits of the whole case, as where the suit is decided on all the evidence and on all the issues, the appellate Court cannot remand the case under this rule (a)

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2 Pat L J 398, 41 I C 202
Mata Din v *Jamna Das* (1905) 27 All 691, *Meghan Dube* v *Pran Singh* (1908) 30 All 63 *Kamla* v *Parbhu* (1916) 39 All 165, 37 I C

2[illegible]
(x1) *Ramasami* v *Narayanasami* (192[illegible]) 48 Mad L J 100 86 I C 548, (25) A M 483
(y) *Mahant Rachu* v *Mahant Raghunath* (1917) 639, 67 I C 494, (22) A P. 575

O. 41, r. 23. Where the first Court heard the entire suit, and *found* all issues in favour of the plaintiff except one, namely, whether *the suit was maintainable having regard* to the provisions of O 21, r 92, and dismissed the suit on the finding that the suit was not maintainable, it was held by the Patna High Court that the suit was disposed of on a preliminary point *within the meaning of this rule* (*b*) This decision is in *conflict* with the decisions referred to above and it is submitted, is not good law To pass a decree in favour of the plaintiff on *the strength* of a plan put in by the plaintiff in a suit for possession of land *is not* a decision of the suit on a *preliminary* point, and no remand can be made in such a case under this rule (*c*)

No order of remand can be made under this rule unless the lower Court has disposed of the *whole* suit upon a preliminary point This rule authorises a remand only where *the entire suit*, and not only a *portion of it*, has been *disposed of by the Court below* on a preliminary point (*d*) Assuming that the entire suit is decided on a preliminary point it is further necessary, before an order of remand can be made under this rule, that the appellate Court should also find that the decision on the preliminary point *is* wrong It is not a good ground, therefore for making an order under this rule, to say that the *preliminary issue e g* an *issue of limitation*, has been decided by the Court of first instance on a wrong view of the burden of proof, unless the appellate Court *finds* that the issue has been *wrongly decided* (*e*) Again if the lower Court decides the suit on several *preliminary points* the appellate Court should not *remand* the suit without deciding all those preliminary points (*f*)

Inherent power of remand. Remand in case of error, omission or irregularity.—No order of remand can be made under the present rule except when the suit has been disposed of on a *preliminary* point There are, however, cases *in which* suits have not been *disposed* of on a *preliminary point* and yet the Courts have claimed the power to remand the case professing to do so in the exercise of their *inherent* power [see s 151] These are cases in which the lower Court has committed any error, omission or irregularity by reason of which there *has not* been a proper trial or an effectual or complete adjudication of the suit, and the party complaining of such error, *omission or irregularity* has been *materially prejudiced* thereby *Thus if a suit* is defective *for* misjoinder of plaintiffs and causes of action the proper course is to return the plaint to the plaintiff for amendment and not to dismiss the suit (see notes to O 2 r 3 p 407 above) If *the lower Court* dismisses *the suit instead of returning the plaint* for amendment the appellate Court may set aside the decree and remand the suit with a direction to the lower Court to return the plaint to the plaintiff for amendment and to proceed with the suit *after the plaint is amended* (*g*) Similarly where a *suit is brought in* the name of *a wrong* person as plaintiff the appellate Court may direct the plaint to be amended and remand the case for re trial (*h*) Where time was granted to the plaintiff to produce his evidence—but neither he nor *his pleader appeared* on the day *to* which the hearing was *adjourned*, and the lower Court instead of proceeding to dispose of the suit under *O* 17, *r* 3, dismissed the suit for default under O 17 r 2 it was held that the appellate Court had power to remand the case to be disposed of in the *manner* prescribed by O 17, *r* 3 (*i*) A case may also be remanded where the decision of the lower Court is given without *taking the* defendant s evidence (*j*) In a Bombay case (*k*) the lower Court had erroneously pre

(*b*) *Thakur v. Sta Ah Manowar* (1919) 4 Pat L J 645 [illegible]

(*c*) *Lala v. Jargadoss* (1909) 32 Mad 83 I C 746

(*d*) *Lanwar v. Samman* (1889) 11 All 488 *Maharaja v. Maganlal* (1893) 19 Bom 303 *Kanchan v. Lar Nath* (1897) 19 Cal 336

(*e*) *Ilahi-ullah v. Lalla Prasad* (1912) 34 All 61 [illegible] I C 94

(*f*) *Great Ind. of Nagpur Railway v. Kelaru Lal* [illegible] 420 (2) A C 716

(*g*) *Salma Bibi v. Sheikh Muhammad* (1896) 18 All 131 *Lajja Ram v. Kuleswar Nath* (1896) 18 All 336

(*h*) *Halab Bakhsh v. Laldeo Prasad* (1901) 24 All 167 *Judab v. Anath* (1910) 37 Cal 171, [illegible] I C 996

(*i*) *Jadam v. Nathu* (1903) 25 All 191

(*j*) *Perumal v. Subramanian* (1898) 23 Mad 446

(*k*) *Jetanlar v. Bai Dwali* (1920) [illegible] Bom L R 771 [illegible] I C 5[illegible]

sumed the death of the mortgagor and decreed redemption by a person claiming to be his heir and the High Court reversed the decree and remanded the case for retrial after joining the mortgagor as a party.

Sections 562 and 566 of the Code of 1882 [now rr 23 and 25 of this Order] were the only sections that provided for a remand The cases cited in the preceding paragraph did not fall under either of those sections Moreover, the Code of 1882 contained a section, being s. 564 which prohibited the appellate Court from remanding a case except as provided by s 562 That section was found in its working to be embarrassing, and to get over the difficulty presented by cases of the kind cited in the preceding paragraph, the Courts resorted to their *inherent* jurisdiction That section has been omitted in this Code on the ground that it was unduly restrictive The absolute prohibition of s 564 having been removed, the Court, it is said, is free under s 151 to make an order of remand though the case may not fall either under this rule or rule 25 (*l*) It has accordingly been held that as under the old Code, so under the new Code, an order of remand can be made though the suit was not disposed of on a point which can be called a preliminary point within the meaning of this rule, provided such an order is necessary for the ends of justice (*m*) In *Nabin Chandra* v *Prankrishna* (*n*), however, Stephen and Mullick, JJ, expressed the opinion that if the appellate Court had at all any inherent power to remand, that power was taken away by s 107 read with O 41, rr 23 and 25, and that under s 107 an appellate Court can only remand a case " subject to such limitations as may be prescribed," that is, prescribed by rules 23 and 25 of O 41 The view so expressed ignores entirely the specific provisions of s 151 of the Code In *Mani Mohan* v. *Ramtaran* (*o*), Jenkins, C J, after observing that the combined effect of s 107 and O 41, r 23, was to limit the power of remand to the position described in O 41, r 23, said " And this is the general rule except under special conditions which have no application in the circumstances of this case " The view taken by Stephen and Mullick, JJ, was dissented from by a Full Bench of the Calcutta High Court in *Ghaznavi* v *The Allahabad Bank, Ltd* (*p*), where it was held that the powers of the appellate Court as regards remand are not restricted to the case specified in O 41, r 23, but that the Court, by reason of its inherent jurisdiction recognized and preserved in the Code [s 151] may order a remand in cases other than the case specified in O 41 r 23, if it be

case (*r*) So also the High Courts of Bombay (*s*) Madras (*t*) and Lahore (*u*) The Allahabad High Court treats the question as unsettled but puts a very wide construction on rule 23 (*v*) See notes to r 33 below, Remand

Remand in appeal from ex parte decree.—See notes to s 96 under the head Appeal from ex parte decree , p 261 above

I C 985 *Bhairab* v *Kali* (1923) 37 Cal L J 491, 74 I C 1033 (23) A C 606

(*q*) [illegible] Ali v *Sarat* (1916) 43 Cal 938 32 I C 791 *Radhakrishna* v *Venkata* (1924) 48 Mad 713 84 I C 955 ( ) A M 2[illegible]9

(*r*) *Raghunandan* v *Jadunandan* (1918) 3 Pat

O. 41, r. 23. **Remand in appeal from an order refusing to set aside an ex parte decree.**—In an appeal from an order refusing to set aside an *ex parte* decree the only case which can be remanded is the application under O 9, r 13, and not the original suit A obtains a decree *ex parte* against *B* *B* applies under O 9, r 13 for an order to set aside the decree on the ground that he was prevented by sufficient cause from appearing at the hearing but the application is refused *B* appeals from the order rejecting the application [O 43, r 1, cl (d)] If the order is reversed by the appellate Court, the proper course for that Court is to remand the application to the lower Court to dispose of that application with due regard to the conditions of O 9, r 13, but not to remand the original suit for re trial (*w*)

Appeal.—An appeal lies from an order remanding a case, where an appeal would lie from the decree of the appellate Court [O 43, r 1, cl (u)] This means that the order of remand is appealable only in cases in which the decree, which would have been passed by the appellate Court had that Court instead of remanding the case under this rule decided the whole case and passed a decree, is appealable (*x*) No appeal lies from a remand order in an appeal from an execution proceeding if the suit is of such a nature that by reason of s 102 no second appeal lies (*x1*) If no appeal is preferred from the order of remand, the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree, see s 105, sub s (2), and notes thereto But though an appeal lies from an order of remand, it must be preferred according to the Calcutta High Court *before* the final disposal of the remanded suit, otherwise it can not be entertained The reason given is that the right of appeal given by s 104 and O 43 from orders specified therein ceases with the disposal of the suit (*y*) On the other hand it has been held by the High Court of Allahabad, that the appeal may be preferred even after the decision of the remanded suit, provided it is within the period of limitation. The Allahabad Court proceeds on the ground that there is no provision in the Code imposing any such restriction on the right of appeal (*z*) The period of limitation for an appeal from an order of remand is 90 days from the date of the order [Limitation Act, art 156]

Though an appeal lies under rule 1 of Order 43 from an order of remand, no appeal will lie from the order when the order is itself made in an appeal preferred under any *other* clause of that rule Thus if an appeal is preferred under O 43, r 1, cl (a), from an order under O 7, r 10 or under O 43, r 1, cl (j), from an order under O 21, r 92, or under [illegible] rder [illegible] , no [illegible] hat cl (u) of r 1 of O 43 is subject to s. 104, sub-s (2) which provides that no appeal shall lie from any order passed in appeal [it may be an order of remand] under that section (*a*)

Appeal from remand under the inherent power.—When the order of remand is made under the inherent jurisdiction recognized in *Ghuznavi* v *The Allahabad Bank* (*b*), is it appealable? There are several decisions against such an appeal (*c*) Mukerji, J.

[illegible] All 200 54 I C 432 *Umri* v *Shah Muhammad* (19[illegible]) 3 Lah 218 68 I C 849, (2[illegible]) A I 178

(*y*) *Madhu Sudan* v *Kamini Kanta* (1905) 32 Cal 1023

(*z*) *Uman Kunwari* v *Jarbandhan* (1908) 30 All 479

(*a*) *Naubat Singh* v *Baldeo Singh* (1911) 33 All 479 9 I C 666 *Mathura* v *Nobin Chandra* (1897) 24 Cal 774 *Jhanday Lal* v *Surman Lal* (1899) 21 All 291 *Chhubu Mian* v *Harcharan Das* (1912) P R no 119, p 406, 18 [illegible]

[illegible] I C 965 (2[illegible]) A M [illegible]29 *Mama* v *Mamin* (192[illegible]) 3 Rang 490, 9[illegible] I C 368, (2[illegible]) A R 3[illegible]0

says an appeal lies because the order of remand is itself a decree (*d*), but if that were so, the provision of O 43, r. 1 (u) would be superfluous. The correct answer seems to be that rule 23 should be construed as widely as possible and that the right of appeal should not be curtailed except on very clear proof of circumstances justifying such curtailment. Therefore, even if the order of remand cannot be justified under the rule, yet if it is in substance an order under that rule, an appeal will lie (*e*) This is, of course, subject to the same condition that an appeal would lie from the decree of the appellate Court.

Powers of High Court in appeal from order of remand—In an appeal from an order of remand preferred under O 43, r 1, cl (u), the High Court is not confined to the question whether the order satisfies the requirements of the present rule, but may also determine the correctness of the lower appellate Court's decision on the "preliminary point" on which the Court of first instance disposed of the case Thus if the Court of first instance dismisses a suit as barred by limitation and the appellate Court reverses the decree and remands the case under this rule, and an appeal is preferred to the High Court from the order of remand, the High Court has the power to determine whether the point of limitation was correctly decided by the lower appellate Court (*f*)

Letters Patent appeal.—An order of remand made by a single Judge of the High Court in second appeal is a "judgment" within the meaning of cl 15 of the Letters Patent, and is appealable as such (*g*)

Privy Council appeal—See notes to s. 109 at pp. 289, 290 *ante*

Improper order of remand.—Under the Code of 1882 an order under s 562 was appealable, and a party might impeach the order of demand on appeal from the *final* decree. When no appeal was preferred from the order of remand, but the order was impeached on appeal from the final decree, and the Code found that the order was improperly made, the question arose as to whether the order should be treated as illegal or merely irregular It was held by the High Court of Allahabad that if a remand was ordered in a case in which it ought not to have been ordered, both the order of remand, and all the proceedings subsequent thereto are void and illegal (*h*) On the other hand, it was held by the Calcutta High Court that the demand order and the subsequent proceedings are not in such a case illegal, but merely irregular and the subsequent proceedings should not be set aside unless the remand had substantially affected the decision of the remanded suit on the merits and the party complaining of the irregularity was materially prejudiced thereby (*i*) [see s 99] The Madras High Court held that though an order of remand made in contravention of the provisions of s 562 is illegal, yet the error may be cured by the consent of parties or by waiver (*j*) The whole difficulty has been got over in the present Code by enacting that a party who does not appeal from an order of remand in the first instance cannot afterwards dispute the correctness of the order on appeal from the final decree (*k*) see s 105 sub s (2)

A A 226 *Kayem Biswas* v *Bahadur Khan* (1925) 30 C W N 41, 89 I C 744, (25) A C 1258

(*f*) *Badam* v *Imrat* (1881) 3 All 675, *Bhau* v *Bapuji* (1890) 14 Bom 14 *Abraham* v *Abraham* (1890) 17 Cal 168, *Deokishen* v (1905) 28 Mad 437 See also *Baikuntha Nath* v *Nawab Salimula* (1908) 12 C W N 590

(*k*) *Munshi Lal* v *Ramasis* (1922) 1 Pat. 246, 65 I C 175, (22) A P 384, *Masih-un nissa Bibi* v *Kaniz* (1921) 43 All 377, 60 I C. 975.

O. 41, rr. 23-25.

Remand of case by consent for trial on issues not raised in appeal—The effect of an appeal is to re open the decree of the lower Court and it is competent to the appellate Court on the agreement of parties to remand the case to the lower Court for trial on issues not raised in the memorandum of appeal (l)

Trial Court.—Jurisdiction to try the case remanded depends entirely upon the order of the appellate Court (m).

Where evidence on record sufficient appellate Court may determine case finally

24 [S. 565] Where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after re settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate Court proceeds

Scope of the rule.—The scope of this rule is limited to cases in which the evidence upon the record is *sufficient* to enable the appellate Court to determine the suit (n)

This rule does not enable an appellate Court to declare a right in favour of one of the parties where no issue has been framed on the point and the right has not been set up in the lower Court (o)

Second appeal—See s 103 and notes thereto

Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from

25 [S 566] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issues, and shall return the evidence to the appellate Court, together with its findings thereon and the reasons therefor

The words and the reasons therefor in paragraph 2 are new

Scope of the rule—This rule refers to cases in which the evidence upon the record is *not sufficient* to enable the appellate Court to determine the suit

"May, if necessary, frame issues.—In framing issues under this rule the appellate Court should have regard to the provisions of O 14 r 3, which indicate the

(l) *Valesa* v *Venkataramа* [illegible] 50 Mad 510 [illegible] 613, [illegible] A 200
(m) *[illegible]* v *[illegible]* (19 3) 45 Mad L J [illegible] 7 [illegible] 321 [illegible] A M 3[illegible] [illegible] *Kali* v *Gopi Nath* (19[illegible]) 44 All [illegible] 6[illegible]
(n) *Bandi* v *Madalapalli* [illegible] 3 Mad 96
(o) *Official Trustee* v *Krishna* (1880) [illegible] Cal [illegible] [illegible] A 160

materials from which issues are to be framed. The issues may be on points not taken in the grounds of appeal (p) See notes to O 14, rr. 1 to 5

Power of Court to which issues are referred for trial under this rule.—The Court to which issues are referred for trial under this rule has no power to try and decide the case, but to try issues only It should then return the evidence to the appellate Court together with its findings thereon and the reasons therefor (q) Nor has it the power to make an order of reference under schedule II, para. 3 of the Code (r)

Court by which issues should be tried.—Where issues are referred for trial under this rule, they are triable only by the Court which was originally seized of the case, and by no other Court (s).

New issue raised before High Court.—"Even if it be competent to the High Court [in second appeal] to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away" (t)

Appeal—No appeal lies under the Code from an order referring issues for trial under this rule (u) Nor does an appeal lie under the Letters Patent (v)

26. [S. 567.] (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the appellate Court, present a memorandum of objections to any finding.

Findings and evidence to be put on record Objections to finding

(2) After the expiration of the period so fixed for presenting such memorandum the appellate Court shall proceed to determine the appeal.

Determination of appeal

Where no memorandum of objection is filed—This rule provides that either party may file a memorandum of objection to the findings by the lower Court on the issues referred to it by the appellate Court It is not to be supposed, however, that if no objections are filed by either party, the appellate Court is absolved from hearing the appeal (w) But the Lahore High Court has held that the Court may in its discretion decline to hear objections if none have been filed (x) Sub r (2) clearly indicates that even if no objections are filed, the appellate Court shall proceed to determine the appeal" That is to say, even if no objections are filed to the findings, the appellate Court is bound to examine the correctness of the findings, and to state in its judgment the reasons (r 31) for which it either accepts or rejects the findings (y) It should not accept the findings blindly without examining the evidence on which they are based (z) See notes to r 31, "Shall state the reasons for the decision

(p) *Chandulal* v *Lakhmi Chand* (1923) 5 Lah
Habib
5"3
660
Lahore Bank, Limited v *Lakhi Ram* (1913) Punj Rec no 105, p 392, 19 I C 970 [no power to delegate]
(t) *Ram Chandra* v *Secretary of State for India* (1916) 43 I A 172 178, 43 Cal 1104, 1116, 37 I C 223
(u) *Kali Kristo* v *Ram Chunder* (1881) 9 C L R

17) 2
L J
Umed Ali v *Salima Bibi* (1884) 6 All 383, *Mumtaz Begam* v *Fateh Husain* (1884) 6 All 391, *Bhagvan* v *Kesur* (1893) 17 Bom 428 *Ramchandra* v *Sono* (1895) 19 Bom 551

O. 41, rr. 26, 27.

Where the appellate Court has heard arguments on some of the issues and has expressed its views thereon and remitted other issues under r 25, it is not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings (*a*)

The appellate Court shall proceed to determine the appeal—When an appellate Court has made an order referring issues for trial under r 25, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal to another Court (*b*)

Unnecessary reference—In the case of an unnecessary reference under r 25, can the Court disregard the findings returned? It can, if the reference order is of a single Judge and the appeal is heard ultimately by a Bench of two Judges (*c*) But not otherwise, for it is an interlocutory order made with jurisdiction and operative in law until set aside in review (*d*) If the findings conflict with other findings of fact in the judgment this will not embarrass a Court of first appeal where the entire evidence is examined. A Court of second appeal may, however, be embarrassed, and it is therefore preferable not to resort to the rule in second appeal (*e*) but to remand under the inherent jurisdiction (*f*)

Second appeal—The provisions of this and the preceding rule apply so far as may be by virtue of O 42, to second appeals. Hence the High Court may in second appeal refer issues of *fact* for trial to the lower appellate Court, but when the finding and evidence upon such issues are returned to the High Court the finding is conclusive, and it cannot be challenged *upon the evidence* before the High Court as in first appeal. The reason is that second appeal *is not allowed on questions of fact* The only grounds on which a second appeal is allowed are those mentioned in s 100 and these relate to errors of law or usage having the force of law or a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits The objections to the findings must therefore be restricted to the limits within which the original pleas in second appeal are confined (*g*)

Sending back case for revised finding—An appellate Court has no power to send back a case to the lower Court to submit a *revised* finding on the fact on evidence already recorded. Such a course is not warranted by any one of the rules 23 to 26 of this Order (*h*) But if it does so it is a mere irregularity within the meaning of s 99, and if the appellate Court on the revised finding returned to it, itself considers the evidence on which it is based the decree will not be set aside in appeal (*i*)

27 [S 598] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court But if—

Production of additional evidence in appellate Court

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(*a*) *Lachman v Janna* (1888) 10 All 162
(*b*) *Lila Narain v Jhamda* (1893) 15 All 315 *Kumarasami v Subbaraya* (1900) 23 Mad 314
(*c*) *Mubarak v Bihari* (1894) 16 All 306 *Jnanendra Nath v Surjya Kant* (1916) 17 C W N 46, 15 I C 39 *East Indian Railway Co v Chanjoo Khan* (1915) 42 Cal 888 28 I C 245
(*d*) *Hook v Administrator-General of Bengal* (1921) 48 I A 187 48 Cal 499 60 I C 631 *Kamini Kumar Deb v Durga Charan* (1923) 37 Cal L J 1, 74 I C 39, (23) A C 5-1
(*e*) *Kamini Kumar Deb v Durga Charan supra*
(*f*) *Ghaznavi v Allahabad Bank* (1917) 44 Cal 9 7 41 I C 593
(*g*) *Lal Kishen v Jasoda Kuar* (1885) 7 All 765, *Ram Mehr v Jala Ram* (1924) 5 Lah 264, 78 I C 404 (25) A L 435 See also *Gopal Singh v Jhakri Rai* (1886) 12 Cal 37 *Beni Prasad v Nand Lal* (189) 21 Cal 94 both cases und r r 27 below
(*h*) *Venkata v Anantha Charar* (1893) 16 Mad 239 (I C)
(*i*) *Mallikarjuna v Pathaneni* (1896) 19 Mad 4 9

(b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, **O. 41, r. 27**

the appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be *produced by an appellate Court, the Courts shall record the* reason for its admission.

When additional evidence may be admitted.—*Under this rule* "the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence *to enable it to pronounce judgment or for any other substantial cause*" (j) Additional evidence under this rule should not be taken until the appellate Court *has examined the evidence on the record* and has *after* such examination come to the conclusion that the evidence as it stands is inherently defective, as, for instance, when the lower Court has omitted to take the evidence of an attesting witness to a mortgage deed (k) Until this is done, the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. As observed by their Lordships of the Privy Council in *Kessowji Issur* v *G I P. Ry* (l), the legitimate occasion for [the application of the present rule] is when, on examining the evidence *as it stands*, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it." This decision seemed to lend support to the view taken in the Calcutta case last quoted that the test of admissibility is the requirement of the Court itself and this construction has often been put upon this rule (m) But in truth sub rule (b) falls into two parts (1) the requirement of the Court and (2) any other substantial cause *Kessowji's* case dealt with (1) only because (2) was barred by an unsuccessful application for review to the lower Court However, a recent decision of the Privy Council makes it clear that the appellate Court has a discretion to admit additional evidence for substantial cause (n)

The power given under this rule should be exercised very sparingly by the Courts and great caution should be exercised in admitting new evidence (o) Additional evidence must not be allowed to enable a plaintiff to make out a fresh case in in appeal. If cases were remanded for the purposes of allowing parties to make out a new case or to improve their case by calling further evidence, there would be no end to litigation (p) An appellant who has ample opportunity of giving evidence in the lower Court, and *elects not to* do so, but rests his case on the evidence as it stood, ought not to be allowed to give evidence which he could have given below (q) Similarly, the appellate Court should not

(j) *In the goods of Premchand* (1894) 21 Cal 484,

(1915) 42 Cal 675 28 I C 865

(m) *Bombay Sizing Co* v *Kusumgar* (1923) 47 Bom 674, 84 I C 74, (24) A B 227

I A. 28, 7 W R 10 *Ram Pershad* v *Rajunder* (1866) 6 W R 262

(p) *Hurpurshad* v *Sheo Dyal* (1876) 26 W R 55, 3 I A 259

(q) *Ramdas* v *Official Liquidator* (1887) 9 All 366

O. 41, r. 27. take evidence which *the lower Court refused to take as it was tendered after the case* was closed (*r*), or admit a document tendered by a party, if, having the opportunity of tendering it in the Court below, he omitted to do so (*s*), though as in *Sreemati* v. *Secretary of State* (*t*) this may sometimes be permitted on terms as to costs. Nor should it allow additional evidence to prove the genuineness of a document held by the lower Court to be a fabrication (*u*) It must, however, be noted that where additional evidence is taken by the High Court with the assent of both sides, it is not open to either party to complain of it (*v*)

Where the lower Court has refused to admit evidence.—An appellate Court should not reverse the decree of the first Court without allowing the decree holder to give evidence which he offered in the first Court, and which that Court declined to take (*w*). The improper rejection of evidence does not justify the reversal of the decree and the appellate Court should act under this rule (*x*)

Where the appellate Court requires any document to be produced.—The appellate Court has no power under this rule to require a document to be produced unless it is required to enable it to pronounce judgment. Where judgment could be pronounced in the absence of the document, the appellate Court should not allow the document to be produced (*y*) The word " requires " means nothing more than " needs " or " finds needful (*z*)

Where the appellate Court requires a witness to be examined.—An appellate Court should not under cl. (b) of this rule allow to be produced before it additional evidence which impeaches the testimony of a witness called in the Court below, without that witness also being called and being given an opportunity to contradict or explain the additional evidence so given, otherwise no witness, whatever his standing would be safe from adverse judicial comment (*a*) Where a witness was examined and cross examined in the Court of first instance, and there was no gap in the evidence or new matter about which it was necessary to examine him, and the appellate Judge merely cross examined him on his previous evidence on the chance of getting to the bottom of the matter, it was held that the examination of the witness by the Court under those circumstances was not warranted by the provisions of this rule (*b*)

"Or for any other substantial cause."—The "cause" referred to here need not be *ejusdem generis* with the causes stated in the earlier part of the rule (*c*) The expression " any other substantial cause confers a wide discretion on the appellate Court to admit additional evidence *when the ends of justice require it* (*d*) It has accordingly been held that the discovery after the filing of the appeal of fresh evidence not known to and available to the appellant after due diligen [illegible] ceedings in the first Court is a " substantial cause " [illegible] fying the admission of such evidence in appeal (*e*) [illegible] clear in the case of *Indrajit* v *Amar Singh* (*f*) The sole issue in that case was whether a grant comprised certain villages The grantor had leased them prior to the grant and

(*r*) *Vaishno* v *Hemraj* (1922) 4 Lah L J 371
(*s*) *Zahrah* v *Bhugwan* (1871) 16 W R 211 *Narendra Nath* v *Lalita Charan* (1918) 46 Cal 119 1 8 48 I C 314
(*t*) (1923) 50 Cal 276, 70 I C 510, (23) A C 233
[illegible] *Kunwar* v *The Maharajah of Benares* (1908) 30 All 367
(*x*) *Raji Jood* v *Jadu* (1921) 34 Cal L J 160, 64 I C 691
(*y*) *Kalika* v *Tulsi* (1916) 1 Pat L J 435, 37 I C 1008
(*z*) *Kreenoji Issur* v *G I. P. Ry* (1907) 31 Bom [illegible] 76, [illegible] 33 [illegible] lad [illegible] 414,
(*d*) *Ambuji* v *Appadurai* [illegible] 30 I C 402 *Bhairab* v *Kali* (1923) 37 Cal L J 491, 74 I C 1038, (23) A C 606
(*e*) *Venkatachella* v *Ranga* (1915) 28 Mad L J 334 28 I C 694
(*f*) (1923) 50 I A 183, 2 Pat 676, 74 I C. 747, (23) A PC. 128

claimed that they were not included in the grant. The first Court decided in favour of the grantor as there was no evidence to show that any arrangement had been made by the grantor with reference to the rent payable by the lessee The grantee appealed and during the appeal discovered documents contemporaneously executed by the grantor directing the lessee to pay rents to the grantee and an under lessee to pay his rents to the lessee These documents the High Court of Calcutta on its construction of *Kessowji's case* held they had no jurisdiction to admit as additional evidence But as to this the Privy Council said —

"Both in the case of *Sree Manchunder Rey* v *Gopalchunder Chuckerbutty* (g) and *Kessowji Issur* v *Great Indian Peninsula Railway* (h), their Lordships were dealing with the power of the appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential to the right determination of the action Under Order 47, rule 1, which reproduces section 623 of the Code of Civil Procedure Act 14 of 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred The grounds on which such an application may be made are specifically set forth in rule 1 In the present case an appeal has been preferred and a review was therefore out of the question and the respondents took the only and proper course to apply to the High Court which was in possession of the case to admit the additional evidence either under general principles of law or under the specific provisions of rule 27 "

The reference to the general principles of laws somewhat weakens the judgment but it does appear that the grounds stated in O 47, r 1, do constitute other substantial cause (i)

Inability to understand the legal issues involved is not substantial cause (j), nor the slackness of the party or his legal advisers (k) The Privy Council refused to allow a party an adjournment to produce the record of a former suit when the absence of this evidence was due to his own remissness (l) If the appellate Court does require a witness not called by inadvertence in the lower Court it is an error of law but one which does not justify interference in revision (m) Again if the party could have applied to the lower Court for an adjournment to call further evidence but does not do so, and takes the chance of a judgment in his favour on the evidence at his disposal he will not be allowed to call it in the appellate Court (n)

Recording of reason for admission of additional evidence—The provision requiring an appellate Court to record its reason for admitting additional evidence is merely directory, and not imperative Hence the omission to record the reason does not render the evidence inadmissible (o) But if one party is allowed to adduce additional evidence the opposite party should be allowed to call rebutting evidence (p), and when additional evidence was recorded and no reason stated for its admission the suit was remanded with a direction to allow the opposite party to adduce rebutting evidence (q) When the Court after the suit was adjourned for judgment recalled and examined the plaintiff without recording reasons and without giving notice to the other side it was held that it had acted without jurisdiction (r)

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(k) *Wali Muhammad* v *Muhammad Buksh* (1924) 5 Lah 84 80 I C 998 (24) A L 444

(l) *Radhakishun* v *Khurshed Hussain* (1920) 47 Cal 662 47 I A 11 55 I C 959

(m) *Gaya* v *Name* (1920) 5 Pat L J 263 56 I C 9 2

234

81 I

L J

407 63 I C 425

O. 41, rr. 27-30.

Second appeal —Except in the case provided in s. 103 the High Court is precluded in second appeal, by virtue of the provisions of s. 100, from entering into questions of fact Hence where the Court of first appeal has *admitted* additional evidence under this rule the hearing in the Court of second appeal will not for that reason be treated as a first appeal so as to entitle the parties to go into questions of fact (s)

No appeal lies from a *refusal* by the lower appellate Court to admit fresh evidence under this rule (t) Hence if the lower appellate Court refuses to admit a document as additional evidence in appeal under this rule the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower appellate Court (u) But in *Jetalal* v *Varajlal* (v), a case was remanded under the inherent jurisdiction to the first appellate Court with a direction to admit additional evidence.

Privy Council appeal —The rejection of an application under this rule does not give a right of appeal to the Privy Council (w)

Mode of taking additional evidence

28 [S 569] Wherever additional evidence is allowed to be produced, the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate Court

It need hardly be stated that where the additional evidence taken by the Court consists of documents they should be exhibited in the case (x) The lower appellate Court resumes its functions as a Court of first appeal and can appoint under s. 75 a commissioner for the examination of witnesses (y)

Points to be defined and recorded

29 [S 570] Where additional evidence is directed or allowed to be taken, the appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified

Judgment in Appeal

Judgment when and where pronounced

30 [S. 571] The appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders

(s) *Beni Pershad* v *Nand Lal* (1897) 24 Cal 98 *Gopal* v *Jhakri* (1886) 12 Cal 37
(t) *Premchand* in *the goods of* (1894) 21 Cal. 484 *Ram Piari* v *Kallu* (1901) 23 All 121 *Durga Prasad* v *Jai Narain* (1911) 33 All 379 9 I C 65
(u) *Vaidyanatha* v *Kuppu* (1919) 42 Mad. 737 53 I C 274 [F B]
(v) (1921) 23 Bom L. R 769 63 I C 4 8.
(w) *Premchand in the goods of* (1894) 21 Cal 484
(x) *Daji* v *Sakharam* (1914) 38 Bom. 665 27 I C 33
(y) *Labh Singh* v *Ram Lal* (1924) 5 Lah. 52 81 I C 559 (25) A L. 39

After hearing the parties or their pleaders.—This rule authorizes the Court to pronounce judgment after hearing the parties or their pleaders Hence a judgment pronounced without hearing the parties or their representatives if they are dead, is unauthorized by the Code Thus where an appellate Court heard and decided on appeal without being aware of the death of the appellant, the decree was held to be a nullity (z) See notes to s. 47, case (4), p. 129

Contents date and signature of judgment

31 [S. 574.] The judgment of the appellate Court shall be in writing and shall state—

(*a*) the points for determination,

(*b*) the decision thereon,

(*c*) the reasons for the decision, and,

(*d*) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein

Shall state the reasons for the decision—The judgment of the appellate Court should state the *reasons* for the decision. The reason of the rule has been stated to be to afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise if they see fit, and are so advised, the right of second appeal conferred by s 100 If an appellate Court could dispose of appeals coming before it in a judgment which does not state the reasons for the decisions, the right of second appeal might altogether be neutralized (*a*) The reason for the decision should be stated not only when the decree of the first Court is varied or set aside but also when it is confirmed (*b*) If this rule is not observed the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law (*c*) This course was adopted where the judgment was appeal dismissed with costs (*d*) and in another case where the judgment was appeal rejected under s 551 [now O 41 r 11] of the Civil Procedure Code (*e*) Where the decree of the first Court is confirmed in appeal the Judge of the appellate Court should state *his own reasons* of the case and should not confine himself to approving of the reasons of the Court of first instance (*f*) The reason is that the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised *his own discrimination* in deciding them (*g*) Thus where the judgment was— To deal with the grounds of appeal would be simply to repeat the judgment of the District Munsif I concur with the decision the District Munsif has given on each point The judgment of the lower Court is confirmed *for the reasons therein set forth* and this appeal is dismissed with costs the judgment was set aside (*h*) In the last mentioned case the Court observed Such a general and wholesale

(z) [illegible]

(a) [illegible]

(b) [illegible] 540

(c) *Saravana Pillai* v *Sesha Reddi* (1908) 31 Mad 469

(d) *Sri Kant* v *Hari Dass* (188?) 11 C L R 131

[illegible] v *Babu Nand* (1887) 9 All 26

O. 41, r. 31. adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law" The same was held where the judgment was, "there is *no satisfactory evidence* that plaintiff was ever in possession of the land in dispute', and the evidence was not discussed in the judgment (i).

If the reasons for the decision are not stated by the appellate Court *as fully as they ought to have been,* but the High Court is satisfied upon the judgment that the Judge of the lower Court had read the evidence and meant to find upon that evidence as a whole, the decree of the lower Court will not be interfered with in second appeal. The proper course to be followed in such a case is to require the Judge, if still holding office, to supplement his judgment by giving in greater details the reasons on which it is based (j)

Shall state the points for determination.—The object of the legislature in making it incumbent by this rule on the appellate Court to raise *points* for determination is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter (k). The exact questions which arise in the appeal and require determination must be stated in the judgment. It is not sufficient to state, 'the point to be determined on appeal is whether or not the decision is consistent with the merits of the case" A proposition so roundly worded is no "point at all (l)

Form of order.—Where there has been a failure by the first appellate Court to comply with the requirements of this rule, the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he need not re hear the appeal unless he is of opinion that he cannot properly dispose of the remanded case without a re hearing But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, a re hearing is always necessary in order that there may be a compliance with the order of the second appellate Court that the case be disposed of according to law (m) See notes above, "Shall state the reasons for the decision"

High Court.—Where a suit was decided by a District Court, and the decree was confirmed in appeal by the High Court, and the High Court did not state in its judgment the reason for its decision, it was said by Edge, C J, on an application for leave to appeal to the Privy Council on the ground that the requirements of this rule were not complied with, that the present rule was not intended to apply to cases where the High Court, after hearing the judgment of the lower Court and arguments thereon, comes to the conclusion that both the judgment and the reasons given by the Court below for its decision are completely satisfactionry (n) And the opinion has been expressed by Mahmood, J, that this rule does not apply at all to judgments of High Courts in second appeal (o) See s 122

Privy Council appeal.—Non compliance with the requirements of this rule is not a ground of appeal to the Privy Council (p)

(i) *Ningappa* v *Shivappa* (1895) 19 Bom 323
(j) *Biswanath* v *Baidyanath* (1886) 12 Cal. 199, 202, 203
(k) *Mhasu Bhauji* v *Davalat* (1905) 7 Bom L R 174
(l) *Sohawan* v *Babu Nand* (1887) 9 All 26, 30-31
(m) *Saravana Pillai* v *Sesha Reddi* (1908) 31 Mad. 469
(n) *Sundar Bibi* v. *Bisheshar Nath* (1887) 9 All 93.
(o) *Sohawan* v *Babu Nand* (1887) 9 All 26, 30-31 See also *Tasaduq* v *Kashi Ram* (1903) 25 All 109, 30 I A 35
(p) *Sundar Bibi* v *Bisheshar Nath* (1887) 9 All 93

O. 41, rr. 32, 33.

32. [*S. 577.*] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the appellate Court may pass a decree or make an order accordingly

What judgment may direct

33. [*New.*] The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Power of Court of Appeal

Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order (*q*)

Illustration

A claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X* *X* appeals and *A* and *Y* are respondents The appellate Court decides in favour of *Y* It has power to pass a decree against *Y*

Cases to which rule applies.—This rule is new It is taken for the most part from O 58 r 4 of the Rules of the Supreme Court of Judicature in England The object of the rule is to empower the appellate Court to do complete justice between the parties O 41, r 4 and this rule gives the Court ample power to make the order appropriate to the ends of justice Under the former rule upon an appeal by one of the parties on a ground common to all the decree may be varied in favour of all under the latter rule the Court has power to make the proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection (*r*) The illustration to the rule indicates a type of case for which provision is intended to be made The following are further instances —

(1) *A* sues *B* and *C* for contribution A decree is passed against *B*, but as against *C* the suit is dismissed *B* appeals making *A* alone respondent to the appeal *A* does not appeal from the decree dismissing the suit as against *C* If the appellate Court is of opinion that *C* is liable and not *B* it may under r 20 direct that *C* be added as a respondent as being a person interested in the result of the appeal' and may under the present rule alter the decree so as to make *C* liable though there was no appeal preferred by *A* from the dismissal of the suit against *C* This is in accordance

(*q*) The proviso was added by Act 9 of 19

(*r*) *Debendra* v *Narendra* (1919) 24 Cal W 9 54 I C 636

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Privy Council appeal.—Non compliance with the requirements of this rule is not a ground of appeal to the Privy Council (p)

(i) *Ningappa* v *Shivappa* (1895) 19 Bom 3_3

(j) *Bisvanath* v *Baidyanath* (1886) 32 Cal. 199, 20[illegible] 203

(k) *Mhasu Bhavji* v *Daulat* (1905) 7 Bom L R 274

(l) *Sohawan* v *Babu Nand* (1887) 9 All 26 30-31

(m) *Saravana Pillai* v *Sesha Reddi* (1908) 31 Mad 469

(n) *Sundar Bibi* v *Bisheshar Nath* (1887) 9 All 93

(o) *Sohawan* v *Babu Nand* (1887) 9 All 26 30-31 See also *Tasadduq* v *Kashi Ram* (1903) 25 All 109 30 I A 35

(p) *Sundar Bibi* v *Bisheshar Nath* (1887) 9 All 93

him for Rs. 95, he ought to have appealed or filed objections (b) Again the rule does not apply when the decree is really a combination of several decrees against several defendants (c) Mukerji, J, on a review of all the cases said the rule should be cautiously applied and only in cases where but for recourse to it the ends of justice would be defeated (d)

Such other decree as the case may require.—The power of the appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment, it may pass such decree as is in accordance with any later enactment which came into operation subsequent to such date (e)

Remand.—*A* sues *B* for three sums of money, *X*, *Y* and *Z* *A*'s claim is allowed as to items *X* and *Y*, but disallowed as to item *Z* *A* appeals from the decree as to item *Z* *B* appeals from the decree as to items *X* and *Y* The appellate Court dismisses *A*'s appeal, and allows *B*'s appeal as to item *X* only with the result that item *Y* is decreed in *A*'s favour. *A* then appeals to the High Court as to items *X* and *Z* The High Court has power under this rule to remand the whole case for determination on the merits. The effect of such an order is to empower the lower Court to reopen the case even as to item *Y* which was decided by the lower appellate Court in favour of *A* and from which decision *B* had not preferred an appeal to the High Court (f)

Proviso.—The proviso was added by Act 9 of 1922 Its effect is that the appellate Court cannot allow a claim for compensatory costs which has been disallowed by the original Court

34. [S. 576.] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Dissent to be recorded

Decree in Appeal.

35. [S. 579.] (1) The decree of the appellate Court shall bear date the day on which the judgment was pronounced

Date and contents of decree

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property,

(b)

(c)

(19_5) _7 Bom L R 91, 86 I C 31 (2_) A B 290

(f) *Sarada Sundari* v *Gangahari* (1919) 46 Cal 738 52 I C 801

O. 41, rr. 35-37. and in what proportions such costs and the costs in the suit are to be paid

(4) The decree shall be signed and dated by the Judge or Judges who passed it:

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree

Judge dissenting from judgment need not sign decree

Costs —Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court the proper course is to dismiss the appeal without costs (g)

Chartered High Courts —This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction [O 49 r 3]

Form —For form of decree in appeal see App B form no 9

Copies of judgment and decree to be furnished to parties

36. [S 580] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the appellate Court and at their expense

Certified copy of decree to be sent to Court whose decree appealed from

37. [S 581] A copy of the judgment and of the decree, certified by the appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits

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ORDER XLII.

Appeals from Appellate Decrees

O. 42, r. 1.

Procedure

1. [S 587] The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees

See s 108 cl (a)

Rules relating to first appeals to apply, so far as may be, to second appeals —We shall note here only those rules relating to first appeals as to the applicability of which to second appeals there have been reported decisions. Rr 1 and 2 of

(g) *Fischer v Kamala Naicker* (1860) 8 M I A 170

O. 42, r. 1.

Order 41, which require a memorandum of appeal in first appeals, have been held to apply to second appeals (*h*). R. 22, which relates to cross objections, has been held to apply to second appeals (*i*). Rr. 25 and 26, which empower the Court of first appeal to frame and refer issues for trial to the lower Court and to determine the appeal after return of findings on such issues, apply to second appeals to the extent indicated in the notes to r. 26 under the head "Second appeal" Rr. 27 and 28, which relate to additional evidence in first appeal, apply to second appeals to the extent mentioned in the notes to r. 27, under the head "Second appeal." The Allahabad High Court has held that the Court cannot on second appeal dispense with copy of the judgment of the Court of first instance (*j*). But omission to annex copy of an interlocutory order incorporated by reference in the judgment may be excused (*k*). As to the applicability to second appeals of r. 31, which relates to the contents of judgment of the first appellate Court, see notes to that rule under the head "High Court."

Inherent power of High Court to remand in second appeal.— Where the Court of first instance declined to record oral evidence tendered by the plaintiff on the ground that the documentary evidence produced by him was sufficient and the decree in favour of the plaintiff was reversed in appeal, but the appellate Court declined to allow the plaintiff respondent to produce oral evidence before it, it was held by the High Court in second appeal, that though there was no provision in the Code strictly applicable to the case, the High Court was warranted *ex debito justitiae* in setting aside the proceedings of both the Courts below and in directing the first Court to retry the case (*l*). See notes to r 33, "Remand"

ORDER XLIII.

Appeals from Orders.

O. 43, r. 1.

Appeal from orders

1. [S. 588.] An appeal shall lie from the following orders under the provisions of section 104, namely :—

(*a*) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court,

(*b*) an order under rule 10 of Order VIII pronouncing judgment against a party,

(*c*) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(*d*) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

(*h*) *Ahmad Ali* v. *Waris Husain* (1893) 15 All 123 127

(*i*) *Kausalia* v. *Gulab Kur* (1899) 21 All 297

(*j*) *Bhairon* v. *Rama Autar* (1921) 43 All 660

(*k*) *Lakshmi* v. *Ishar* (1922) 4 Lah L J 20 (22) A L 93

(*l*) *Durga Dihal* v. *Anoraji* (1895) 17 All 29 See also *Kebul* v. *Rajani* (1924) 39 Cal L J 261 81 I C 999 (25) A C 98 *Jeslanker* v. *Bai Divali* (1920) 22 Bom L R 771, 57 I C 525

O. 43, r. 1.

(e) an order under rule 4 of Order X pronouncing judgment against a party,

(f) an order under rule 23 of Order XI;

(g) an order under rule 10 of Order XVI for the attachment of property,

(h) an order under rule 20 of Order XVI pronouncing judgment against a party,

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement,

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale,

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit,

(l) an order under rule 10 of Order XXII giving or refusing to give leave,

(m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction,

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,

(o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage money;

(p) orders in interpleader suits under rule 3, rule 4, or rule 6 of Order XXXV,

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII,

(r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX,

(s) an order under rule 1 or rule 4 of Order XL.

(t) an order of refusal under rule 19 of Order XLI to re admit, or under rule 21 of Order XLI to re hear an appeal,

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court,

O. 43, rr. 1, 2.

(v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;

(w) an order under rule 4 of Order XLVII granting an application for review.

Section 104.—This rule forms part of s 104 [see s. 104, sub s. (1), cl. (i)] The result is that no second appeal lies from an order passed in an appeal preferred under this rule (m)

Clause (a): Order returning plaint to be presented to the proper Court—Where an order is made by the first Court of appeal returning a *plaint* under O 7, r 10, by virtue of the powers conferred on it by s 107, the order is appealable under this clause, and an appeal will lie to the High Court under s 106 (n) But no appeal lies from an order of an appellate Court returning a *memorandum of appeal* to be presented to the proper Court. The terms of cl (a) of this rule do not cover such a case nor can the reading of O 7, r 10, with s 107 justify the interpolation of the words "memorandum of appeal" after the word "plaint" in cl. (a) of the present rule (o)

Other clauses.—These have already been considered in their proper place

Procedure

2 [S. 590.] The rules of Order XLI shall apply, so far as may be, to appeals from orders

See s 108 cl. (b)

ORDER XLIV

Pauper Appeals

O. 44, r. 1.

Who may appeal as pauper

1 [S 592] Any person entitled to prefer an appeal who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable

Procedure on application for admission of appeal

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust

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(m) *Naubat Singh v Baldeo Singh* (1911) 33 All 479 9 I C 666 [O 43 r 1 cl (e)] *Nazar Husain v Kesri Mal* (1890) 12 All 581 *Nur-ud Din v Pran Kishan* (1918) 40 All 659 47 I C 16

(n) See O 7 r 10 Notes Appeal

(o) *Raghunath v Shamo Koeri* (1904) 31 Cal 344.

O. 44, r. 1.

Alteration in the rule.—The words "in all matters including the presentation of such application" in the first paragraph are new. See notes below under those words.

"In all matters including the presentation of such application."—The present rule provides that the provisions relating to *suits* by paupers shall apply so far as may be to *appeals* by paupers Therefore the application referred to in this rule for leave to *appeal* as a pauper must be *presented by the applicant in person* just as an application for leave to *sue* as a pauper [see O 33, r 3] This is now made clear by the addition of the words "in all matters including the *presentation* of such application" In the absence of these words in the old section it was held by the Madras High Court that the rule as to the *presentation* of a pauper's petition (now contained in O 33, r 3) did not apply to pauper appeals (p) The Madras decision is no longer law.

"Subject to the provision relating to suits by paupers."—*A* sues *B* to recover certain properties as the heir of her deceased husband. The suit is dismissed. *A* applies for leave to appeal as a pauper It is found on inquiry that *A* had before instituting the suit entered into an agreement falling within the terms of O 33, r 5 (d), which would have disentitled *A* to sue as a pauper The appellate Court should under these circumstances refuse leave to *A* to appeal as a pauper (q)

by the Court, the appeal must be held to be in time, though the court fee may have been paid after the expiration of the period of limitation prescribed for filing the appeal (s)

Proviso to the rule.—The proviso is mandatory (t) and is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should express and record briefly the reasons on which the leave proceeds (u) The proviso is of course not applicable unless the appeal is *in forma pauperis* (v)

Appeal—No appeal lies under the Code from an order refusing leave to appeal as a pauper It was held in a Madras case that no appeal lies from such an order under cl. 15 of the Letters Patent (w) but that decision has been dissented from by a Full Bench

(s) [illegible] I C 741 [illegible]

[illegible] 840 [illegible] 530
(w) *Appasami* v *Somasundara* (1903) 26 Mad 437
(x) *Tuljaram* v *Alagappa* (1912) 35 Mad 1, 9, 17 8 I C 340

held that no appeal lies under the Letters Patent from an order refusing leave to appeal as a pauper (y) That decision, however, proceeded on grounds no longer tenable, and it cannot, therefore, be treated as a precedent See notes to s 104, "Letters Patent Appeal," p 282 above.

O. 44, rr. 1, 2.

Limitation.—The period of limitation for leave to appeal as a pauper is 30 days from the date of the decree appealed from (z). See Limitation Act, 1908, sch. I, art. 170

Form.—For form of application to appeal *in forma pauperis*, see App G, form no 10 For form of notice of appeal *in forma pauperis*, see App G, form no 11

2. [S. 593.] The inquiry into the pauperism of the applicant may be made either by the appellate Court or under the orders of the appellate Court by the Court from whose decision the appeal is preferred:

Inquiry into pauperism

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such inquiry.

ORDER XLV.

Appeals to the King in Council.

O. 45, rr. 1, 2.

1. [S. 594.] In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order.

"Decree" defined

When appeals lie to King in Council.—See ss 109 and 110

2. [S. 598.] Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

Application to Court whose decree complaind of

In forma pauperis.—When a person applies for leave to appeal to His Majesty in Council *in forma pauperis*, he must present an application for that purpose to the High Court, and a separate application to His Majesty in Council (a)

Power of High Court to grant leave to appeal to His Majesty in Council in forma pauperis.—It has recently been held by the High Courts of Calcutta (b), Patna (c), and Madras (d), that O 44, r 1, does not apply to appeals to His Majesty in Council, and that the High Court has no power to grant leave to appeal

(y) *Banno* v *Mehdi Husain* (1899) 11 All 375
(z) See *Mahadeo* v *Lakshman* (1895) 19 Bom 48
(a) *Munni Ram* v *Sheo Churn* (1846) 4 M I A 114
(b) *Jagadanand* v *Rajendra* (1913) 17 Cal L J 381 18 I C 129
(c) *Ramkishen Lal* v *Manna Kumari* (1916) 3 Pat L J 179, 44 I C 731
(d) *Amba* v *Srinivasa* (1919) 42 Mad 32, 47 I C 646

O. 45, rr. 2, 3.

in forma pauperis to His Majesty in Council. The point arose in an earlier Calcutta case, but it was not decided (*e*.) In a still earlier case it was said that the usual security for costs must be given (*f*)

Limitation.—See notes to s. 109 above.

3. [S. 600.] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

Certificate as to value or fitness

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Alteration in the rule.—In sub rule (2) the word "shall" has been substituted for the word "may."

Petition.—A petition for a certificate, which was dropped when the judgment complained of was reversed on review, was treated as revived when the review was held incompetent by the Privy Council (*g*)

Certificate.—The certificate of leave to appeal, and not the order for such certificate, is the document which the Judicial Committee are bound to consider and act upon in determining whether leave to appeal has been properly granted or not; and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, they ought to hold that leave has not properly been given (*h*) The certificate must make plain upon the face of it that the discretion conferred upon the High Court was invoked and exercised (*i*) The assent of the respondent to the issue of a certificate under this rule cannot give effect to it in the absence of the conditions under which alone it could be issued (*j*)

Certificate as to fitness.—Where a case fulfils the requirements of s 110, the petitioner is entitled to a certificate *as of right* in the ordinary course of procedure *When it does not, that is, where the matter is under the appealable value or is not measurable by money, the granting of the certificate is entirely in the discretion* of the Court (*k*) *In the former case*, the High Court should certify the sufficiency of the amount for appeal to the Privy Council, and should also certify, when the decision of the lower Court is affirmed, that the appeal involves a question of law The Judicial Committee *will not* interfere with any question of valuation unless it can be shown that some item has been improperly valued or excluded, or that there is some fundamental principle which renders the valuation unsound. *On the mere question of the value of admitted items* the Committee will not interfere, nor will they allow a party to contend that the valuation has been arrived at on an erroneous principle, unless he has raised that con

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(*e*) *Thompson* v *Calcutta Tramways Co* (1894) 21 Cal 523 at p 525

(*f*) *Gour Surn Dass, In re* (1872) 19 W R 305

(*g*) *Sela* v *Chhaju* (1923) 4 Lah 445, 77 I. C. 869, (24) A L 225

(*h*) *Radha Krishn Das* v. *Rai Krishn Chand* (1901) 23 All 415, 28 I A 182.

(*i*) *Radha Krishna* v *Swaminatha* (1921) 48 I A. 31, 44 Mad 293, 60 I C 85

(*j*) *Banarsi Prasad* v *Kashi Krishna* (1901) 23 All 227 28 I A 11

(*k*) *Banarsi Prasad* v *Kashi Krishna* (1901) 23 All 227, 231, 28 I A 11

tention by his printed case (l) *In the latter case*, it is enough if the certificate states that the case is a fit one for appeal to His Majesty in Council (m). Where a party applies to the Committee for *special leave* to appeal, the matter being under the appealable value or not measurable by money, he should first have applied to the Court below for a certificate under this rule and s. 109, cl (c), that the case is otherwise a fit one for appeal to His Majesty in Council, and observed that unless this was done, special leave to appeal would not be granted by the Committee except in special cases (n). See notes to s 109 "Certificate as to fitness," p. 291, and notes to s. 110 under sub head "Where the matter is under the appealable value or is not capable of valuation," p 299

Procedure.—If the petitioner does not prosecute his petition, it may be struck off for non prosecution (o)

Appeal—An order granting a certificate that the case is a fit one for appeal to the Privy Council is not a "judgment" within the meaning of cl 15 of the Letters Patent Hence no appeal lies from such an order (p) Nor does an appeal lie under that clause from an order refusing an application for leave to the Privy Council where the refusal is based on the ground that the case did not fulfil the requirements of s 110 above (q).

Form—For form of notice under sub r (2), see App G, form no 12

Consolidation of suits

4. [*New.*] For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same question for determination.

Consolidation of suits—This rule is new In the absence of any such rule in the Code of 1882, it was held by the High Court of Allahabad that suits involving substantially the same questions for determination could be consolidated for the purpose of reaching the pecuniary limit necessary for an appeal, if the property affected by the suits was the same, notwithstanding that the suits were decided by separate judgments (r) According to the Calcutta decisions, however, such consolidation was not permissible unless the suits, besides involving the same question for determination, were decided by the same judgment (s) The present rule gives effect to the Calcutta rulings (t) It need hardly be observed that suits that could be consolidated for the purposes of pecuniary valuation must be suits actually instituted and not merely suits *in gremio futuri* (u)

Judgment—The judgment referred to in this rule is the judgment appealed against and not the judgment of the lower Court (v)

Inherent power to consolidate cases—This rule provides for consolidation of cases "for the purposes of pecuniary valuation." The High Court of Patna has held

. All | 44 Mad L J 424, 73 I C 217, ('23) A M.

All 196)18 | 60 I C 517

O. 45, rr. 4-6.

that the High Court has inherent powers to permit consolidation of cases on grounds other than those specified in this rule Accordingly where two appeals to His Majesty in Council were in substance one, the two were ordered to be consolidated and tried together the Court observing that in the interest of justice and to save unnecessary expense the appeals ought to be consolidated (w)

Remission of dispute to Court of first instance

5. [*New*] In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made

Dispute as to value of subject-matter —This rule is new It gives legislative recognition to the practice followed under the Code of 1882 in cases where there was a dispute as to the value of the subject matter of the suit This practice referred to in the undermentioned Calcutta case (x) where it was held that a plaintiff in a suit for damages cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure *A* claims Rs 10 000 as damages for an alleged defamation The suit is dismissed on the ground that the libel was privileged and the decision is affirmed in appeal *A* applies for leave to appeal to the Privy Council The mere fact that A claimed Rs 10 000 as damages is not sufficient proof that the amount of

practice—a practice sanctioned by the Judicial Committee—to ascertain by evidence and enquiry what the true value is But where an inquiry has already been made at the trial of the suit by the Court of first instance as to the value of the subject matter of the suit and the finding as to the value has been acquiesced in by the applicant the High Court r
reference is made
held by that Court
to some other officer ( )

Effect of refusal of certificate

6. [S 601] Where such certificate is refused, the petition shall be dismissed

Costs —Where the petition is made to the High Court and it is dismissed with costs the proper Court to execute the order is the lower Court (a)

Appeal —An appeal lies from an order made by any Court other than a High Court refusing the grant of a certificate under this rule [O 43 r 1, cl (v)].

(w) *Chaudry Har Prasad* v *Brij Kishor Das* (1918) 3 Pat L J 446, 45 I C 551

(x) *Lal Amrita Nath* v *Akhoy Charan* (1905) 9 C W N 370

(y) *Anant* v *Ramchandra* (1918) 42 Bom 603 46 I C 4

(z) *Hanuman* v *Baluji* (1916) 43 Cal 255, 34 I C 303

(a) *Jogendra* v *Wazidunissa* (190) 34 Cal 809

7. [S. 602] (1) Where the certificate is granted, the **O. 45, r. 7** applicant shall, within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow*, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

Security and deposit required on grant of certificate

(a) furnish security *in cash or in Government securities* for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,

(2) papers which the parties agree to exclude,

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub rule (1) deposit the amount required to defray the expense of printing such copy

Rule amended —The italicized words were added into this rule by Act 26 of 1920 In sub rule (1) the words originally were within six months The period is now reduced to 90 days See notes below Extension of time The provisoes were also added by the same Act

O. 45, rr. 7, 8.

Date of the decree.—This means the date on which the decree is pronounced not that on which it is signed (c).

Extension of time.—It has been held by the Judicial Committee of the Privy Council that the High Court may extend the time allowed for giving the security and making the deposit provided there are "cogent reasons" for doing so (d). According to the Madras High Court the "cogent reasons" must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to the absence and difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence (e). On the other hand, it has been held by the Chief Court of the Punjab that poverty is a cogent reason for extending the time if the amount required is large and the applicant has deposited a substantial portion of the amount within the time originally allowed (f). Prior to Act 26 of 1920 it was the uniform practice to extend time on good cause shown. But the object of the amending Act was to expedite Privy Council appeals and the restrictive words used limit the Court's discretion so that the Court can in no case grant an extension of more than sixty days (g). The Allahabad High Court has held that the shorter period allowed by the amending Act does not apply when the decree was passed before the Act came into force (h).

Security in case of consolidated appeal.—Where two or more appeals are consolidated for purposes of pecuniary valuation, the security required by this rule is the whole security which the appellants together have to furnish and not only a portion thereof. Therefore if two or more appeals are consolidated, and some sets of appellants furnish the security required from them, but others do not, the consolidated appeal cannot be admitted under r. 8 below (i).

Records.—The Privy Council have strongly condemned the inclusion in the record of unnecessary papers and disallowed the costs occasioned thereby (j).

Delay.—If delay in the preparation of the record is due to the inaction of the appellant it seems that the appeal may be certified as not effectually prosecuted (k).

Appeal.—No appeal lies under cl. 15 of the Charter from an order refusing to extend the time for furnishing security for costs and directing the appeal to be struck off (l).

8. [S. 603.] Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

Admission of appeal and procedure thereon.

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) *Harendra* v. *Hari Das* (1909) 14 Cal. W. N. 420, 5 I. C. 644 [illegible].
(d) *Burjore* v. *Bhagana* (1883) 11 I. A. 7, 10, 10 Cal. 557; *Fazal-un-Nissa* v. *Musa* (1884) 6 All. 250.
(e) *Lingayya* v. *Mahalakshmamma* (1900) 24 Mad. 241.
(f) *Lagga* v. *Sandhya* (1910) Punj. Rec. no. 44, p. 138, 8 I. C. 723.
(g) *Ram Dhan* v. *Prag Narain* (1922) 44 All. 216, 64 I. C. 212, ('22) A. A. 42.
(h) *Lala Lal* v. *Prahlad Das* (1922) 44 All. 242, 65 I. C. 340, ('22) A. A. 87.
(i) *Lala Nain* v. *Lal Lagnath* (1919) 4 Pat. L. J. 1[illegible], 50 I. C. 511.
(j) *Gopal Chandra* v. *Lagan Kanta* (1920) 47 Cal. 415, 46 I. A. 2[illegible] (P. C.).
(k) *Saiid* v. *Lekhu* (1924) 2 Rang. 51, 80 I. C. 744, ('24) A. R. 217.
(l) *Kishen Pershad* v. *Tunckdhari* (1881) 19 Cal. 1[illegible].

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

"Such security."—See notes to r. 7 above, "Security in case of consolidated appeal"

Notice.—For form of notice under cl (b) of this rule, see App. G, form no. 10. The accidental omission of notice is not a sufficient ground for rehearing provided the respondents knew the appeal had been admitted (*m*)

9. [S. 604.] At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security and make further directions thereon.

Revocation of acceptance of security

9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court:

Power to dispense with notices in case of deceased parties

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.

This rule was added by Act 26 of 1920

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

Power to order further security or payment

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

(*m*) *Hardit Singh* v *Gurmukh Singh* (1920) 22 Bom L R 530, 59 I C 7 [P C]

O. 45, rr. 10-13.

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment

Effect of failure to comply with order

11. [S 606] Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed

Refund of balance deposit

12. [S 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7

Powers of Court pending appeal

13. [S 608] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise

Alterations in the rule:—

1. The words "admitting the appeal" which occurred in the first paragraph of the *old section after the* word "*Court*" *have been omitted. Those words gave rise to a* conflict of decisions on the question whether the Court had power under the old section to stay the execution of the decree appealed from after a petition had been presented for leave to appeal but before the appeal was admitted It was held by the High Court of Bombay that the Court had the power (*n*). On other hand, it was held by the High Court of Calcutta that the Court had no such power, the decision being based on the ground that the words "the Court *admitting the appeal*' indicated that no stay could be granted *until the appeal was admitted* (*o*) *The words* "*admitting the appeal*' *have been* omitted to make it clear that the power conferred by this rule may be exercised at any time after the presenting of the petition, and even before the grant of a certificate for the admission of the appeal

Another result of the omission of the words "admitting the appeal" after the word "Court" is to invest the High Court with power to stay execution, notwithstanding that an appeal has been admitted by special leave of His Majesty in Council (*p*) Under the Code of 1882 it was held that since the powers conferred by the corresponding s 608 could only be exercised by the *Court admitting the appeal*, the High Court had no power to stay execution where the appeal was admitted by special leave of His Majesty in Council (*q*)

It seems unnecessary to add that a District Court cannot stay execution and that O. 41 does not apply (*r*)

2 The words "by the appointment of a receiver or otherwise" at the end of cl. (d) are new.

"The Court."—The "Court" referred to in this rule and r 14 is the High Court (*s*)

Stay of execution before grant of certificate.—See notes above, "Alterations in the rule," No 1

Stay of execution in view of an application for special leave to appeal.—The High Court has an inherent power to make an order for stay of execution in view of an application by the judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (*t*)

Clause (b).—The respondent decree holder's failure to give security will not deprive him of the benefit of s 15 of the Limitation Act (*u*)

Clause (c).—If the Court fixes a time for furnishing security as a condition of stay of execution it is advisable that the time for tender of security should be specified with further directions for the inquiry as to its sufficiency (*v*) Proceedings for final decree for partition after a preliminary decree has been passed are not execution proceedings which can be stayed under this rule (*w*)

(*n*) *Dame Janbai* v *Sale Mahomed* (1895) 19 Bom 10.

(*o*) *Jarao Kumari* v *Gopi Chand* (1900) 5 C W N 562.

(*p*) *Nityamoni Dasi* v *Madhu Sudan* (1911) 38 Cal 335, 38 I A 74, 11 I C 384

(*q*) Moheshchandra v *Satrughan* (1900) 27 Cal. 1, 26 I A 281.

(*r*) *Maung Po Shain* v *Maung Po Kin* (1925) 3 Rang 158, 88 I C 992, ('25) A R 254

(*s*) *Ram Bahadur* v *Radha Krishen* (1918) 3 Pat L J 40, 42 I C 835

(*t*) *Nanda Kishore* v *Ram Golam* (1913) 40 Cal 955, 18 I C 207

(*u*) *Panday Buldeo* v *Srimati Radhey* (1920) 5 Pat L J 39, 53 I C 9

(*v*) *Kedarnath* v *Matilal* (1920) 24 C W N 265, 57 I C 382

(*w*) *Ram Narain* v *Hernam Das* (1920) 42 All 170, 54 I C 561

O. 45, rr. 13, 14.

Security after execution.—The Court has power to require *security* to be given under this rule even after the decree has been executed wholly or in part (x). It has also the power to *stay* further execution after the decree has been partially executed (y).

Stay of execution where appeal admitted by special leave.—See notes above "Alterations in the rule," No. 1, second paragraph.

Appointment of receiver where appeal admitted by special leave.—The High Court has power to appoint a receiver under cl. (d) notwithstanding that the appeal was admitted by special leave of His Majesty in Council (z).

Practice.—Applications of the character mentioned in this rule ought always to be made in the first instance, at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the peculiar case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application (a) If the application is refused by the High Court, and the Judicial Committee is of opinion that the application ought to have been granted, it may grant a stay of execution. But more than this it will not do, for instance, it will not appoint a receiver of the property under attachment nor take the security referred to in cls. (b) and (c) of sub rule (2) In such cases, the Judicial Committee will grant leave to the applicant to apply to the High Court with an intimation of its opinion. The High Court is bound to take notice of such order, it being an order of His Majesty the King in Council, and to govern itself accordingly (b)

Appeal.—No appeal lies under cl. 15 of the Letters Patent from an order refusing to stay execution pending appeal to the Privy Council (c)

Increase of security found inadequate

14. [S. 609.] Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practi-

cable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit

"**The Court**" —See notes under the same head to r 13 above

Procedure to enforce orders of King in Council

15. [S 610] (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same, and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments

(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place

O. 45, r. 15.

A [illegible] in the rule.—Paragraphs 3 and 4 of the old section which related to the [illegible] for the costs of the respondents have been omit[illegible] was added by Act 26 of [illegible]

Jurisdiction of Patna High Cou[illegible] [illegible] jurisdiction to execute an order of His Majesty in Council passed in an ap[illegible] a decree of the Calcutta High Court on appeal from a subordinate Court in Behar. The application for execution of such an order should be made to the Calcutta High Court (*d*)

"Whoever desires to obtain execution."—It may be that where a decree *has been passed in favour of a number of persons jointly*, an *application* under this rule by one or more of them would be sufficient to entitle *all of them* to apply for *execution* in the Court below But it is not so where several persons are by a decree declared entitled to *separate specific shares*, say of an ijmali share, in which case each person obtains by the decree a right to a *separate* share. In such a case *no single* plaintiff is entitled to execute the decree on behalf of all the plaintiffs, from which it follows that an application under sub r (1) by some of the plaintiffs does not entitle all of them to apply under sub r (2) for execution to the Court to which the order of His Majesty in Council is sent for execution under that sub rule (*e*)

Functions of the High Court under this rule.—The act of the High Court in receiving and filing orders of His Majesty in Council under this rule is a purely ministerial function The High Court, therefore, has no power, under this rule to discuss the effect of the order of His Majesty in Council on an *application* to file the order. If the *order is impeached* as erroneous, *the proper course* for the party *aggrieved by the* order is to apply to His Majesty in Council to make the necessary *alteration* or modification in the order (*f*)

"Execution."—The word "execution" includes restitution as described in s 144. A person, therefore, who desires to obtain execution, though it be by way of restitution, must apply in the first instance to the Court indicated by this rule (*g*). The provisions of this *rule are mandatory* so that if the *petition* is presented to a different *Court* the execution application is *liable to be dismissed* (*h*)

Application for execution of order of His Majesty in Council by assignee of order.—Where an order of His Majesty in *Council* is transmitted by the High *Court for execution* under sub r. (2) to the *Court* which passed the *first decree* appealed from, the latter Court is not in the position of a Court to which a decree is transferred for execution, and it is not therefore precluded from entertaining an *application* for execution of the order by an *assignee* of the order (*i*) See O 21, r. 16, and notes thereto, Application for execution by a transferee should be made to the Court which passed the decree, *p 614 above*

Enforcement of liability of surety.—*A* obtains a decree against *B* in a High Court for possession of certain immoveable property *B* appeals to the Privy Council, and *C* stands surety for *A*'s costs of the appeal [r 7, sub r 1, cl. (a)]. If the appeal is dismissed with costs, *A may proceed against C for costs by an application for execution* (s 145)

(*d*) *Lalji* v. *Baijnath* (1917) 2 Pat L J 684, 43 I C 457

(*e*) *Maharaja Rameshwar* v. *Rai Baijnath* (1917) 2 Pat L J 496 40 I C 508

(*f*) *Prem Lal* v. *Sumbhoonath* (1895) 22 Cal. 960, 971 972

(*g*) *Damodar Das* v. *Brij Lal* (1915) 37 All. 567, 30 I C 77

(*h*) *Bhagwania* v. *Zamir* (1924) 3 Pat. 590, 75 I. C. 766, ('24) A P 576

(*i*) *Krishna Bhoopathi* v. *Raja of Vizianagram* (1915) 38 Mad 832, 23 I C 235

O. 45, r. 15.

Suppose now that in the case put above *A* applies for execution of the decree, and that possession of the property is delivered to him on *D* standing surety for re delivery of the property to *B*, and for the payment of mesne profits in the event of *B*'s appeal being successful [r 13, sub r (2), cl (b)] Suppose further that the Privy Council, allows *B*'s appeal, and reverses the decree of the High Court If *A* fails to re deliver the property or to pay the mesne profits to *B*, *B* may proceed against *D* by an *application for execution* [s 145] (j)

Restitution.—*A* obtains a decree against *B* for possession of certain immoveable property Possession of the property is delivered to him in execution. The decree is then set aside in appeal to the Privy Council Pending the appeal to the Privy Council the property is sold in execution of a decree obtained by *C* against *A*, and it is purchased by *P* *B* is entitled on reversal of the decree by the Privy Council to restitution of the property as against *P*, the latter being a "representative" of *A* within the meaning of s 47 (k) See notes to s 144 under the head "Against whom restitution may be claimed," p 343 above

Mesne profits.—Where a party is dispossessed of land in pursuance of a decree of the High Court, and the decree is reversed in appeal to the Privy Council, he is entitled not only to restoration of the land, but to mesne profits during the period of dispossession, though the order of His Majesty in Council may be silent as to such profits (l) See s 144

Rate of exchange.—The Court have differed on the question whether the words "for the time being" refer to the rate of exchange at the date of the passing of the order or to that current when the amount is realised The former view is held by the Calcutta High Court (m), the latter by the Allahabad High Court (n)

Interest on costs.—Where interest on costs is not allowed in the order of His Majesty in Council, such interest cannot be given by any Court in this country (o)

Letters Patent appeal.—An appeal lies under cl 15 of the Letters Patent from an order of a single Judge of a High Court *refusing* to transmit for execution the order of His Majesty in Council as provided by sub rule (2) of this rule (p)

Limitation.—An application for execution under this rule is governed by Art 183 of the Limitation Act, 1908 (q)

Dismissal of appeal for want of prosecution.—Where an appeal is preferred to the Privy Council from the decree of a High Court, but the appeal is *dismissed for want of prosecution*, the order of His Majesty in Council does not amount to a decree at all for purposes of limitation or for any other purpose Such an order *does not deal judicially* with the matter of the suit, but merely recognizes authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all (r)

(j) *Arunachellam* v *Arunachellam* (1892) 15 Mad 203, is no longer law

(k) *Garudhuj Prasad* v *Baiju Mal* (1906) 28 All 337

(l) *Arunachellam* v *Arunachellam* (1892) 15 Mad

(o) [illegible] v *Secretary of State* (1877) 4 I A 137, 3 Cal 161

23 I C 649 [P C] *Batuk Nath* v *Munni Dei* (1914) 36 All 284 41 I A 104, 23 I C 644

O. 45, r. 16.

16. [S 611.] The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees

Appeal from order relating to execution

Appeal —See notes to r 15 above, ' Letters Patent appeal

ORDER XLVI

Reference

O. 46, r. 1.

1. [S 617] Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court

Reference of question to High Court

Alterations in the rule.—

1 The words is not subject to appeal have been substituted for the word final, as the expression final decree is now used in this Code in contradistinction to a preliminary decree

2 The words or the construction of a document which construction may affect the merits which occurred in the old section after the words having the force of law have been omitted as they are sufficiently covered by the power to refer any question of law

Hearing of a suit or appeal —A reference can be made to the High Court under this rule only in a *suit* or an *appeal in a suit* and not in every matter before the Court in which a point arises on which the Court entertains reasonable doubt (*s*) Thus where a pleader was fined Rs 25 by a Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee and on appeal the District Judge referred the matter to the High Court under this rule it was held that no reference could properly be made under this rule as there was no *suit* or *appeal in a suit* (*t*) Nor can any reference be made in a proceeding other than a *suit* or an *appeal in a suit* even by virtue of the provisions of s. 141 above (*u*) See notes to s. 141, The procedure provided in this Code p 337 above

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(*s*) *Mahammad* v *Ahmadbhai* (1901) 25 Bom 327

(*t*) *Jashvant* v *De Souza* (1888) 12 Bom 78

(*u*) *Damodara* v *Kuttapa* (1911) 36 Mad 16 10 I C 879 *Tancred* v *Mullick* (19—) 29 C W N 291 (—3) A C 391 84 I C 545

Decree not subject to appeal.—This rule does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal Therefore no reference can be made to the High Court in a matter in which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal. It is only when a decree is not subject to appeal that a reference can be made under this rule (t). In *Ramphul* v *Durga* (w), a Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, returned the plaint to be presented to the proper Court On appeal, the District Judge referred the matter to the High Court The High Court held that the order of the Munsif returning the plaint being an appealable order [O. 43, r. 1, cl. (a)], the High Court had no jurisdiction to entertain the reference On the same ground it is held that there could be no reference under this rule in a matter of probate, and that an order made by a District Judge on an application for probate being appealable, it cannot be referred for the opinion of the High Court under this rule though, when referred the High Court may deal with the case as a Court of concurrent jurisdiction under s. 264 of the Indian Succession Act (x).

Jurisdiction.—A Judge who has no jurisdiction to hear a suit or an appeal has no jurisdiction to make a reference before or at the hearing of such suit or appeal (y)

Reasonable doubt.—A reference under this rule can only be made when a Judge entertains a reasonable doubt on a question of law or usage having the force of law. A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court to which he is subordinate, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council (z). If the Court has no reasonable doubt it should not make a reference merely because it is asked to make one (a)

Reference by Presidency Small Cause Court.—See Presidency Small Cause Court Act, 1882, s. 69.

Court may pass decree contingent upon decision of High Court

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

Judgment of High Court to be transmitted, and case disposed of accordingly

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the

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(x) *Monohur Mookerjee, in the matter of* (1850) [illegible]

O. 46, rr. 3-6.

reference was made, and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court

"Such Court shall proceed to dispose of the case in conformity with the decision of the High Court —In *Yule & Co* v *Mahomed Hossein* (b) the Calcutta Small Cause Court passed a decree for the plaintiffs contingent on the opinion of the High Court The High Court held that upon the case presented by the plaintiffs they could not recover The judgment of the High Court was transmitted to the Small Cause Court, and the Small Cause Court Judge instead of entering judgment for the defendants allowed the suit to be withdrawn by the plaintiffs with liberty to them to bring a fresh suit [O 23 r 1] Upon a petition for revision it was held by the High Court that the Small Cause Court was bound on receipt of the decision of the High Court to dispose of the case in conformity with that decision and to enter judgment for the defendants and that the order allowing the plaintiffs to withdraw from the suit was illegal

Costs of reference to High Court

4 [S. 620] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case

Power to alter etc decree of Court making reference

5 [S 621] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such orders as it thinks fit

Power to refer to High Court questions as to jurisdiction in small causes

6 [S 646A] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit

At any time before judgment —A reference under this rule can only be made *before* judgment (c)

(b) (1897) 24 Cal 120

(c) *Dwarkabai* v *Sadashivadas* (1900) 24 Bom 310

7. [S 646-B.] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

O. 46, r. 7.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule the High Court may make such order as in the circumstance appears to it to be just and proper

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule

Provincial Small Cause Courts' Act 9 of 1887, sec 16 —Section 16 of the Provincial Small Cause Courts Act runs as follows Save as expressly provided by this Act or by any other enactment for the time being in force a suit cognizable by a Court of Small Causes *shall not be tried* by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable

"If required by a party shall —It has been held by the High Courts of Madras and Calcutta that a District Court is bound to make a reference under this rule if one of the parties requires it to do so (*d*) On the other hand it has been held by the Allahabad High Court that the word shall is not mandatory but merely directory, and that a District Court should not make a reference under this rule unless it is satisfied that a Court subordinate thereto has erroneously held upon the point of Jurisdiction in regard to the particular suit before it (*e*)

***Statement* of reasons** —Where a reference is made to the High Court under this rule, the District Court which makes the reference should state its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous (*f*)

Powers of High Court under this rule —There is a conflict of decisions as to the powers of the High Court under this rule as will be seen from the cases considered below —

Illustration

A suit cognizable by a Small Cause Court is tried by a District Munsif on the original side without objection to his jurisdiction and a decree is passed for the plaintiff The

(*d*) *Simson* v *McMaster* (1890) 13 Mad 344 *Suresh Chunder* v *Kristo Rangini* (1894) 21 Cal 249 251

(*e*) *Madan Gopal* v *Bhagwan Dass* (1889) 11 All 304

(*f*) *Chhotu* v *Jawahir* (1906) 28 All 293

O. 46, r. 7.

tion in his grounds of appeal The District Court ...
Munsif. The plaintiff applies to the High Court under s. 115 for a revision of the decision of the District Court It is clear that the suit being one of a nature cognizable by a Small Cause Court, the District Munsif had no jurisdiction to entertain it under his ordinary jurisdiction having regard to the provisions of section 16 of the Provincial Small Cause Courts Act set forth above. Nor had the District Court jurisdiction to entertain the appeal from the decree in such a suit. What order should the High Court make, assuming, of course, that the suit was one of a nature cognisable by a Small Cause Court and which of the following courses should it adopt ?—

(1) Should the High Court set aside the decrees of both the Courts below and return the plaint for presentation to the proper Court ?

(2) Or has it power to consider the case on the merits and to decline to interfere in the matter even though in strict law the suit should have been tried under a different procedure ?

(3) Or should it not set aside at least the decree of the District Court as having been made without jurisdiction and *then* dispose of the case on its merits leaving the decree passed by the Munsif to stand or not as may in its discretion appear best ?

The first course was adopted by White, C J, in a Madras case where the learned Judge observed that there was no *alternative* but to adopt *that course* (*g*).

The second course was adopted by the High Court of Calcutta in the under mentioned cases (*h*), where the Court declined to interfere on the ground that they had a complete discretion in the matter

The third course was adopted in a recent case by a Full Bench of the Madras High Court (*i*). The Full Bench held, dissenting from the Calcutta decisions cited above, ... the Calcutta decision was followed, ... jurisdiction That decree was accordingly set aside, ... Munsif was restored. The same course was adopted in a Bombay case (*k*).

As regards the Allahabad High Court, declined to interfere in one case on the ground that the present rule did not apply unless there was an *erroneous holding* as to jurisdiction, and that there could be no "holding" at all if no objection to jurisdiction was ... In a later case, it followed the Full Bench ... and restored the decree passed by the Munsif (*m*).

(*g*) *Ramasamy* v. *Orr* (1903) 26 Mad 176

(*h*) *Suresh Chunder* v. *Kristo Rangini* (1894) 21 Cal 249 [case of second appeal], *Parmeshwari* v. *Jagat* (1914) 19 C. W. N. 900, 27 I C 972.

(*i*) *Kumpara* v. *Kunhitali* (1910) 33 Mad 323, 1 I C 543

(*j*) *Parameshwaran* v. *Ishan* (1904) 27 Mad. 478

(*k*) *Shankarbhai* v. *Soonabhai* (1901) 25 Bom 417.

(*l*) *Ram Lal* v. *Kabul Singh* (1903) 25 All 135

(*m*) *Abdul Majid* v. *Baidyadhar* (1917) 39 All 101, 37 I C 92.

ORDER XLVII.

Review

Application for review of judgment

1. [S 623] (1) Any person considering himself aggrieved— **O. 47, r. 1.**

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate Court the case on which he applies for the review

In what cases a party may apply for a review—A party aggrieved by a *decree or a decision specified in clause (a) (b) or (c) of sub-rule (1) [see s 114]* may apply for a review in any of the following cases —

I on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made *or*

II on account of some mistake or error apparent on the face of the record, *or*

III for any other sufficient reason

Ex parte decree or order—A party aggrieved may apply for a review of an ex parte decree or order (*n*) and if the case falls within this rule it is no objection that an application under O 9 r 13 could have been made and that it is barred by

(*n*) *B bi Mutto v Ilahi Begam* (1884) 6 All 65 But see now *Mahadeo v Lakshmi Narayan* (1925) 49 Bom 839 90 I C 610 (25) A B 521

O. 47, r. 1. limitation (o) See notes under O 9, r 13, and O 41, r 19 The Court has jurisdiction to review an ex parte order for issue of writ for delivery of possession and to recall the writ (p)

Miscellaneous proceedings.—The provisions of the Code as to review apply to proceedings under the Indian Succession Act and an order granting letters of administration is open to review (q)

Order on application—Where a party aggrieved by a decree applies for a review, the application may either be granted or rejected (r 4 below)

If the application is rejected the case ends there, and the parties are relegated to the old decree The order rejecting the application is final, and no appeal lies therefrom (r 7), but the party aggrieved may appeal from the old decree

If the application is admitted, the case is re-heard, and it may result *in a repetition* of the decree or *in some variation* of it. In *either* case the whole matter having been re-opened there is a *fresh* decree (r) until that fresh decree is passed the old decree remains in suspense (s)

1 Discovery of new and important matter or evidence.—When a review is sought on the ground of the discovery of new evidence the evidence must be (1) relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment (t) As stated by Lord Loreburn L C in *Brown v Dean* (u), "It [new evidence] must at least be such as is presumably to be believed, and if believed would be conclusive" Applications on this ground must be treated with great caution and as required by r 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged (v) It is not only the discovery of new and important *evidence* that entitles a party to apply for a review but the discovery of any new and important *matter* which was not within the knowledge of the party when the decree was made *A* sued *B* to recover a sum of money alleged to be due under a certain agreement, and obtained a decree *B* appealed to the Privy Council Pending the appeal *A* brought another suit against *B* to recover another sum of money alleged to have become due under the *same* agreement, and obtained a decree *on the strength of the former decree* Their Lordships of the Privy Council reversed the first decree. *B* then applies for a review of the second decree, and the application was allowed on the ground that in the circumstances of the case the Privy Council decision was "new and important *matter*" on which to apply for a review of the second decree (w) This decision stands on the special facts of the case In *Amrit Lal v Madho Das* (x) it was held that where a decree is based upon a decision of a Divisional Bench of the High Court, and that decision is subsequently overruled by the Full Bench the reversal is no ground for a review of the decree Nor is the production of a new ruling or authority which if brought to the notice of the Judge at the first hearing might have altered the judgment, "new and important matter" within the meaning of this rule (y)

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates

(o) *Chokkalingam Chetty v Lakshmanan* (19[illegible]) 36 Mad L J 22[illegible] [illegible] I C 444 But see now *Manphul Singh v Hakim Hamid* (19[illegible]3) 21 All L J 416 74 I C [illegible] ([illegible]3) A A [illegible]
(p) *Lash Behari v Hemanta* (19[illegible]) [illegible] Cal L J 34[illegible] 65 I C 9[illegible] ([illegible]) A C [illegible]
(q) *Auung Hone v Ayon Soon* (19[illegible]) 3 Rang 281 ([illegible]) A R 318 91 I C [illegible]
(r) *Kashilal v Fulchand* (1906) 30 Bom [illegible]
(s) *Ichharam v Tapubai* (19[illegible]) 46 Bom [illegible]19 [illegible] I C 7[illegible]3 ([illegible]) A B 310
(t) *Appa Rao In re* (1887) 10 Mad 73 77 13 I A 155 *Nandalal v Panchaman* (1918) 45 Cal 60 67 69 42 I C 464
(u) (1910) A C at p 374
(v) *Chiranjilal v Tulsiram* (1920) 47 Cal [illegible]
(w) *Waghela v Masludin* (1887) 13 Bom 330 *Raman v Hari* (1907) 31 Bom [illegible] *Ram Lal v Kulla Prasad* (1911) 33 All [illegible] 10 I C [illegible]
(x) (1886) 6 All [illegible]
(y) *Eden v Lasheer* (1876) 1 Cal 154 *Abdul Sadiq v Abdul [illegible]* (1[illegible]) 21 All 15[illegible] 1[illegible]3

grounds which would *alter or cancel the decree*. Thus if a suit is dismissed on two grounds, namely, (1) that no notice of suit was given, and (2) that the plaintiff was illegitimate, and the plaintiff applies for a review on the ground of discovery of new evidence on the question of legitimacy, it is a good ground for rejecting the application that even if the Court held on the reception of new evidence that the plaintiff was legitimate, it would not lead to the modification or setting aside of the original decree, the absence of notice being fatal to the suit (z).

II. Mistake or error apparent on the face of the record.—A review may be granted, whether on any ground urged at the original hearing of the suit or not whenever the Court considers that it is necessary to correct an *evident* error or omission (a) Thus a review was granted where an error on a point of law was apparent on the face of the judgment (b) Similarly a review was granted when the provisions of the second paragraph of s 575 [now s 98, sub s (2)] were wrongly applied (c). But it is no ground for review that the judgment proceeds on an incorrect exposition of the law (d), or on a ruling which has subsequently been modified (e) or reversed (f) See s 152

III. "For any other sufficient reason."—These words mean that the reason must be one sufficient to the Court to which the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record (g) Thus in *Ghansham* v. *Lal Singh* (h), a reference to a Full Bench was disposed of in the absence of the respondent The respondent proved that his absence at the hearing was due to the fact that notice of the reference was not served upon him It was held that this constituted a "sufficient reason" for granting a review In *Suleman* v. *The New Oriental Bank Corporation, Ltd* (i), a review was granted on the ground that the question that had cropped up at the hearing was one of great general commercial importance In *Gopal* v *Solomon* (j), all the parties, counsel on both sides, and the Judge were at the trial of the suit under a misapprehension as to the contents of a document It was held that this was a "sufficient reason" for granting a review In a Patna case, where an auction purchaser applied for an order for delivery of possession and the order was made, it was held that it was sufficient ground for reviewing the order that the application was on the face of it barred by limitation (k) But a party who not only had an opportunity of raising a question but who did raise it and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question in review (l). Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong (m) Omission to raise a point of law is not sufficient (n) Nor is it a ground for review of a compromise that a party alleges that his consent was procured by undue influence (o)

(z) *Mahabir* v *Collector of Allahabad* (1914) 36 All 277, 21 I C 514

(a) *Kalu* v *Vishram* (1877) 1 Bom 543 *Chintamani* v *Pyari* (1870) 6 B L R 126 But see *Sheo Ratan* v *Lappu Kuar* (1883) [illegible]

(d) *Chhajju Ram* v *Neki* (1922) 49 I A 144, 3 Lah 127, 72 I C 566, (22) A PC 112

(e) *Garabini* v *Suraja Narain* (1924) 3 Pat 34, 75 I C 177, (24) A P 250, Contra *Brindaban* v *Damodor* (1925) 29 C W N 148, 85 I C 65, (25) A C 304

(f) *Venkamma* v *Rangrao* (1922) 43 Mad L J 33, 70 I C 741, (22) A M 227

[illegible] ll 36 2 Cal [illegible] L J [illegible] All 440, 29 I C 994

(n) *Kamla Prasad* v *Kunj Behari* (1920) 5 Pat L J 344 57 I C 11

(o) *Mariedu* v *Rama* (1922) 43 Mad L J 290 70 I C 425, (22) A M 446

O. 47, r. 1.

The ground of review must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made, on the ground of the happening of some *subsequent event* (p) But when a decree fixed a period for the performance of a condition and a railway strike made timely performance impossible the High Court of Allahabad held that it had jurisdiction to extend the time in review (q)

The Privy Council have in the case of *Chhajju Ram* v *Neki* (r) reviewed the case law in which their Lordships said there was no little inconsistency (due partly to the fact that prior to the Code of 1877 the ground for review was not so restrictive) and laid down the rule that ' any other sufficient reason " means a reason sufficient on grounds at least *analogous* to those specified immediately previously The case was one in which the Punjab Chief Court had granted a review as the judgment had " proceeded on an incorrect exposition of the law This was held by the Privy Council not to be analogous and therefore not a sufficient reason. The actual decision is no doubt correct but the general rule laid down has not escaped criticism Mukerjee, J, in *Gopila Ram* v *Mahar Ali* (s) referring to *Chhajju s case* said " Whether any analogy can be discovered between the two grounds specified, namely, ' the discovery of new and important matter or evidence and ' some mistake or error apparent on the face of the record' need not be discussed But whether a particular reason is analogous to either one or other of these two grounds may obviously lead to very refined if not subtle arguments " Again in *Narain Das* v *Chiranji Lal* (t) the Allahabad High Court described the rule in *Chhajju s case* as technical and said in our opinion the words in O 47, r 1, ' for any other sufficient reason are not only very wide in themselves but are intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by a strict adherence to the terms of the decree " There is much force in these criticisms for as Mukerjee, J, pointed out in *Probhas Kumar* v *Nithar Lal* (u) the powers exercisable under s. 151, and under O 47, r 1, are not mutually exclusive and there are several cases where it was held to be immaterial whether the review was granted under O 47 or under the inherent jurisdiction, *e.g.*, where a suit was by mistake dismissed for default though a plaintiff was present in person (v), or where a suit was dismissed for failure to make up the deficit of Court-fee and it was found that the Court-fee had been embezzled by a pleader s clerk (w), or where important evidence was produced just after judgment was signed (x)

Chhajju s case, however, is the law, and has been followed (y) But there are some inconsistencies in the cases which follow it and these serve to illustrate the difficulty of applying the rule. Thus though *Chhajju s* case decided that an incorrect exposition of the law was not a sufficient reason, yet in *Murari Rao* v. *Balwant Dikshit* ( ) an error as to the Hindu law of succession was held to be an error patent on the face of the record and again in *Brindaban* v *Damodar* (a) the Calcutta High Court reviewed its judgment because it construed a leading case in Hindu Law in a sense different to that adopted in a subsequent Privy Council decision. Another similar case is *Garibani* v *Suraja* (b) In that case a landlord had obtained a decree for rent against tenants of a 12 anna share of a holding and advertised the whole holding for sale. The tenants of the 4 anna share sued to restrain the sale alleging fraud and collusion The Judge dismissed the

[illegible] C 872.
(t) (1925) 47 All 361
(u) (1924) 28 C W N 928, 84 I C 278, ('24) A C 1054
(v) *Basanta Kumar* v *Abhoy* (1923) 37 Cal. L J 97 73 I C 306 ('23) A C 460.

[illegible] (1925) 4 Pat. 180 213.
[illegible] *Prasad* (1924) 3 Pat. A P 36.
[illegible]) 2 Pat. 765 82 I C
[illegible] *he application of Dwarka Dush* (1924) 46 All 245, 82 I C. 1022 ('24) A A 298
(z) (1923) 46 Mad 955 78 I C 342 ('24) A M 99
(a) (1925) 29 C W N 148, 85 I C. 65, ('25) A C 304
(b) (1924) 3 Pat. 134, 75 I C 177 ('24) A P 280

suit and then granted a review as a case on which he had rel ed had been subsequently overruled. In appeal Dawson Miller, C J , admitted that if review was on the ground of error patent on the face of the record no appeal lay under rule 7, but said that in view of *Chhajju's* case it could not be contended that review had proceeded on this ground He held that the review was on the ground of discovery of new matter and that in this view the condition of rule 4 (2) (b) was not fulfilled as the subsequent overruling deci sion had been published before the trial and accordingly reversed the order for review. Of other cases decided on the rule in *Chhajju's* case two deserve special notice *Bindubashini* v *Secretary of State* (c) arose out of a motion by the Collector to hold an inquiry under s. 19H of the Court Fees Act into the value of an estate. The Govern ment pleader applied for an adjournment to call his evidence but the Judge refused and gave judgment. The Judge then granted a review as the Government pleader was under the impression that the case would not be taken up This was reversed in revision by Rankin, J , as the case was not analogous to excusable failure to bring before the Court new and important matter or evidence and as there was an element of negli gence in the case, for the Judge had not found that there was any justification for the Government pleader s erroneous impression The other case *Mahadeo* v *Lakshmi Narayan* (d) decides that since *Chhajju s* case a plaintiff whose suit has been dismissed under O 9, r 8, has no remedy by way of review

Review granted on particular ground—Where a review is granted on a particular ground, it is in the discretion of the Court to re hear the whole case or only the particular point on which the review has been granted (e)

Where an appeal dismissed summarily under O 41, r 11, is admitted on an applica tion for review, the appeal is not restricted to the single ground which was made the basis of the application for review (f)

"Order."—An order under O 33, r 7, refusing leave to sue as a pauper, is open to review under this rule (g) And so is an order as to costs (h) and an order rejecting an application for leave to appeal to His Majesty in Council (i) But an order under s 39 (h) of the Guardians and Wards Act 1890 is not open to review (j)

Where an appeal has been preferred before application for review—

—After an appeal has been preferred from a decree no application can be made for a review of that decree This clearly appears from cl (a) of sub r (1) An appeal is not the less ' preferred within the meaning of this rule though it may be dismissed sum marily under O 41, r 11 Hence a party against whom a decree has been passed is precluded, after dismissal of his appeal under O 41, r 11 from applying for a review (k) If an appeal is dismissed for default and an application under O 41, r 19, has become time barred, review is incompetent (l) But if the appeal is withdrawn, it is as though no appeal had been ' preferred, and hence it is open to the party to apply for a review (m) See notes to O 41, r 27, under the head ' Or for any other substantial cause "

Filing of appeal pending application for review—Where an application for review has been presented by a party to the suit, and an appeal is afterwards pre

(c) (1924) 51 Cal 70 79 I C 745 (24) A C 774
(d) (1925) 49 Bom 839 90 I C 610 (25) A B 521 See also as to appeals *Manphul* v *Hakim* (1923) 21 All L J 416 74 I C 528 (23) A

I C 768
(i) *Nand Kishore* v *Ram Gulam* (1912) 39 Cal 1037, 17 I C 221

O. 47, rr. 1, 2.

ferred from the same decree, whether by the same party or by the other party to the suit, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application (n) But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with (o) And this is so even if the appeal is dismissed under O 41 r 11 (p) On the other hand, if the application for review is granted, and a new decree is passed the appeal cannot be heard and it must be dismissed, for the decree appealed from is superseded by the new decree (q)

No review allowed on a question of fact after decision of second appeal.—The High Court cannot in second appeal allow an application for a review of judgment on the ground of discovery of *new evidence*, *after* the appeal is disposed of by that Court The reason is that the High Court is bound in second appeal by the *findings of fact* of the lower appellate Court But if the application is made *before* the disposal of the appeal it may be a ground for allowing the appellant to withdraw the appeal to enable him to apply to the lower appellate Court for a review of its judgment on the ground of discovery of new evidence (r)

Application to set aside order made by another Judge—One Judge of a High Court cannot set aside an order made by another Judge of that Court even though the order be wrong The remedy lies in review on the grounds mentioned in this rule (s)

Review of judgment passed in appeals preferred under cl. 15 of the Letters Patent—It is competent to the High Court to review judgments passed in appeals preferred under cl 15 of the Letters Patent The words "decree or order" include a judgment (t)

Commissioner—*A commissioner for taking accounts has no power of review* under this order, but before his report is submitted he may reopen the inquiry into any item on grounds analogous to those of this rule (u)

2. [S 624.] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the

To whom applications for review may be made

(n) *Chenna Reddi* v *Peddaobi Reddi* (1909) 32 Mad 416 2 I C 802 (F B) *Narayan* v *Laxmibai* (1914) 38 Bom 416 23 I C 513 *Pyari Mohan* v *Kalu Khan* (1917) 44 Cal 1011 41 I C 497

(o) *Pyari Mohan* v *Kalu Khan* (1917) 44 Cal 1011 1015-1016 41 I C 497 *Gour* v *Nilmadhab* (1922) 36 Cal L J 84 73 I C 34 ('23) A C 115 Quaere as to cases coming under O 47 r 1(-)?

(p) *Shivappa* v *Ramchandra* (1922) 46 Bom 1, 63 I C 910 ('22) A B 130

(q) *Kanhaiya Lal* v *Baldeo Prasad* (1906) 28 All 240 *Piyban Lal* v *Salig Ram* (1912) 34 All 282 *Pyari Mohan* v *Kalu Khan* (1917) 44 Cal 1011 41 I C 497 *Laskeshar Nath* v *Ram Kishen Das* (1919) Punj Rec No 140, p 381 54 I C 968 *Malawa Ram* v *Madan Gopal* (1919) Punj Rec No 166 p 443 [illegible]

[illegible]

(u) [illegible] I C 593 ('21) A B 231

decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

To whom application for review may be made —This is s 624 recast with proviso (c) to s 626 superadded to it The alteration of language does not involve any alteration of law

Rule 1, sub r (1) provide, that the application for review of a decree or order should be made to the Court which passed the decree or order sought to be reviewed. Reading rule 1 with the present rule, we have the following result —

I Where a decree is passed by a *High Court Judge,* the application for review of the decree may be made to that Judge *or to his successor in office, whatever be the ground on which the review is sought*

II (1) Where a decree is passed by a *Judge other than a High Court Judge,* the application for review of the decree may be made to the Judge who delivered the judgment *or to his successor in office, provided* the review is sought on the ground of—

(a) the discovery of new and important matter or evidence *or*

(b) some clerical or arithmetical mistake or error apparent on the face of the decree

(2) Where a decree is passed by a *Judge other than a High Court Judge,* and the review is sought, not upon the grounds mentioned above, but *upon other grounds,* the application *shall* be made to the very Judge who passed the decree, it cannot be made to his successor in office (v) Thus if a review is sought of a decree passed by a Judge other than a High Court Judge on the ground of a supposed error of judgment (w), or if a review is sought of an order made by such a Judge on the ground that the order was made in the absence of the applicant and without giving him notice of the hearing (x), the application for review *shall be made* only to the Judge who passed the decree or made the order Such an application, however, *may be disposed of* by the *successor* of the Judge who passed the decree provided that the Judge who passed the decree has ordered notice to issue under rule 4 sub rule (2), proviso (a) It is not necessary that the application should also be *disposed of* by the Judge who passed the decree (y)

Rule 5 provides for the *hearing* of applications for review

3. [S 625] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis,* to applications for review

Form of applications for review

This rule relates to form and does not enlarge the right It does not make O 43, r 1 (t) applicable to a refusal to restore an application for review (z)

4. [S 626] (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application where rejected

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same

Application where granted

(w) *Behari Lall* v *Mungolanath* (1880) 5 Cal. 110
(x) *Khe[illegible]* v *Dha[illegible]* (1890) 14 Bom 101
(y) *Ganpat* v *J[illegible]* (189[illegible]) 16 Bom 603
(z) *G[illegible]* v *Zorawar Singh* (1925) 47 All 1 80 I C 649 (2[illegible]) [illegible]

O. 47, r. 4.

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for: and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Alterations in the rule.—The words "and the Judge shall record with his order his reason for such opinion," which occurred in the old section after the words "it shall grant the same in sub r (2), have been omitted Those words were construed by the Privy Council as being no more than a direction to the Judge how to act when he *had decided to grant the application* (*a*)

"No such application shall be granted without previous notice to the opposite party.'—The expression 'opposite party" means the party interested to support the order sought to be vacated or modified upon the application for review. When an appeal is summarily dismissed under O 41, r 11, the order of dismissal may be set aside on an ex parte application for review without notice to the respondent. The respondent in such a case cannot be said to be "the opposite party" within the meaning of cl (a) of this rule (*b*)

New matter or evidence.—The effect of this expression is the same as if the words were "new and important matter or evidence ' as in rule 1 above (*c*)

"Strict proof.—As to the meaning of the words "strict proof" in sub r (2), cl (b), see notes to r 7 below, "Sub rule (1), cl (b) application in contravention of provisions of rule (4)

Form.—As to form of notice required by sub r 2 (a), see App G, form no 14

Second application for review.—See notes under the same head to r 7 below.

Death of party pending review.—The order granting a review only holds the judgment in suspense The death of a party does not therefore cause the suit or appeal to abate (*d*)

Appeal.—It is provided in general terms by O 43, r 1, cl. (w), that an appeal lies from an order under this rule granting an application for review Cl (w) however is to be read with and subject to rule 7 below (*e*) See notes to r. 7 under the head "Appeal."

(*a*) *Shankar Baksh* v *Balwant Singh* (1900) 27 Cal 333 27 I A 79

(*b*) *Janaki Nath* v *Prabhasini* (1916) 43 Cal 178 30 I C 535 dissenting from *Abdul Hakim* v *Hem Chandra* (1915) 42 Cal 433, 30 I C 165 *Official Trustee of Bengal* v *Benode Behari* (1924) 51 Cal 943 84 I C 147, ('25) A C 114

(*c*) *Chiranji Lal* v *Tulsiram* (1920) 47 Cal 563 (F B)

(*d*) *Achyut* v *Tapibai* (1924) 48 Bom 210, 79 I C 753 ('24) A B 310

(*e*) *Hari Charan* v *Baran Khan* (1914) 41 Cal 746 25 I C 903, *Abid* v *Mehendra Lal* (1915) 42 Cal 880 29 I C 262, *Nandalal* v *Panchanan* (1918) 45 Cal 60 78, 42 I C 474, *Sundar Mall* v *Upendra Nath* (1916) 1 Pat L J 193 35 I C 15

5. [S 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same

Application for review in Court consisting of two or more Judges

6. [S 628] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

Application where rejected

(2) Where there is a majority, the decision shall be according to the opinion of the majority

7. [S 629] (1) An order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to on the ground that the application was—

Order of rejection not appealable Objections to order granting application

(*a*) in contravention of the provisions of rule 2,

(*b*) in contravention of the provisions of rule 4, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same

O. 47, r. 7.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

Alterations in the rule:—

1 The words "shall not be appealable" have been substituted for the word "final" This is merely a verbal alteration

2 The words "the Court *shall* order it to be restored" in sub r. (2) have been substituted for the words "the Court *may* order it to be restored"

3 The last paragraph of the old section has been transferred to r. 9.

Appeal—

(i) *Order "rejecting" application for review* —No appeal lies under the Code from an order *rejecting* an application for review Nor does an appeal lie from such an order under cl 15 of the Letters Patent for the said clause is controlled by the express provisions of this rule which says that such an order "shall not be appealable," and even if it is not so controlled, an order rejecting an application for review is not a "judgment" within the meaning of that clause (*f*) Nor is the order open to revision under s. 115 of the Code for even if it is wrong, it is no more than erroneous exercise of discretion (*g*) But where there is no exercise of discretion at all, as where the Court rejects the application, not after considering whether there are sufficient grounds for a review [r. 4, sub r. 1], but on the erroneous view that it has no jurisdiction to entertain the application, the order is open to revision, for it is a case of failure to exercise a jurisdiction vested in the Court by law (*h*)

(ii) *Order granting application for review* —An appeal lies from an order *admitting* an application for review, O 43, r 1 (w) It is clear, however, from sub r (1) that an appeal from such an order can lie only in the three cases mentioned therein, for otherwise the provisions of sub r (1), so far as they relate to appeal, would be quite superfluous (*i*) The Bombay High Court in a recent case (*k*) have held that the right of appeal given by O 43, r 1 (w) is not restricted by this rule which is treated as having become superfluous since a right of appeal was expressly conferred by the present Code But the old Code referred to objections being made by way of appeal and it is submitted that there is only a limited right of appeal as held by the other High Courts In cases other than those specified in the rule, no appeal can lie either under this rule or under cl 15 of the Letters Patent (*l*) Thus if an appeal is preferred from an order admitting an application for review on the ground that the alleged "sufficient reason" for which the application was admitted did not constitute "sufficient reason" within the meaning of r 1 of this Order, the appeal should not be entertained (*m*) Nor is the order appealable solely on the ground that the application for review was time barred (*n*) There must be an error both as to limitation and in the application of the rule as to sufficient reason. If the appeal is entertained, the order of the appellate Court may be set aside in revision under s 115 on the ground of "material irregularity" (*o*)

(*f*) *Achaya* v *Ratnavelu* (1886) 9 Mad 253 *Tirmal* v *Kanhaiya* (1923) 45 All 535 (23) A I R A 306

(*g*) *Ram Lal* v *Ratan Lal* (1904) 26 All 572 *Lakshman* v *Maruti* (1926) 28 Bom L R 254, 60 I C 267, (24) A I R 344

(*h*) *Akbar Khan* v *Muhammad Ali Khan* (1909) 31 All 610 4 I C 23

(*i*) *Hari Charan* v *Ratan Khan* (1914) 41 Cal 746 25 I C 903

(*k*) *Dattu* v *Kashasappa* (1925) 27 Bom L R 1446, (26) A I B 1-1

(*l*) *Bombay and Persia Steam Navigation Co* v *Zuari* (1888) 12 Bom 171, *Munni Ram* v *Luchen Prokash* (1897) 24 Cal 579, *Durga Lal* v *Lachmi Prasad* (1896) 18 All 44, *Uddhov Churn* v *Shamoid* (1889) 16 Cal 788 *Khurshed Alam Khan* v *Rahmatullah Khan* (1918) 40 All 64, 43 I C 470, *Nandalal Mullick* v *Panchanan* (1918) 45 Cal 60 42 I C 484, *Surya Narain* v *Kunja Behari* (1921) 25 C W N 844, 66 I C 959, *Munna* v *Kunja Behari* (19..) 44 All 645, 67 I C 317, (22) A, A 206, *Venkata* v *Veena* (1924) 46 Mad L J 463, 83 I C 548, (24) A. M 602, *Meah* v *Durga* (1925) 29 C W N 1057 90 I C 458 (26) A C 245, *Sundar* v *Habib Ullah* (1920) 42 All 623 60 I C 81, *Madhori Saran* v *Partab* (1925) 47 All 501, 89 I C 663, (25) A A 502

(*m*) *Ali Akbar* v *Khurshed Ali* (1905) 27 All 693, *Yusuf* v *Nawab* (1913) Punj Rec p 11, p 45, 18 I C 920.

(*n*) *Khurshed Alam Khan* v *Rahmatullah Khan* (1918) 40 All 64, 43 I C 470

(*o*) *Abdul Sadiq* v *Abdul Aziz* (1898) 21 All 1--

(iii) *Second appeal from order passed in appeal under this rule*—No second appeal lies from an order passed in appeal from an order granting an application for review This is now sufficiently clear from the provisions of O 43, r 1, cl (w), read with s. 104, sub s (2) *A* applies for a review, and the application is granted *B* appeals from the order granting the application Whether the appellate Court confirms or sets aside the order of the lower Court no second appeal lies to the High Court from the order of the appellate Court (*p*)

Sub-rule (1)(b): "In contravention of the provision of rule 4."—It is provided by r 4 above that no application for review should be granted on the ground of discovery of new matter without *strict proof* of the allegation as to such discovery The words strict proof mean proof *according to the formalities of law* Where an order therefore is made granting a review on proof of discovery of new matter according to the formalities of law, no appeal lies from the order on the ground that the evidence adduced in proof of the allegation as to discovery of new matter was *not sufficient* to prove the allegation. The words strict proof do not refer to *sufficiency of proof in securing the conviction of the judicial mind on the fact in* dispute (*q*)

Grounds of objection in appeal—An order granting an application for review can only be objected to upon the three grounds specified in the rule and no other whether the objection is taken by an appeal from the order (*r*) or in an appeal from the final decree passed in the suit (*s*)

Second application for review—Though no appeal lies from an order rejecting an application for review, it does not preclude a second application for review on grounds *different* from those taken in the first application (*t*)

Where application for review is time-barred—The period for an application for review of judgment by a Provincial Court of Small Causes is 15 days from the date of the decree, by the High Court in the exercise of its original jurisdiction 20 days and by other Courts 90 days [Limitation Act 1908, arts 161 162 173] and the applicant is entitled under s 12 of the Limitation Act to deduct time spent in obtaining copy of the decree (*u*) But the Court may admit the application after the period of limitation *if the applicant satisfies the Court that he had sufficient cause for not making the application* within the prescribed period [Limitation Act 1908 s 5] Where a second application for review is made after the period of limitation the mere fact that the second application was not made because the first was pending does not constitute sufficient cause for admitting the second (*v*) If an application for review is admitted after the period of limitation on the ground that the applicant has shown sufficient cause, the order granting the application may be appealed from as provided by cl (c) of sub r (1) and the order may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (*w*)

(*p*) See *Thakur Singh* v *Chundan Singh* (1885) 11 Cal 296 *Gopal Das* v *Alaf Khan* (1889) 11 All 383 *Papayya* v *Chelamayya* (1889) 12 Mad 123, *Kanti Chunder* v *Saligram* (1897) 24 Cal 319 See also *Bala* v *Bhiva* (1889) 13 Bom 496

(*q*) *Abid* v *Mahendra* (1915) 42 Cal 850 29 I C 282 *Bai Vemalbai* v *Bai Vemalbai* (1918) 42 Bom 295 46 I C 14 *Nandalal Mullick* v *Panchanan Mukerjee* (1918) 45 Cal 60 42 I C 481 *Chiranjilal* v *Tulsiram* (1920) 47 Cal 563

(*r*) *Khurshed* v *Rahmatullah* (191) 40 All 68 43 I C 490

(*s*) *Baroda Charn* v *Gobind Proshad* (1895) 22 Cal 984

(*t*) *Gobinda Ram* v *Bholanath* (1888) 15 Cal 437 *Lallia* v *Mathura* (1916) 38 All. 280 32 I C 642

(*u*) *Iqbal* v *Umar* (1925) 7 Lah L J 179 88 I C 1023 (1925) A L 577

(*v*) *Ratanram* v *Malbari* (190) 26 Bom 485

(*w*) *Madho Das* v *Rukman* (1880) 2 All 287

O. 47, rr. 7-9.

Review granted without jurisdiction.—If a review is granted in a case where the Court has no *jurisdiction* to grant it, it is not clear whether an appeal lies from the order granting the review But the order being one made without jurisdiction, it comes within the purview of s 115, and is therefore open to revision (x) It has been held that no appeal lies if the review is granted in the inherent jurisdiction (y)

Registry of application granted and order for re-hearing

8. [S. 630] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re hearing as it thinks fit

Bar of certain applications

9. [S. 629, last para.] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

ORDER XLVIII.

Miscellaneous

O. 48, rr. 1-3.

Process to be served at expenses of party issuing

1. [S 93] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs

Costs of service

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued

Orders and notices how served

2. [S 94] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons

Use of forms in appendices

3. [S 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned

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(x) *Lamanathan* v *Narayanan* (1904) 27 Mad 60 607 *Chunilal* v *Sonubai* (1897) 21 Bom 329

(y) *Basanta* v *Abhoy* (1923) 37 Cal L J 99, 73 I C 306 (1923) A I C 4.0

ORDER XLIX.

Chartered High Courts

O. 49, rr. 1-3.

Who may serve processes of High Court.

1. [S 636.] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs

Saving in respect of Chartered High Courts

2 [*New*] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Application of rules

3 [*Cf.* s. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original Civil jurisdiction, namely —

(1) rule 10 and rule 11, clauses (*b*) and (*c*), of Order VII,

(2) rule 3 of Order X,

(3) rule 2 of Order XVI

(4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII

(5) rules 1 to 8 of Order XX, and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bombay High Court under s. 122 — See Appendix III below

ORDER L

Provincial Small Cause Courts

O. 50, r. 1.

Provincial Small Cause Courts

1. [*New.*] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts' Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say

(*a*) so much of this schedule as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits,

(*ii*) the execution of decrees against immoveable property or the interest of a partner in partnership property,

(*iii*) the settlement of issues; and

(*b*) the following rules and orders,—

Order II, r 1 (frame of suit),

Order X, r 3 (record of examination of parties),

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment,

Order XVIII, rules 5 to 12 (evidence),

Orders XLI to XLV (appeals),

Order XLVII, rules 2, 3, 5, 6, 7 (review),

Order LI

See s. 7 and notes thereto

ORDER LI

Presidency Small Cause Courts

O. 51, r. 1.

Presidency Small Cause Courts

1. [*New.*] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts' Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

APPENDIX A.
PLEADINGS.

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(1) TITLES OF SUITS

IN THE COURT OF

A B (add description and residence) . *Plaintiff*

against

C D (add description and residence) *Defendant*

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(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

The *A B* Company, Limited, having its registered office at
A B, a public officer of the C D Company

A B (add description and residence), on behalf of himself and all other creditors, of *C D* late of *(add description and residence)*

A B (add description and residence), on behalf of himself and all other holders of debentures issued by the Company, Limited
The Official Receiver

A B, a minor *(add description and residence)*, by *C D* [*or* by the Court of Wards] his next friend

---

A B (add description and residence), a person of unsound mind [*or* of weak mind] by *C D*, his next friend

---

A B, a firm carrying on business in partnership at

A B (add description and residence), by his constituted attorney *C D (add description and residence)*

A B (add description and residence), Shebait of Thakur

A B (add description and residence), executor of *C D deceased*

A B (add description and residence), heir *of C D* deceased

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(3) PLAINTS

No 1

MONEY LENT

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , he lent the defendant rupees repayable on the day of

ORDER L

Provincial Small Cause Courts

O 50, r. 1

Provincial Small Cause Courts.

1. [*New.*] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(*a*) so much of this schedule as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;

(*ii*) the execution of decrees against immoveable property or the interest of a partner in partnership property;

(*iii*) the settlement of issues; and

(*b*) the following rules and orders,—

Order II, r. 1 (frame of suit);

Order X, r. 3 (record of examination of parties);

Order XV except so much of rule 4 as provides for the pronouncement at once of judgment;

Order XVIII, rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, rules 2, 3, 5, 6, 7 (review);

Order LI.

See s. 7 and notes thereto.

ORDER LI

Presidency Small Cause Courts

O 51, r 1

Presidency Small Cause Courts.

1. [*New.*] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XVI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

No 5
GOODS MADE AT DEFENDANT'S REQUEST AND NOT ACCEPTED
(*Title*)

A. B, the above named plaintiff, states as follows —

1 On the day of 19 , E F agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that E F should pay for the goods on delivery rupees

2 The plaintiff made the goods, and on the day of 19 , offered to deliver them to E F, and has ever since been ready and willing so to do

3 E F has not accepted the goods or paid for them

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 6.
DEFICIENCY UPON A RE SALE [GOODS SOLD AT AUCTION]
(*Title.*)

A B, the above named plaintiff, states as follows —

1. On the day of 19 , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re sold by auction on his account, of which condition the defendant had notice

2 The defendant purchased [*one crate of crockery*] at the auction at the price of rupees

3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after

4 The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards

5 On the day of 19 , the plaintiff resold the [*crate of crockery*], on account of the defendant, by public auction, for rupees

6 The expenses attendant upon such re sale amounted to rupees

7 The defendant has not paid the deficiency thus arising amounting to rupees

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 7
SERVICES AT A REASONABLE RATE
(*Title*)

A B, the above named plaintiff, states as follows —

1 Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request, but no express agreement was made as to the sum to be paid for such services.

2 The services were reasonably worth rupees.

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 8.
SERVICES AND MATERIALS AT A REASONABLE COST
(*Title.*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , at , the plaintiff built a house [known as No , in], and furnished the materials

therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2 The work done and materials supplied were reasonably worth rupees

3 *The defendant has not paid the money*

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 9

USE AND OCCUPATION

(*Title.*)

A B, the above named plaintiff, executor of the will of *X Y*, deceased, states as follows —

1 That the defendant occupied the [house No Street) by permission of the said *X Y*, from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises

2 That the use of the said *premises for the said period* was reasonably worth rupees

3. The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff *as executor of X Y*, claims [*Relief claimed*].

No 10

ON AN AWARD

(*Title*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of *E F* and *G H*, *and* the original document is annexed hereto.

2 *On the* day of 19 , the arbitrator awarded that the defendant should [pay the plaintiff rupees]

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 11

ON A FOREIGN JUDGMENT

(*Title.*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , at in the State [or Kingdom], of , the Court of that State [*or* Kingdom] in a suit therein pending between the plaintiff and the defendant duly adjudged that the defendant should pay to the plaintiff rupees with interest from the said date

2 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 12

AGAINST SURETY FOR PAYMENT OF RENT

(*Title*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , *E F* hired from the plaintiff for the term of years, the [house No , Street], at the annual rent of rupees, payable [monthly]

2 The defendant agreed, in consideration of the letting of the premises to *E F* to guarantee the punctual payment of the rent

3 The rent for the month of 19 , amounting to rupees, has not been paid.

[*If, by the terms of the agreement notice is required to be given to the surety, add* —]

4 On the day of 19 , the plaintiff gave notice to the defendant of the non payment of the rent, and demanded payment thereof

5 *The defendant has not paid the same*

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 13

BREACH OF AGREEMENT TO PURCHASE LAND

(*Title.*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement and the original document is hereto annexed

[*Or*, On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees]

2 On the day of 19 , the plaintiff being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [*or*, was ready and willing, and is still ready and willing and offered to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon

3 The defendant has not paid the money

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 14.

NOT DELIVERING GOODS SOLD

(*Title.*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery

2 On the [said] day the plaintiff was ready and willing and offered, to pay the defendant the said sum upon delivery of the goods

3 The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

Forms of Pleadings.

App. A.

No 15

WRONGFUL DISMISSAL.

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant *or* in the capacity of foreman, *or as the case may be*] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees monthly]

2 On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3 On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 16

BREACH OF CONTRACT TO SERVE

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

2 The plaintiff has always been ready and willing to peform his part of the agreement [and on the day of 19 , offered so to do]

3 The defendant (entered upon) the service of the plaintiff on the above mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No. 17

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title)

A B the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed [*Or state the tenor of the contract*]

[2 The plaintiff duly performed all the conditions of the agreement on his part]

3 The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner]

[*As in paras 4 and 5 of Form No 1, and Relief claimed.*]

No 18

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title)

A. B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff took *E F* into his employment as a clerk.

2 In consideration thereof on the day of 19 , the defendant agreed with the plaintiff that if *E F.* should not faithfully perform his

duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees

[*Or*, 2 In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E F*. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void]

[*Or*, 2 In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed]

3 Between the day of 19 , and the day of 19 *E F* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 19

By Tenant against Landlord, with Special Damage

(*Title*)

A. B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term

2 ALL conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit

3 On the day of during the said term, *E F*, who was the lawful owner of the said house, unlawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him

4 The plaintiff was thereby (prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving and lost the custom of *G H* and *I F* by such removal)

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 20

On an Agreement of Indemnity

(*Title*)

A B, the above named plaintiff states as follows —

1 On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A B* and *C D*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

3 On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E F*, in the High Court of Judicature at upon a debt due from the firm to *E F*, and on the day of 19], the plaintiff paid rupees [in satisfaction of the same]

4 The defendant has not paid the same to the plaintiff

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

Forms of Pleadings.

App. A.

No 21

PROCURING PROPERTY BY FRAUD

(Title)

A B the above named plaintiff, states as follows —

1 On the day of 19 , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities]

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees

3 The said representations were false [or, *state the particular falsehoods*] and were then known by the defendant to be so

4 The defendant has not paid for the goods [or, *if the goods were not delivered*] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 22

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON

(Title)

A B the above named plaintiff, states as follows —

1 On the day of 19 , the defendant represented to the plaintiff that E F was solvent and in good credit, and worth rupees over all his liabilities [*or, that F F then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit*]

2 The plaintiff was thereby induced to sell to E F [rice] of the value of rupees [on months credit]

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff]

4 E F [did not pay for the said goods *at the expiration of the credit aforesaid, or*] has not paid for the said rice, and the plaintiff has wholly lost the same

As in paras 4 and 5 of Form No 1, and Relief claimed

No 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND

(Title)

A B, the above named plaintiff, states as follows —

1 [The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein and of water in the well and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2 On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water

[*As in paras. 4 and 5 of Form No 1, and Relief claimed*]

No 24

CARRYING ON A NOXIOUS MANUFACTURE

(*Title*)

A B, the above named plaintiff, states as follows —

1 The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called , situate in

2 Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands

3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died

4 The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to move his cattle, sheep and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 25

OBSTRUCTING A RIGHT OF WAY

(*Title*)

A B, the above named plaintiff, states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of]

2 He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, *or* on foot] at all times of the year

3 On the day of 19 , defendant wrongfully obstructed the said way so that the plaintiff could not pass [with vehicles *or* on foot, *or* in any manner] along the way [and has ever since wrongfully obstructed the same]

4 (*State special damage if any*)

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 26

OBSTRUCTING A HIGHWAY

(*Title*)

1 The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it

2 Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [*or* into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 27

DIVERTING A WATER COURSE.

(*Title*)

A B, the above named plaintiff, states as follows —

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , the village of district of

Forms of Pleadings.

App. A. 2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill

3 On the day of 19 , the defendant, by cutting the bank of the stream wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill

4 By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas before the said diversion of water, he was able to grind sacks per day

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 28

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION

(*Title*)

A B, the above named plaintiff, states as follows —

1 *Plaintiff is, and was at the time hereinafter mentioned,* possessed of certain *lands situate, etc, and entitled to take and use a portion of the water of a certain stream* for irrigating the said lands

2 On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid by wrongfully obstructing and diverting the said stream

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 29

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(*Title*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendants were common carriers of passengers by railway between *and*

2 On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3 While he was such passenger, at [or near the station of *or* between the station of and] a collision occurred on the said railway, caused by the negligence and unskilfulness of *the defendants servants, whereby the plaintiff was much injured* [*having his leg broken*, his head cut, etc, *and state the special damage if any as*] and incurred expense for medical attendance and is permanently disabled from carrying on his former business as [a salesman]

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

[*Or thus* —2 On that day the defendants by their servants so negligently and *unskilfully drove and managed an engine and a train of carriages attached thereto upon* and along the defendants railway which the plaintiff was then lawfully crossing that the said engine and train were driven and struck against the plaintiff, whereby, etc, *as in para* 3]

No 30

INJURIES CAUSED BY NEGLIGENT DRIVING

(*Title*)

A B, the above named plaintiff, states as follows —

1 The plaintiff is a shoe maker carrying on business at The defendant is a merchant of

2 On the day of 19 , the plaintiff was walking southwards along Chowringhee, in the city of Calcutta, at about 3 o clock in the after noon He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant drawn by two horses under the charge and control of the defendant s servants was negligently, suddenly, and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses

3 By the blow and fall and trampling the plaintiff left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffereing and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits

[*As in paras 4 and 5 of Form No 1, and Relief claimed*]

No 31

FOR MALICIOUS PROSECUTION

(*Title*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, *or as the case may be*] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, *or* hour and gave bail in the sum of rupees to obtain his release]

2 In so doing the defendant acted maliciously and without reasonable or probable cause

3 On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff

4 Many persons whose names are unknown to the plaintiff hearing of the arrest, and supposing the plaintiff to be a criminal have ceased to do business with him, *or* in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E F*, *or* in consequence the plaintiff suffered pain of body and mind and was prevented from transacting his business, and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 32

MOVEABLES WRONGFULLY DETAINED

(*Title*)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*], the estimated value of which is rupees

2 From that day until the commencement of this suit, the defendant has detained the same from the plaintiff

3 Before the commencement of the suit to wit on the day of 19 , the plaintiff demanded the same from the defendant but he refused to deliver them

[*As in paras 4 and 5 of Form No 1*]

6. The plaintiff claims—
   (1) delivery of the said goods, or rupees, in case delivery cannot be had,
   (2) rupees compensation for the detention thereof

The Schedule

No 33

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant *C D* for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities]

2 The plaintiff was thereby induced to sell and deliver to *C D* [one hundred boxes of tea], the estimated value of which is rupees

3 The said representations were false, and were then known by *C D* to be so [*or* at the time of making the said representations *C D* was insolvent, and knew himself to be so]

4 *C D* afterwards transferred the said goods to the defendant *E F* without consideration [*or* who had notice of the falsity of the representation]

[*As in paras 4 and 5 of Form No 1*]

7 The plaintiff claims—
   (1) delivery of the said goods or rupees in case delivery cannot be had
   (2) rupees compensation for the detention thereof

No 34

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE

(Title.)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at contained [ten bighas]

2 The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true and signed an agreement of which the original is hereto annexed But the land has not been transferred to him

3 On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase money

4 That the said piece of ground contained in fact only [five bighas]

[*As in paras 4 and 5 of Form No 1*]

7 Plaintiff claims—
   (1) rupees with interest from the day of 19
   (2) that the said agreement be delivered up and cancelled

No 35

AN INJUNCTION RESTRAINING WASTE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is the absolute owner of [*describe the property*]

2 The defendant is in possession of the same under a lease from the plaintiff



3 The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[*Pecuniary compensation may also be claimed*]

No 36

INJUNCTION RESTRAINING NUISANCE

(*Title*)

A B, the above named plaintiff, states as follows —

1 Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No Street, Calcutta]

2 The defendant is, and at all the said times, was the absolute owner of [a plot of ground in the same street]

3 On the day of 19 , the defendant erected upon his said plot a slaughter house, and still maintains the same, and from that day until the present time has continually caused cattle to be brought and killed there [and *has caused the blood and offal to be thrown into the street opposite the said house of the* plaintiff]

4 In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same

[*As in paras 4 and 5 of Form No 1*]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance

No 37

PUBLIC NUISANCE

(*Title*)

A B the above named plaintiff, states as follows —

1 The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends unless restrained from so doing, to continue and repeat the said wrongful act

2 The plaintiff has obtained the consent in writing of the Advocate General [*or* of the Collector or other officer appointed in this behalf] to the institution of this suit

[*As in paras 4 and 5 of Form No 1*]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid

No 38

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE

(*Title*)

A B, the above named plaintiff, states as follows —

[*As in Form No 27*]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No 39

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION AND FOR AN INJUNCTION

(*Title*)

A B, the above named plaintiff, states as follows —

1 Plaintiff is, and at all times hereinafter mentioned was, the owner of a portrait of his grand father [which was executed by an eminent painter], and of which no duplicate exist [*or state any facts showing that the property is of a kind that cannot be replaced by money*]

2 On the day of 19 , he deposited the same for safe keeping with the defendant.

3 On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same

4 The defendant refuses to deliver the same to the plaintiff and threatens to conceal dispose of, cut or injure the same if required to deliver it up

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting]

[*As in paras 4 and 5 of Form No 1*]

8 The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting]

(2) that he be compelled to deliver the same to the plaintiff

---

No 40

INTERPLEADER

(*Title*)

A B, the above named plaintiff, states as follows —

1 Before the date of the claims hereinafter mentioned *G H* deposited with the plaintiff [*describe the property*] for [safe keeping]

2 The defendant *C D* claims the same [under an alleged assignment thereof to him from *G H*]

3 The defendant *E F* also claims the same [under an order of *G H* transferring the same to him]

4 The plaintiff is ignorant of the respective rights of the defendants

5 He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6 The suit is not brought by collusion with either of the defendants.

[*As in paras 4 and 5 of Form No 1*]

9 The plaintiff claims—

(1) That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto,

(2) that they be required to interplead together concerning their claims to the said property,

(3) that some person be authorised to receive the said property pending such litigation

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto

No 41

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS

(*Title*)

A B, the above named plaintiff, states as follows —

1 *E F*, late of , was at the time of his death, and his estate still is indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*]

2 *E F* died on or about the day of
By his last will, dated the day of , he appointed *C D* his executor [*or* revised his estate in trust, etc, *or* died intestate *as the case may be*]

3 *The will was proved by C D* [*or letters of administration were granted etc*]

4 The defendant has possessed himself of the moveable [and immoveable *or* the proceeds of the immoveable] property of *E F* and has not paid the plaintiff his debt [*As in paras 4 and and 5 of Form No 1*]

7 The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E F* deceased, and that the same may be administered under the decree of the Court

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No 42

ADMINISTRATION BY SPECIFIC LEGATEE

(*Title*)

[*Alter Form No 41 thus*]—

[*Omit paragraph* 1 *and commence paragraph* 2] *E F*, late of , died on or about the day of By his last will, dated the day of he appointed *C D* his executor, and *bequeathed to the* plaintiff [*here state the specific legacy*]

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E F* and, amongst other things, of the said [*here name the subject of the specific bequest*]

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*] or that etc

No 43

ADMINISTRATION BY PECUNIARY LEGATEE

(*Title*)

[*Alter Form No 41 thus*]—

[*Omit paragraph* 1 *and substitute for paragraph* 2] *E F*, late of died on or about the day of . *By* his *last* will dated the day of , he appointed *C D* his executor and bequeathed to the plaintiff a legacy of rupees

In paragraph 4 substitute legacy *for debt*

Another Form

(*Title*)

E F, the above named plaintiff states as follows —

1 *A B* of X in the died on the day of . *By* his last will, dated the day of , he appointed the defendant and *M N* [who died in the testator s lifetime] his executors and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life] and after his decease, and in default of his having a son who

should attain twenty one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir at law, and as to his moveable property for the persons who would be the testator's next-of kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid

2 The will was proved by the defendant on the day of . The plaintiff has not been married

3 The testator was at his death entitled to moveable and immoveable property *the defendant entered into the receipt of the rents of the immoveable property and* got in the moveable property, he has sold some part of the immoveable property

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff claims—

(1) *to have the moveable and immoveable property of A B administered* in this Court, and for that purpose to have all proper directions given and accounts taken,

(2) such further or other relief as the nature of the case may require

No 44

EXECUTION OF TRUSTS

(*Title*)

A B the above named plaintiff, states as follows —

1 He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E F* and *G H*, the father and mother of the defendant [*or* an instrument of transfer of the estate and effects of *E F* for the benefit of *C D* the defendant, and the other creditors of *E F*]

2 *A B* has taken upon himself the burden of the said trust, and is in possession of [*or* of the proceeds of] the moveable and immoveable property transferred by the said instrument

3 *C D claims to be entitled to a beneficial interest under the instrument*

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust] and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C D*, the defendant, and all other persons who may be interested in such administration in the presence of *C D*, and such other persons so interested as the Court may direct or that *C D* may show good cause to the contrary

[N B —*Where the suit is by a beneficiary, the plaint may be modelled,* mutatis mutandis *on the plaint by a legatee*]

No 45

FORECLOSURE OR SALE.

(*Title*)

A B, *the above named plaintiff, states as follows* —

1 The plaintiff is mortgagee of lands belonging to the defendant.

2 The following are the particulars of the mortgage —

(*a*) (date),

(*b*) (names of mortgagor and mortgagee),

(*c*) (sum secured),

(d) (rate of interest),
(e) (property subject to mortgage),
(f) (amount now due),
(g) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*)

(*If the plaintiff is mortgagee in possession, add*)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time

6 The plaintiff claims—

(1) Payment, or in default [sale *or*] foreclosure [and possession],
[*Where Order 34, rule 6 applies*]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No 46

REDEMPTION

(*Title*)

A B, the above named plaintiff, states as follows —

1 The plaintiff is mortgagor of lands of which the defendant is mortgagee
The following are the particulars of the mortgage —

(a) (date),
(b) (names of mortgagor and mortgagee),
(c) (sum secured),
(d) (rate of interest),
(e) (property subject to mortgage),
(f) (*If the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*)

(*If the defendant is mortgagee in possession, add*)

3 The defendant has taken possession [*or* has received the rents] of the mortgaged property

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff claims to redeem the said property and to have the same re conveyed to him [and to have possession thereof]

No 47

SPECIFIC PERFORMANCE (No 1)

(*Title*)

A B, the above named plaintiff, states as follows —

1 By an agreement, dated the day of and signed by the defendant, he contracted to buy of [*or* sell to] the plaintiff a certain immoveable property therein described and referred to, for the sum of rupees.

2 The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so

3 The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[*As in paras 4 and 5 of Form No 1*]

6 The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit

Forms of Pleadings.

App. A.

No 48

SPECIFIC PERFORMANCE (No 2)

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement in writing and the original document is hereto annexed

The defendant was absolutely entitled to the immoveable property described in the agreement

2 On the day of 19 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument

3 On the day of 19 , the plaintiff again demanded such transfer [*or* the defendant refused to transfer the same to the plaintiff]

4 The defendant has not executed any instrument of transfer

5 The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant

[*As in paras 4 and 5 of Form No 1*]

8 The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [*following the terms of the agreement*]

(2) rupees compensation for withholding the same

No 49

PARTNERSHIP

(Title.)

A B the above named plaintiff, states as follows —

1 He and *C D* the defendant, have been for years [*or* months] past carrying on business together under articles of partnership in writing [*or* under a deed *or* under a verbal agreement]

2 Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [*Or* the defendant has committed the following breaches of the partnership articles —

(1)

(2)

(3)

[*As in paras 4 and 5 of Form No 1*]

5 The plaintiff claims—

(1) dissolution of the partnership

(2) that accounts be taken

(3)

(N B —

and instead [illegible]

(4) WRITTEN STATEMENTS

General defences.

Denial

The defendant denies that (*set out facts*)

The defendant does not admit that (*set out facts*)

The defendant admits that but says that

Protest	The defendant denies that he is a partner in the defendant firm of
	The defendant denies that he made the contract alleged or any contract with the plaintiff
	The defendant denies that he contracted with the plaintiff as alleged or at all
	The defendant admits assets but not the plaintiff's claim
	The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them
Limitation	The suit is barred by article or article of the second schedule to the Indian Limitation Act, 1908
Jurisdiction	The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*)
	On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action
Insolvency	The defendant has been adjudged an insolvent
	The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver
Minority	The defendant was a minor at the time of making the alleged contract
Payment into Court	The defendant as to the whole claim (*or* as to Rs part of the money claimed *or as the case may be*) has paid into Court Rs and says that this sum is enough to satisfy the plaintiff's claim (*or* the part aforesaid)
Performance remitted	The performance of the promise alleged was remitted on the (*date*)
Rescission	The contract was rescinded by agreement between the plaintiff and defendant
Res judicata	The plaintiff's claim is barred by the decree in suit (*give the reference*)
Estoppel	The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*)
Ground of defence subsequent to institution of suit	Since the institution of the suit, that is to say, on the day of (*set out facts*)

No 1

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

1 The defendant did not order the goods.

2 The goods were not delivered to the defendant

Forms of Pleadings.

App. A.

3 The price was not Rs.

4 }
5 } Except as to Rs. [or] , same as { 1
6 } { 2
{ 3

7 The defendant [for *A B* the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to *C D* the plaintiff's agent] on the day of 19

8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19

No 2

DEFENCE IN SUITS ON BONDS

1 The bond is not the defendant's bond

2 The defendant made payment to the plaintiff on the day according to the condition of the bond

3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

No 3

DEFENCE IN SUITS ON GUARANTEES

1 The principal satisfied the claim by payment before suit

2 The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement

No 4

DEFENCE IN ANY SUIT FOR DEBT

1 As to Rs 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff

Particulars are as follows —

	Rs
1907, January 25th	150
February 1st	50
Total	200

2 As to the whole [or as to Rs , part of the money claimed] the defendant made tender before suit of Rs , and has paid the same into Court

No 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

1 The defendant denies that the carriage mentioned in the plaint was the defendant's carriage and that it was under the charge or control of the defendant's servants The carriage belonged to of Street, Calcutta, livery stable keepers, employed by the defendant to supply him with carriages and horses, and the person under whose charge and control the said carriage was, was the servant of the said

2 The defendant does not admit that the said carriage was turned our of Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace

3 The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4 The defendant does not admit the statements contained in the third paragraph of the plaint.

No 6

DEFENCE IN ALL SUITS FOR WRONGS

1 Denial of the several acts [or matters] complained of

No 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff

2 The goods were detained for a lien to which the defendant was entitled

Particulars are as follows —

1907, May 3rd To carriage of the goods claimed from Delhi to Calcutta —
43 maunds at Rs 2 per maund Rs

No 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1 The plaintiff is not the author (*assignee, etc*)

2 The book was not registered

3 The defendant did not infringe

No 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1 The trade mark is not the plaintiff's

2 The alleged trade mark is not a trade mark

3 The defendant did not infringe

No 10

DEFENCE IN SUITS RELATING TO NUISANCES

1 The plaintiff's lights are not ancient (*or* deny his other alleged prescriptive rights)

2 The plaintiff's lights will not be materially interfered with by the defendant's buildings

3 The defendant denies that he or his servants pollute the water (*or* do what is complained of)

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so and must state the grounds of the claim, i.e whether by prescription grant or what*]

4 The plaintiff has been guilty of laches, of which the following are particulars —

1870 Plaintiff's mill began to work.

1871 Plaintiff came into possession

1883 First complaint

5 As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff [*If other grounds are relied on, they must be stated* e g *limitation as to past damage*]

No 11

DEFENCE TO SUIT FOR FORECLOSURE

1 The defendant did not execute the mortgage

2 The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*)

3 The suit is barred by article of the second schedule to the Indian Limitation Act, 1877

Forms of Pleadings.

App. A.

4 The following payments have been made, viz. —

	Rs.
(Insert date) ————————	1,000
(Insert date) ————————	500

5 The plaintiff took possession on the of
and has received the rents ever since of

6 The plaintiff released the debt on the of

7 The defendant transferred all his interest to A B by a document, dated

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No 12

DEFENCE TO SUIT FOR REDEMPTION

1 The plaintiff's right to redeem is barred by article of the second schedule to the Indian Limitation Act, 1877

2 The plaintiff transferred all interest in the property to A B

3 The defendant by a document dated the day of transferred all his interest in the mortgage debt and property comprised in the mortgage to A B

4 The defendant never took possession of the mortgaged property, or received the rents thereof

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits)

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

1 The defendant did not enter into the agreement

2 A B was not the agent of the defendant *(if alleged by plaintiff)*

3 The plaintiff has not performed the following conditions—*(Conditions)*

4 The defendants did not—*(alleged acts of part performance)*

5 The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—*(State why)*

6 The agreement is uncertain in the following respects—*(State them)*

7 *(or)* The plaintiff has been guilty of delay,

8 *(or)* The plaintiff has been guilty of fraud *(or* misrepresentation)

9 *(or)* The agreement is unfair

10 *(or)* The agreement was entered into by mistake

11 *The following are particulars of (7) (8), (9), (10) (or as the case may be).*

12 The agreement was rescinded under Conditions of Sale, No 11 *(or* by mutual agreement)

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e g, the Indian Limitation Act, accord and satisfaction, release, fraud, etc)

No 14

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

1 A B's will contained a charge of debts, he died insolvent, he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs

2 The defendant applied the whole of the said sums and the sum of Rs which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator

3 The defendant made up his accounts, and sent a copy thereof to the plaintiff on the day of 19 and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant s offer

4 The defendant submits that the plaintiff ought to pay the costs of this suit

---

No 15

PROBATE OF WILL IN SOLEMN FORM

1 Th said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or* of the Hindu Wills Act, 1870]

2 The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding

3 The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant]

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant s present knowledge, being [*state the nature of the fraud*]

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or* of the contents of the residuary clause in the said will, *as the case may be*]

6 The deceased made his true last will dated the 1st January 1873, and thereby appointed the defendant sole executor thereof

The defendant claims —

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff

(2) that the Court will decree probate of the will of the deceased, dated the 1st January 1873 in solemn form of law

---

No 16

PARTICULARS (O 6, r 5)

(Title of suit)

The following are the particulars of (*Here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the of

Particulars

(Here set out the particulars ordered in paragraph if necessary)

4 The following payments have been made, viz. —

	Rs.
(*Insert date*) ————	1,000
(*Insert date*) ————	500

5 The plaintiff took possession on the of
and has received the rents ever since of

6 The plaintiff released the debt on the of

7 The defendant transferred all his interest to *A B* by a document, dated

---

No 12

DEFENCE TO SUIT FOR REDEMPTION

1 The plaintiff's right to redeem is barred by article of the second schedule to the Indian Limitation Act, 1877

2 The plaintiff transferred all interest in the property to *A B*

3 The defendant, by a document dated the day of transferred all his interest in the mortgage debt and property comprised in the mortgage to *A B*

4 The defendant never took possession of the mortgaged property, or received the rents thereof

(*If the defendant admits possession for a time only he should state the time, and deny possession beyond what he admits*)

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

1 The defendant did not enter into the agreement

2 *A B* was not the agent of the defendant (*if alleged by plaintiff*)

3 The plaintiff has not performed the following conditions—(*Conditions*)

4 The defendants did not—(*alleged acts of part performance*)

5 The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—(*State why*)

6 The agreement is uncertain in the following respects—(*State them*)

7 (*or*) The plaintiff has been guilty of delay,

8 (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation)

9 (*or*) The agreement is unfair

10 (*or*) The agreement was entered into by mistake

11 The following are particulars of (7), (8), (9), (10) (*or as the case may be*)

12 The agreement was rescinded under Conditions of Sale, No 11 (*or* by mutual agreement)

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e g, the Indian Limitation Act, accord and satisfaction, release, fraud, etc*)

No 14

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

1 *A B's* will contained a charge of debts, he died insolvent, he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs

NOTICE —1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses

2 If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree which may be against your person or property or both

No 3

SUMMONS TO APPEAR IN PERSON (O 5, r 3)

(*Title*)

To

[*Name, description and place of residence*]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in this Court in person on the day of 19 , at o clock in the noon to answer the claim, and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O 37, r 2)

(*Title*)

To

[*Name, description and place of residence*]

WHEREAS

has instituted *a suit against you under Order XXXVII of the Code of Civil Procedure* 1908, for Rs , balance of principal and interest due to him as the of a of which a copy is hereto annexed you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs and the sum of Rs for costs

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 5

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO PLAINTIFF (O 1 r 10)

(*Title*)

To

[*Name description and place of residence*]

WHEREAS has instituted the above suit against for

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and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved

Take notice that you should on or before day of 19 , signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT

(O 22, r 4)

(*Title*)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said , deceased, and desiring that you be made the defendant in his stead:

You are hereby summoned to attend in this Court on the day of 19 , at A.M to defend the said suit and, in default of your appearance on the day specified the said suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 7

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT (O 5, r 21)

(*Title.*)

WHEREAS it is stated that $\frac{\text{defendant}}{\text{witness}}$ in the above suit is at present residing in It is ordered that a summons returnable on the day of 19 , be forwarded to the Court of for service on the said $\frac{\text{defendant}}{\text{witness}}$ with a duplicate of this proceeding

The Court fee of chargeable in respect to the summons has been realized in this Court in stamps

Dated 19

Judge.

No 8

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O 5, r 24)

(*Title*)

To

The Superintendent of the Jail at

UNDER the provision of Order V, rule 24 of the Code of Civil Procedure, 1908, a summons in duplication is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested

to cause a copy of the said summons to be served upon the said defendant and to return the original to the Court signed by the said defendant, with a statement of service endorsed thereon by you

Judge

No 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER (O 5, rr 27, 28)

(*Title*)

To

UNDER the provisions of Order V, rule 27 (28, *or as the case may be*) of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you

Judge

No 10

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT (O 5, r 23)

(*Title*)

Read proceeding from the forwarding for service on in suit No of 19 of that Court

Read Serving Officer s endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with a copy of this proceeding

Judge

Note —This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Alterations made in this Form by the High Court of Bombay —See Appendix III below, rule 4

No 11

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O 5 r 18)

(*Title*)

The affidavit of son of I $\frac{\text{make oath}}{\text{affirm}}$ and say as follows —

(1) I am a process server of this Court

(2) On the day of 19 I received a $\frac{\text{summons}}{\text{notice}}$ issued by the Court of in Suit No of 19 in the said Court, dated the of 19 in the said Court dated the day of 19 for service on

(3) The said was at the time personally known to me, and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the

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day of 19 , at about o clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(a)

(b)

(a) Here state whether the persons served, signed or refused to sign the process, and in whose presence

(b) Signature of process-server

or,

(3) The said not being personally known to me accompanied me to and pointed out to me a person whom he stated to be the said , and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process, and in whose presence

(b) Signature of process server

or,

(3) The said and the house in which he ordinarily resides being personally known to me I went to the said house in and there on the day of 19 , at about o clock in the noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which process was served, with special reference to Order 5, rules 15 and 17

(b) Signature of process server

or,

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides I did not find the said there

(a)

(b)

(a) Enter fully an exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17

(b) Signature of process server

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

$\frac{\text{Sworn}}{\text{Affirmed}}$ by the said before me this day of 19

Empowered under section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents

Alterations made in this Form by the Chief Court of the Punjab under Section 122.—See Appendix V below

No. 12

NOTICE TO DEFENDANT. (O. 9, r. 6)

(Title)

To

(Name, description and place of residence.)

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same, in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

SUMMONS TO WITNESS. (O 16, rr. 1, 5)

(Title)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [*or* to send to this Court]

A sum of Rs , being your travelling and other expenses and subsistence allowance for one day, is herewith sent If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

NOTICE —(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid

(2) If you are detained beyond the day aforesaid, a sum of Rs will be tendered to you for each day's attendance beyond the day specified

No 14

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16, r 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law, and whereas it appears that the evidence of the witness is material, and he absconds and keep out of the way for the purpose of evading the service of the summons This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued

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requiring the attendance of the witness in this Court on the day of 19 , at o'clock in the forenoon and from day to day until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 15

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16, r 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, *issued, requiring the attendance of the witness in this Court on the* day of 19 , at o'clock in the forenoon, and from day to day until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS (O 16, r 10)

(Title)

To

The Bailiff of the Court

WHEREAS the witness cited by has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court, You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 17

WARRANT OF ARREST OF WITNESS (O 16, r 10)

(Title)

To

The Bailiff of the Court

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons] You are hereby ordered to arrest and bring the said before the Court.

You are further ordered to return this warrant on or before the day of 19 , with an endorsement certifying the day on and the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 18.

WARRANT OF COMMITTAL. (O. 16, r. 18)

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document), on the day of 19 ; and whereas the Court has called upon the said to furnish such security, which he has failed to do, This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL (O 16, r 18)

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required before this Court in the abovenamed case to give evidence (*or* to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (*or* defendant), the said cannot give such evidence (*or* produce such document); and whereas the Court has called upon the said to give security for his appearance on the day of 19 , at which he has failed to do, This is to require you to receive the said into your custody in the civil prison and produce him before this Court at on the day of 19

GIVEN under my hand and the seal of the Court, this day of 19

Judge

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION

No 1

ORDER FOR DELIVERY OF INTERROGATORIES (O 11, r 1)

In the Court of

Civil Suit No of 19

A B *Plaintiff*

against

C D, E F and G H *Defendants*

Upon hearing and upon reading the affidavit of filed the day of 19 , It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by Order XI, rule 8, and that the costs of this application be

No 2

INTERROGATORIES (O 11, r 4)

(*Title as in No 1, supra*)

Interrogatories on behalf of the above named [*plaintiff or defendant C D*] for the examination of the above named [*defendants E F and G H or plaintiff*]

1 Did not, etc

2 Has not, etc

etc, etc, etc,

[*The defendant E F is required to answer the interrogatories numbered*]

[*The defendant G H is required to answer the interrogatories numbered*]

No 3

ANSWER TO INTERROGATORIES (O 11, r 9)

(*Title as in No 1, supra*)

The answer of the above named defendant E F to the interrogatories for his examination by the above named plaintiff

In answer to the said interrogatories, I, the above named E F, make oath and say as follows —

1 }
2 } Enter answers to interrogatories in paragraphs numbered consecutively

3 I object to answer the interrogatories numbered on the ground that [*state grounds of objection*]

No 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O 11 r 12)

(*Title as in No 1, supra*)

Upon hearing

It is ordered that the do within days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be

No 5.

AFFIDAVIT AS TO DOCUMENTS. (O 11, r. 13)

(Title as in No. 1, supra.)

I, the above named defendant, *C D*, make oath and say as follows —

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2 I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*]

3 I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*]

5. According to the best of my knowledge, information and belief I have not now and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto

---

No 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O 11, r 14)

(Title as in No 1, supra)

Upon hearing and upon reading the affidavit of filed the day of 19 , It is ordered that the do, at all seasonable times, on reasonable notice, produce at , situate at , the following documents, namely , and that the be at liberty to inspect and peruse the documents so produced, and to make notes of their contents In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

---

No 7

NOTICE TO PRODUCE DOCUMENTS (O 11, r 16)

(Title as in No 1, supra)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [plaint *or* written statement *or* affidavit dated the day of 19]

[*Describe documents required*] X Y, *Pleader for the*

To Z, *Pleader for the*

No 8

NOTICE TO INSPECT DOCUMENTS (O 11 r 17)

(Title as in No 1, supra)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered*

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in that notice] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*] —

No 9

NOTICE TO ADMIT DOCUMENTS (O 12, r 3)

(*Title as in No 1, supra*)

Take notice that the palintiff [*or* defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his pleader or agent, at on between the hours of , and the defendant [*or* plaintiff] is hereby required, within forty eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit

G H, *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F, *pleader* [or *agent*] *for defendant* [or *plaintiff*]

[*Here describe the documents and specify as to each document whether it is original or a copy*]

No 10

NOTICE TO ADMIT FACTS. (O 12, r 5)

(*Title as in No 1, supra*)

Take notice that the plaintiff [*or* defendant] in this suit, for the purposes of this suit requires defendant [*or* plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified, and the defendant [*or* plaintiff] is hereby required within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit

G H, *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F, *pleader* [or *agent*] *for defendant* [or *plaintiff*]

The facts, the admission of which is required, are—

1 That M died on the 1st January, 1890
2 That he died intestate
3 That N was his only lawful son
4 That O died on the 1st April, 1896
5 That O was never married

No 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O 12, r 5)

(*Title as in No 1, supra*)

The defendant [*or* plaintiff] in this suit, for the puposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant [*or* plaintiff] on any other occasion or by any one other than the plaintiff [*or* defendant, or party requiring the admission]

E F, *pleader* [or *agent*] *for defendant* [or *plaintiff*]

To G H, *pleader* [or *agent*] for *plaintiff* [or *defendant*]

	Facts admitted		Qualifications or limitations, if any, subject to which they are admitted.
1	That M died on the 1st January, 1890	1	
2	That he died intestate	2	
3	That N was his lawful son	3	But not that he was his only lawful son
4	That O died	4	But not that he died on the 1st April, 1890
5	That O was never married	5	

No 12

NOTICE TO PRODUCE (GENERAL FORM) (O 12, r 8)

(*Title as in No* 1, *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry memorandum or minute relating to the matters in question in this suit, and particularly

G H *pleader* [or *agent*] *for plaintiff* [or *defendant*]

To E F, *pleader* [or *agent*] *for defendant* [or *plaintiff*]

DECREES.

No 1

DECREE IN ORIGINAL SUIT (O 20, rr 6, 7)
(*Title*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered and decreed that and that the sum of Rs be paid by the to the on account of the costs of this suit, with interest thereon at the rate of per cent per annum from this date to date of realization

GIVEN under my hand and the seal of the Court, this day of 19

Judge

Costs of Suit

Plaintiff				Defendant			
	Rs	A	P		Rs	A	P
1 Stamp for plaint				Stamp for power			
2 Do for power				Do for petition			
3. Do for exhibits				Pleader s fee			
4 Pleader s fee on Rs				Subsistence for witnesses			
5 Subsistence for witnesses				Service of process			
6 Commissioner s fee				Commissioner s fee			
7 Service of process							
Total				Total			

No 2

SIMPLE MONEY DECREE (Section 34)
(*Title*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered that the do pay to the the sum of Rs with interest thereon at the rate of per cent per annum from to the date of realization of the said sum and do also pay Rs , the costs of this suit, with interest thereon at the rate of per cent per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this day of 19

Judge

Costs of Suit

Plaintiff	Rs	A.	P	Defendant.	Rs	A.	P.
1 Stamp for plaint				Stamp for power			
2 Do for power				Do for petition			
3 Do for exhibit				Pleader's fee			
Pleader's fee on Rs				Subsistence for witnesses			
Subsistence for witnesses				Service of process			
Commissioner's fee				Commissioner's fee			
Service of process							
Total				Total			

No 3

PRELIMINARY DECREE FOR FORECLOSURE. (O 34, r 2)

(*Title.*)

This suit coming on this day, etc., It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs ,

and it is decreed as follows —

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, re transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him [Where the plaintiff claims by derived title add *or by those under whom he claims*] [Where the plaintiff is in possessoin add *and shall put the defendant in possession of the property*]

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property

Schedule.

Description of the mortgaged property

No 4

PRELIMINARY DECREE FOR SALE. (O 34, r 4)

(*Title.*)

This suit coming on this day, etc It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and that such amount shall carry interest at the rate of per cent per annum until realization, and it is decreed as follows —

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required re transfer the pro,

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to the defendant free from the mortgagee and from all incumbrances created by the plaintiff or any person claiming under him [Where the plaintiff claims by derived title add *or by those under whom he claims*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property*]

(2) That if such payment is not made on or before the said day of 19 , the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as afore said together with subsequent interest and subsequent cost, and that the balance if any be paid to the defendant

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

Schedule

Description of the mortgaged property

No 5

PRELIMINARY DECREE FOR REDEMPTION (O 34, r 7)

(*Title*)

This suit coming on this day, etc , It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 is Rs and it is decreed as follows —

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19 the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him [Where the defendant claim by derived title add or *by those under whom he claims*] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property*]

(2) *That if such payment is not made on or before the said* day of 19 , the plaintiff shall be debarred from all rights to redeem the property [If the mortgage is simple or usufructuary substitute *the property shall be sold*]

Schedule

Description of the mortgaged property

No 6

DECREE FOR FORECLOSURE —FIRST MORTGAGEE v SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(*Title*)

It is hereby declared that the amount due to the plaintiff on account of principal, interests and costs calculated up to the day of 19 (*a*) is Rs *x*, and that on the day of 19 (*b*) there will be due to the plaintiff for interest the further sum of Rs making in all Rs *y*, and it is further declared that on the day of 19 (*b*) there will be due to the first defendant on account of principal, interests and costs Rs *z*,

and it is decreed as follows —

(1) That if the first defendant pays into Court the said sum of Rs. x on or before the said day of 19 (a) the plaintiff shall deliver up, etc, (as in Form No 3)

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs y, on or before the day of 19 , the plaintiff shall deliver up, etc (as in Form No 3)

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. y and Rs. z on or before the day of 19 (b) the first defendant shall deliver up etc (as in Form No 3)

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property [Where the second defendant is in possession add *and shall put the first defendant in possession of the property*]

No 7

DECREE FOR SALE—FIRST MORTGAGEE *v* SECOND MORTGAGEE AND MORTGAGOR—ONE PERIOD FOR REDEMPTION

(*Title*)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs x, and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs y

and it is decreed as follows —

(1) That if the defendants or either of them pay into Court the said sum of Rs x on or before the said day of 19 , the plaintiff shall deliver up etc (as in Form No 4)

(2) That if payment of the said sum is not made on or before the day of 19 the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying there out the expenses of the sale) be paid into Court to the credit of this suit and applied, first in payment to the plaintiff of the said sum of Rs x and such subsequent interest and costs as may be allowed by the Court secondly in payment to the first defendant of the said sum of Rs. y and such subsequent interest and costs as aforesaid, and that the balance, if any be paid to the second defendant

(3) That in case the defendants or either of them shall pay the said sum of Rs x as aforesaid he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs x and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

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(a) Insert a day within six months from the date of decr

(b) Insert a day within three months from the date mentioned in (a)

Forms of Decrees.

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No 8

DECREE FOR SALE—SECOND MORTGAGEE *v* FIRST MORTGAGEE AND MORTGAGOR—ONE PERIOD FOR REDEMPTION

(Title)

[Insert declarations of the amounts due to the plaintiff Rs. *y* and to the first defendant Rs *x* as in Form No .]

And it is decreed as follows —

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs *x* on or before the said day of 19 , the first defendant shall deliver up, etc (as in Form No 4)

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property, and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first in payment to the first defendant of the said sum of Rs *x* and such subsequent interest and costs as may be allowed by the Court, secondly, in payment to the plaintiff of the said sum of Rs *y* and such subsequent interest and costs as aforesaid and that the balance if any be paid to the second defendant

(3) That if the plaintiff shall pay the said sum of Rs *x* into Court on or before the day of 19 the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs *y* on or before the day of 19 and thereupon the plaintiff shall deliver up, etc (as in Form No 4)

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid the mortgaged property or a sufficient part thereof shall be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs *x* and Rs *y* and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

No 9.

DECREE FOR SALE—SUB MORTGAGEE *v* MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB MORTGAGE

(Title)

[Insert declarations of the amounts due to the plaintiff Rs *x* and to the first defendant Rs *y* as in Form No 7]

And it is decreed as follows —

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs *x* and Rs. *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc (as in Form No 4), and thereupon the sum of Rs *x* shall be paid to the plaintiff

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc (as in Form No 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs x and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant), secondly, in payment to the first defendant of the excess of Rs y over Rs x and such subsequent interest and costs as aforesaid, and that the balance, if any, be paid to the second defendant

(4) In the event of payment by the first defendant and in default of payment by the Second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale proceeds shall be applied in payment to the first defendant of the said sum of Rs y and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No 10.

FINAL DECREE FOR FORECLOSURE (O 34, r 3)

(*Title*)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19 and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property*]

Schedule

Description of the mortgaged property

No 11

DECREE AGAINST MORTGAGOR PERSONALLY (O 34, r 6)

(*Title*)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs y and there is now due to the plaintiff the sum of Rs x mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent. per annum from the day of 19 to this day, and also the sum of Rs for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. z, And whereas it appears to this Court that the defendant is personally liable for the said balance.

It is hereby decreed as follows —

(1) That the said sum of Rs y be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. z with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

Forms of Decrees.

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No 12

DECREE FOR RECTIFICATION OF INSTRUMENT

(Title)

It is hereby declared that the , dated the day of 19 , does not truly express the intention of the parties to such

And it is decreed that the said be rectified by

No 13

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

(Title)

It is hereby declared that the , dated the day of 19 , and made between and , is void as against the plaintiff and all other the creditors, if any of the defendant

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No 14.

INJUNCTION AGAINST PRIVATE NUISANCE

(Title)

Let the defendant his agents, servants and workmen, be perpetually restrained from burning or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff

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No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title)

Let the defendant , his contractors, agents and workmen be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights

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No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant , his agents, servants, and workmen, perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever

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No 17

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made, that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all other the

In suits by legatees—

2 That an account be taken of the legacies given by the testator's will

In suits by next of kin—

3 That an inquiry be made and account taken of what, or of what share, if any the plaintiff is entitled to as next-of kin [*or* one of the next of kin] of the intestate

[After the first paragraph the decree will, where necessary, order, in a creditor s suit, inquiry and accounts for legatees, heirs at law and next-of kin In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words The form is continued as in a creditor's suit]

4 An account of the funeral and testamentary expenses

5 An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use

6 An inquiry what part (if any) of the moveable property of the deceased is out standing and undisposed of

7 And it is further ordered that the defendant do, on or before the day of next, pay into Court, all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use

8 And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9 And that Mr. *E F.* be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees).

10 And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death ,

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof ,

(c) an account, so far as possible, of what is due to the several incumbrancers and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed

11 And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent

12 And it is ordered that *G H* shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject *to the approval* of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle

13 And it is further ordered that, for the purpose of the inquiries hereinbefore directed the * shall advertise in the newspapers according to the practice

* Here insert name of proper officer

of the Court, or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such enquiries

14 And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed before the day of and that the * do certify the result of the inquiries, and the accounts and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15 And, lastly, it is ordered that this suit [*or* proceeding] stand adjourned for [*making* final decree to the day of

Such part only of this decree is to be used as is applicable to the particular case]

No 18

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

(*Title*)

1 It is ordered that the defendant do, on or before the day of pay into Court the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs for interest at the rate of Rs per cent per annum, from the day of to the day of amounting together to the sum of Rs

2 Let the * of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said costs, when so taxed be paid out of the said sum of Rs order to be paid into Court as aforesaid as follows —

(*a*) The costs of the plaintiff to Mr , his attorney [*or*, pleader] and the costs of the defendant to Mr , his attorney [*or* pleader]

(*b*) And (*if any debts are due*) with the residue of the said sum of Rs after payment of the plaintiff s and defendant s costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate of the * together with subsequent interest on such of the debts as bear interest, be paid, and after making such payments let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them

3 And if there should then be any residue, let the same be paid to the residuary legatee

No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(*Title*)

1 It is declared that the defendant is personally liable to pay the legacy of Rs bequeathed to the plaintiff,

2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy ,

* Here insert name of proper officer

3 And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest,

4 And it is ordered that the defendant do pay the plaintiff his costs of suits, the same to the taxed in case the parties differ

No 20

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT OF KIN

(*Title*)

1 Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff s costs, when so taxed be paid by the defendant to the plaintiff out of the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E F*, the intestate, within one week after the taxation of the said costs by the said * and let the defendant return for her own use out of such sum her costs, when taxed

2 And it is ordered that the residue of the said sum of Rs after payment of the plaintiff s and defendant s costs as aforesaid, be paid and applied by defendant as follows

(*a*) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one third share of the said residue to the plaintiff s *A B*, and *C D*, his wife, in her right as the sister and one of the next of kin of the said *E F*, the intestate

(*b*) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next of kin of the said *E F*, the intestate

(c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one third share of the said residue to *G H*, as the brother and the other next of kin of the said *E F*, the *intestate*

No 21

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(*Title*)

It is declared that the proportionate shares of the parties in the partnership are as follows —

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of , and it is *ordered that the dissolution thereof as from that day be advertised in the* Gazette etc

And it is ordered that be the receiver of the partnership estate and effects in this suit and do get in all the outstanding book debts and claims of the partnership

And it is ordered that the following accounts be taken —

1 An account of the credits, property and effects now belonging to the said partnership,

2 An account of the debts and liabilities of the said partnership,

3 An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

* Here insert name of proper officer.

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And it is ordered that the good will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock in trade, be sold on the premises, and that the *may, on the application of any of the parties fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of .

No 22

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is ordered that the fund now in Court, amounting to the sum of Rs be applied as follows —

1 In payment of the debts due by the partnership set forth in the certificate of the * amounting on the whole to Rs

2 In payment of the costs of all parties in this suit, amounting to Rs

[*These Costs must be ascertained before the decree is drawn up*]

3 In payment of the sum of Rs to the plaintiff as his share of the partnership assets, of the sum of Rs , being the residue of the said sum of Rs now in Court, to the defendant as his share of the partnership-assets

[*Or*, and that the remainder of the said sum of Rs be paid to the said plaintiff [*or* defendant] in part payment of the sum of Rs certified to be due to him in respect of the partnership accounts.]

4 And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or* defendant] the sum of Rs being the balance of the said sum of Rs due to him which will then remain due

No 23

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS

(Title)

It is hereby decreed as follows —

(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed

(2) That the defendant do pay to the plaintiff the sum of Rs with interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree holder] [the relinquishment of possession by the judgment-debtor with notice to the decree holder through the Court the expiration of three years from the date of the decree]

* Here insert name of proper officer

EXECUTION.

No 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED (O 21, r 2)

(Title)

To

WHEREAS in execution of the decree in the above named suit has applied to this Court that the sum of Rs recoverable under the decree has been $\frac{\text{paid}}{\text{adjusted}}$, and should be recorded as certified, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why the $\frac{\text{payment}}{\text{adjustment}}$ aforesaid should not be recorded as certified

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 2

PRECEPT (Section 46)

(Title)

UPON hearing the decree holder it is ordered that this precept be sent to the Court of at under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending an application which may be made by the decree holder for execution of the decree

Schedule

Dated the day of 19

Judge

No 3

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (O 21 r 6)

(Title)

WHEREAS the decree holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court alleging that the judgment debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI rule 6, of the Code of Civil Procedure, 1908, it is

Ordered

• That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non satisfaction

Dated the day of 19

Judge

No 4

CERTIFICATE OF NON SATISFACTION OF DECREE (O 21 r 6)

(Title)

Certified that no (1) satisfaction of the decree of this Court in Suit No of 19 , a copy of which is hereunto attached has been obtained by execution within the jurisdiction of this Court

Dated the day of 19 .

Judge.

(1) If partial, strike out ' no ' and state to what extent.

Forms of Execution.

App. E.

No 5

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT

(O 21, r 6)

(Title)

Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service thereof	Costs of execution	Amount realized	How the case is disposed of	Remarks
1	2	3	4	5	6	7	8	9
					Rs A P	Rs A P		

Signature of Muharrir in charge. *Signature of Judge.*

No 6

APPLICATION FOR EXECUTION OF DECREE (O 21, r 11)

In the Court of

I , decree holder, hereby apply for execution of the decree herein *below set forth* —

No of suit	Names of parties	Date of decree	Whether any appeal preferred from decree	Payment or adjustment made, if any	Previous application, if any, with date and result	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree	Amount of costs, if any, awarded	Against whom to be executed	Mode in which the assistance of the Court is required
1	2	3	4	5	6	7	8	9	10
789 of 1897	A B—Plaintiff C D—Defendant	October 11th, 1897	No	None	Rs 72 4 recorded on application, dated the 4th March, 1899	Rs 314 8 2 principal [interest at 6 per cent per annum, from date of decree till payment]	Rs a p As awarded in the decree 47 10 4 Subsequently incurred 8 2 0 Total 55 12 4	Against the defendant C D	[When attachment and sale of moveable property is sought] I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me [When attachment and sale of immoveable property is sought.] I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed , *Decree holder*

Dated the day of 19

Forms of Execution.

App. E.

[When attachment and sale of immoveable property is sought]

Description and Specification of Property

The undivided one third share of the judgment debtor in a house situated in the village of value Rs 40 and bounded as follows —

East by G s house, west by H s house, south by the public road, north by private lane and J s house

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed , *Decree holder*

No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE (O 21, r 16)

(*Title*)

To

WHEREAS

has made application to this Court for execution of decree in Suit No of 19 on the allegation that the said decree has been transferred to him by assignment this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why execution should not be granted

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 8

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY (O 21, r 30)

(*Title*)

To

The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No of 19 , to pay to the plaintiff the sum of Rs as noted in the margin and whereas the said sum of Rs *has not been paid, These are to* command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs together with Rs the costs of this attachment, to hold the same until further orders from this Court

DECREE			
Principal			
Interest			
Costs			
Costs of execution			
Further Interest			
Total			

You are further commanded to return this warrant on or before the day of 19 , *with an endorsement certifying the day on which and* manner in which it has been executed, or why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

Schedule

No. 9

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED BY DECREE (O. 21, r. 31.)

(*Title*.)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to deliver to the plaintiff the moveable property (*or* a share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (*or* share) has not been delivered.

These are to command you to seize the said moveable property (*or* a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court this day of 19 .

Schedule.

No. 10

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, r. 34.)

(*Title*.)

To

TAKE notice that on the day of 19 the decree holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof a draft is hereunto annexed, of the immoveable property specified hereunder and that the day of 19 , is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court this day of 19 .

Judge.

No. 11

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21. r. 35.)

(*Title*.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit. You are hereby directed to put the said in possession of the same and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

Forms of Execution.
App. E.

No 12

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.
(O 21 r 37)
(*Title*)

To

WHEREAS has made application to this Court for execution of decree in Suit No of 19 by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the civil prison, in execution of the said decree

GIVEN under my hand and the seal of the Court this day of 19

No 13

WARRANT OF ARREST IN EXECUTION (O 21, r 38)
(*Title*)

To

The Bailiff of the Court

WHEREAS was adjudged by a decree of the Court in Suit No of 19 , dated the day of 19 , to pay to the decree holder the sum of Rs as noted in the margin and whereas the said sum of Rs has not been paid to the said decree-holder in satisfaction of the said decree these are to command you to arrest the said judgment debtor and unless the said judgment-debtor shall pay to you the said sum of Rs together with Rs for the costs of executing this process to bring the said defendant before the Court with all convenient speed You are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed

Principal				
Interest				
Costs				
Execution				
Total				

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 14

WARRANT OF COMMITTAL OF JUDGMENT DEBTOR TO JAIL. (O 21 r 40)
(*Title*)

To

The Officer in charge of the Jail at

WHEREAS who has been brought before this Court this day of 19 under a warrant in execution of a decree which was made and pronounced by the said

Court on the day of 19 , and by which decree it was ordered that the said should pay ,
And whereas the said has not obeyed the decree, not satisfied the Court that he is entitled to be discharged from custody, you are hereby, in the name of the King Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908, and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal

GIVEN under my signature and the seal of this Court, this day of 19

Judge

No 15

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE
(Sections 58, 59)

(*Title*)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free judgment debtor now in your custody

Dated *Judge*

No 16

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF (O 21, r 46)

(*Title*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No of 19 , in favour of for Rs , It is ordered that the defendant be, and is hereby prohibited and restr ined, until the further order of this Court, from receiving from the following property in the possession of the said , that is to say to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained until the further order of this Court, from delivering the said property to any person or persons whomsoever

GIVEN under my hand and the seal of the Court this day of 19 .

Judge

Forms of Execution.

App. E.

No 17

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS OR SECURED BY NEGOTIABLE INSTRUMENT (O 21, r 46)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No of 19 , in favour of , for Rs , It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said , be, and you are hereby prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise, than into this Court

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 18

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION (O 21, r 46)

(*Title*)

To

Defendant, and to

, Secretary of *Corporation*

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No of 19 , in favour of , for Rs . *It is* ordered that you the defendant be, and you are hereby prohibited and restrained until the further order of this Court, from making any transfer of shares in the aforesaid Corporation, namely, , or from receiving payment of any dividends thereon, and you, , the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 19

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY (O 21, r 48)

(*Title*)

To

WHEREAS , judgment debtor in the above named case, is a (*describe office of judgment debtor*) receiving his salary (*or* allowances) at your hands, and whereas , decree holder in the said case, has applied in this Court for the attachment of the salary (*or* allowances) of the said to the extent of due to him under the decree. You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum in monthly instalments to this Court.

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (O 21, r 51)

(*Title*)

To

The Bailiff of the Court

WHEREAS an order has been passed by this Court on the day of 19 , for the attachment of ,

You are hereby directed to seize the said and bring the same into Court

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 21

ATTACHMENT

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT (O 21, r 52)

(*Title*)

To

SIR,

The plaintiff having applied, under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc*), I request that you will hold the said money subject to the further order of this Court

I have the honour to be,

Sir

Your most obedient Servant,

Judge

Dated day of 19

No 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT (O 21 r 53)

(*Title*)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No of 19 in which he was and was has been attached by this Court on the application of the in the suit specified above You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor

I have the honour, etc .

Judge.

Dated the day of 19 .

Forms of Execution.

App. E.

No 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE
(O 21, r 53)
(*Title.*)

To

WHEREAS an application has been made in this Court by the decree holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No of 19 , in which was and was , It is ordered that you, the said be, and you are hereby prohibited and restrained until the further order of this Court, from transferring or charging the same in any way

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 24

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY
(O 21 r 54)
(*Title*)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No of 19 , in favour of , for Rs. , It is ordered that you, the said , be, and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule

Judge.

No 25

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC, OF MONEY, ETC, IN THE HANDS OF A THIRD PARTY (O 21, r 56)
(*Title*)

To

WHEREAS the following property has been attached in execution of a decree in Suit No of 19 , passed on the day of 19 , in favour of for Rs. It is ordered that the property so attached, consisting of Rs. in money and Rs. in currency notes, or a sufficient part thereof to satisfy the said decree shall be paid over by you, the said , to

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No 26

NOTICE TO ATTACHING CREDITOR (O 21, r 58.)
(*Title.*)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance

in execution of the decree in suit No of 19 , *this is to give you notice to appear before this Court on* , the day of 19 , either in person or by a pleader of the Court duly instructed to support your claim as attaching creditor

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 27

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY (O 21, r 66)

(*Title*)

To

The Bailiff of the Court

THESE are to command you to sell by auction after giving days previous notice by affixing the same in this Court house, and after making due proclamation the property attached under a warrant from this Court dated the day of 19 in execution of a decree in favour of in Suit No of 19 or so much of the said property as shall realize the sum of Rs , being the of the said decree and costs still remaining unsatisfied

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 28

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION (O 21 r 66)

(*Title*)

To

Judgment debtor

WHEREAS in the abovenamed suit the decree holder has applied for the sale of You are hereby informed that the day of 19 has been fixed for settling the terms of the proclamation of sale

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 29

PROCLAMATION OF SALE (O 21 r 66)

(*Title*)

Notice is hereby given that under rule 64 of Order XXI of the Code of Civil Procedure 1908 *an order has been passed by this Court for the sale of the attached property* mentioned in the annexed schedule in satisfaction of the claim of the decree holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

Suit No of 19 , filed by the of in which was plaintiff and was defendant

Forms of Execution.

App. E.

The sale will be by public auction, and the property will be put up for sale in lots specified in the schedule The sale will be of the property of the judgment debtors above named as mentioned in the schedule below, and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o clock on the at In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped

At the sale the public generally are invited to bid, either personally or by duly authorised agent No bid by, or on behalf of, the judgment creditors above mentioned, however will be accepted, nor will any sale to them be valid without the express permission of the Court previously given The following are the further

Conditions of sale

1 The particulars specified in the schedule below have been stated to the best of the information of the Court but the Court will not be answerable for any error, misstatement or omission in this proclamation

2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale In the event of any dispute arising as to the amount bid or as to the bidder the lot shall at once be again put up to auction

3 The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so

4 For reasons recorded it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI

5 In the case of moveable property the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re sold

6 In the case of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re sold

7 The full amount of the purchase money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day

8 In default of payment of the balance of purchase money within the period allowed, the property shall be re sold after the issue of a fresh notification of sale The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold

GIVEN under my hand and the seal of the Court, this day of 19

Judge

Schedule of Property

Number of lot	Description of property to be sold with the name of each owner where there are more judgment debtors than one	The revenue assessed upon the estate or part of the estate if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government	Details of any incumbrances to which the property is liable	Claims if any which have been put forward to the property and any other known particulars bearing on its nature and value

No 30

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE (O 21, r 66)

(*Title*)

To

The Nazir of the Court

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 has been fixed for the sale of the said property copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published

Dated the day of 19

Schedule *Judge*

No 31

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT (O 21, r 71)

(*Title*)

Certified that at the re sale of the property in execution of the decree in the above named suit, in consequence of default on the part of purchaser there was a deficiency in the price of the said property amounting to Rs and that the expenses attending such re sale amounted to Rs. making a total of Rs. , which sum is recoverable from the defaulter

Dated the day of 19 .

Officer holding the sale

Forms of Execution.

App. E.

No 32

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION (O 21, r 79)

(*Title*)

To

WHEREAS
has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are *hereby prohibited* from delivering possession of the said
to any person except the said

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 33

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER (O 21, r 79)

(*Title*)

To and to

WHEREAS
become the purchaser at a public sale in execution of the decree in the above suit has of being debts due from you
to you

It is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 34

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION (O 21, r 79)

(*Title*)

To

and , Secretary of Corporation

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you , It is ordered that you
be, and you are hereby prohibited from making any transfer of the said shares to any person except the said , the purchaser

, the purchaser aforesaid

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 35

CERTIFICATE TO JUDGMENT DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR SELL PROPERTY (O 21, r 83)

(*Title.*)

WHEREAS in execution of the decree passed in the above suit an order was made on the day of 19 , for the sale of the undermentioned property of the judgment debtor , and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a perod of from the date of this certificate, provided that all monies payable under such mortgage, lease or sale shall be paid *into this Court and not to the said judgment debtor.*

Description of Property

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21, rr 90, 92)

(*Title*)

To

WHEREAS the undermentioned property was sold on the day of 19 , in execution of the decree passed in the above named suit, and whereas the decree holder [*or* judgment debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [*or* fraud] in publishing [*or* conducting] the sale, namely, that Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19

Description of Property

Judge

No 37

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O 21, rr 91, 92)

(*Title.*)

To

WHEREAS , the purchaser of the undermentioned property sold on the day of 19 , in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that the judgment-debtor, had no saleable interest therein

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19

Description of Property

Judge

No 38

CERTIFICATE OF SALE OF LAND (O 21, r 94)

(Title)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 19 of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court

GIVEN under my hand and the sale of the Court, this day of 19

Judge

No 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (O 21, r 95)

(Title)

To

The Bailiff of the Court

WHEREAS , has become the certified purchaser of at a sale in execution of decree in Suit No of 19

You are hereby ordered to put the said , the certified purchaser, as aforesaid in possession of the same

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 40

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE (O 21, r 97)

(Title)

To

WHEREAS the decree-holder in the above suit, has complained to this Court that you have resisted *(or obstructed)* the officer charged with the execution of the warrant for possession,

You are hereby summoned to appear in this Court on the day of 19 , at A.M., to answer the said complaint

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 41

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to , the plaintiff in this suit, and whereas the Court is satisfied that without any just cause resisted [*or* obstructed] and is still resisting [*or* obstructing] the said in obtaining possession of the property, and whereas the said has made application to this Court that the said be committed to the civil prison,

You are hereby commanded and required to take and receive the said in to the civil prison and to keep him imprisoned therein for the period of days.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 42

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.)

(Title.)

To

Collector of

SIR,

In answer to your communication No. , dated representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,
Sir,
Your Obedient Servant,
Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No 1

WARRANT OF ARREST BEFORE JUDGMENT (O 38, r 1)

(Title)

To

The Bailiff of the Court

WHEREAS , the plaintiff in the above suit, claims the sum of Rs as noted in the margin and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to

Principal			
Interest			
Costs			
Total			

These are to command you to demand and receive from the said the sum of Rs as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs is forthwith delivered to you by or on behalf of the said , to take the said into custody and to bring him before this Court in order that he may show cause why he should not furnish security to the amount of Rs for his personal appearance before the Court until such time as the said suit shall be fully and finally disposed of and until satisfaction of any decree that may be passed against him in the suit

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 2

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT (O 38 r 2)

(Title)

WHEREAS at the instance of , the plaintiff in the above suit the defendant has been arrested and brought before the Court And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance the Court has ordered him to furnish such security

Therefore I have voluntarily become surety and do hereby bind myself my heirs and executors to the said Court that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit and in default of such appearance I bind myself my heirs and executors to pay to the said Court at its order any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19

Witnesses (Signed)

1

2

No 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE (O. 38, r 3)

(*Title*)

To

WHEREAS who became surety on the day of 19 for your appearance in the above suit has applied to this Court to be discharged from his obligation.

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4

ORDER FOR COMMITTAL. (O. 38, r. 4)

(*Title.*)

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of the defendant, to answer any judgment that may be passed against him in the suit, and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; It is ordered that the said defendant be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 5

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE (O 38, r 5)

(*Title*)

To

The Bailiff of the Court

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit

These are to command you to call upon the said defendant on or before the day of 19 either to furnish security for the sum of Rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him, or to appear and show cause why he should not furnish security, and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Forms of Supplemental Proceedings.

App. F.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O 38, r. 5)

(*Title*)

WHEREAS at the instance of the plaintiff in the above suit the defendant, has been directed by the Court to furnish security in the sum of Rs to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed,

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce, and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs or such sum not exceeding the said sum as the said Court may adjudge

Schedule.

Witness my hand at this day of 19 .

Witnesses

1 (Signed)

2.

No. 7.

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY.

(O 38, r 6)

(*Title*)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do, These are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court, and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, r. 1)

(*Title*)

Upon motion made unto this Court by , Pleader or [or Counsel for] the plaintiff *A. B.* and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this suit on the day of , *or* the written statement of the said plaintiff] filed on the day of and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing*]; *add,* and also the evidence of.

as to service of notice of this motion upon the defendant *C D*]. This Court doth order that an injunction be awarded to restrain the defendant *C D* his servants, agents and workmen, from pulling down, or suffering to be pulled down the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No 9, Oilmonger's Street, Hindupur, in the Taluk of , and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court

Dated this day of 19 .

Judge

[*Where the injunction is sought to restrain the negotiation of a note or bill, the order ing part of the order may run thus —*]

restrain the defendants day of 19 , parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , etc , mentioned in the plaintiff s plaint [*or* petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[*In Copyright cases*] to restrain the defendant *C. D*, his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof until the, etc

[*Where part only of a book is to be restrained*] to restrain the defendant *C D*, his servants, agents, or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, etc ,] mentioned to have been published by the defendant as hereinafter specified, *namely, that part of the said book which is entitled* *and also that part* which is entitled [*or* which is continued in page to page both inclusive] until , etc

[*In Patent cases*] to restrain the defendant *C D* his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff s plaint [*or* petition, etc , *or* written statement, etc] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff s plaint [or as the case may be] mentioned and from counterfeiting, imitating or resembling the same inventions, or either of them or making any addition thereto, or subtraction therefrom, until the hearing, etc

[*In cases of Trade marks*] to restrain the defendant *C D*, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff *A B* in bottles having affixed thereto *such labels as in plaintiff s plaint or petition etc] mentioned, or any* other labels so contrived or expressed *as, by colourable imitation or otherwise, to* represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A B*, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff *A B*, until the, etc

[*To restrain a partner from in any way interfering in the business*]

to restrain the defendant *C D*, his servants and agents from entering into any contract, and from accepting, drawing, endorsing or negotiating

any bill of exchange, note or written security in the name of *the partnership firm of B* and *D* and from contracting any debt, buying and selling any goods and from making or entering into any verbal or written promise, agreement or undertaking and from doing or causing to be done, any act, in the name or on the credit of the said partnership firm of *B* and *D*, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc

No 9

APPOINTMENT OF A RECEIVER (O 40, r 1)

(*Title*)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 in *favour of* , You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on

You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 10

BOND TO BE GIVEN BY RECEIVER (O 40, r 3)

(*Title*)

KNOW all men by these presents, that we and and are jointly and severally bound to of the Court of in Rs to be paid to the said or his successor in office for the time being For which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators jointly and severally, by these presents

Dated this day *of* 19

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*]

And whereas the said has been appointed, *by* order of the above mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named

Now the condition of this obligation is such, that if the above bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property and in respect of the moveable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct then this obligation shall be void, otherwise it shall remain in full force

Signed and delivered by the above bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPEAL, REFERENCE AND REVIEW.

No 1

MEMORANDUM OF APPEAL. (O 41, r 1)

(*Title*)

The above named appeals to the Court at from the decree of in suit No of 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appealed from, namely —

No 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE (O 41 r 5)

(*Title*)

To

This security bond on stay of execution of decree executed by witnesseth —

That , the plaintiff in Suit No of 19 having sued , the defendant, in this Court and decree having been passed on the day of 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court the said appeal is still pending

Now the plaintiff decree holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security Accordingly I, of my own free will, stand security to the extent of Rs mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the appellate Court the said defendant shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of 19 .

Schedule

Witnessed by (Signed)

1

2

No 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O 41, r 6)

(*Title*.)

To

This security bond on stay of execution of decree executed by witnesseth.—

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court, and a decree having been passed on the day of 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court the said appeal is still pending

Now the plaintiff decree holder has applied for execution of the said decree and had been called upon to furnish security Accordingly, I, of my own free will, stand security to the extent of Rs mortgaging the properties specified in the schedule hereunto annexed, and convenant that if the decree of the first Court be reversed or varied by the appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this. day of

19 .

Schedule

Witnessed by (Singed)

1

2

No 4

SECURITY FOR COSTS OF APPEAL. (O 41, r 10)

(Title)

To

This security bond for costs of appeal executed by witnesseth —

This appellant has preferred an appeal from the decree in Suit No of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant, I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of 19

Schedule

Witnessed by (Signed)

1

2

No 5

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, r. 13)

(Title)

To

You are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL (O 41, r 14)

(*Title*)

APPEAL from the of the Court of dated the day of 19

To

Respondent,

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorised to act for you in this appeal, it will be heard and decided in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge

[NOTE —If a stay of execution has been ordered, intimation should be given of the fact on this notice]

No 7

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT (O 41, r 20)

(*Title*)

WHEREAS you were a party in Suit No of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 , at A M If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence

GIVEN under my hand and the seal of the Court this day of 19

Judge.

No 8

MEMORANDUM OF CROSS OBJECTION (O 41, r 22)

(*Title.*)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No of 19 , dated the day of 19 , and whereas notice of the day fixed for hearing the appeal was served on the on the day of 19 , the files this memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and set forth the following grounds of objection to the decree appealed from namely —

Forms of Appeal.

App. G.

No 9

DECREE IN APPEAL (O 41, r 35)

(*Title*)

Appeal No of 19 from the decree of the Court of dated the day of 19 .

Memorandum of Appeal

The *Plaintiff / Defendant* above named appeals to the Court at from the decree of , in the above suit, dated the day of 19 , for the following reasons, namely —

This appeal coming on for hearing on the day of 19 , before in the presence of for the appellant and of for the respondent, it is ordered —

The costs of this appeal as detailed below, amounting to Rs , are to be paid by The costs of the original suit are to be paid by

GIVEN under my hand this day of 19

Judge

Costs of Appeal

	Appellant	Amount Rs	a	p	Respondent.	Amount. Rs	a	p
1	Stamp for memorandum of appeal				Stamp for power			
2	Do for power				Do for petition			
3	Service of processes				Service of processes			
4	Pleader s fee on Rs				Pleader s fee on Rs			
	Total				Total			

No 10

APPLICATION TO APPEAL IN FORMA PAUPERIS (O 44, r 1)

I the above named present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof

Dated the day of 19

(*Signed*)

Note —Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper

No 11

NOTICE OF APPEAL IN FORMA PAUPERIS (O 44, r 1)

(*Title*.)

WHEREAS the above named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19

been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore mentioned date

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 12

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED (O 45, r 3)

(*Title.*)

To

TAKE notice that
has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of Section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for

GIVEN under my hand and the seal of the Court, this day of 19 .

Registrar

No 13

NOTICE TO RESPONDENT OF ADMISSION OF THE APPEAL TO THE KING IN COUNCIL (O 45, r 8)

(*Title*)

To

WHEREAS , the in the above case has furnished the security and made the deposit required by Order XLV rule 7 of the Code of Civil Procedure 1908

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19

GIVEN under my hand and the seal of the Court, this day of 19

Registrar

No 14

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED (O 47, r 4)

(*Title*)

To

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case The day of 19 is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED (O 14, r 6)

(Title)

WHEREAS we the parties in the above suit, are agreed as to the question of fa t [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of imitation *(or state the point at issue whatever it may be)*

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or* affirmative] of such issue, will pay to the said the sum of Rupees *or* such sum as the Court shall hold to be due thereon) and I the said will accept the said sum of Rupees (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [*or*, that upon such finding I, the said will do or abstain from doing, etc , etc]

Plaintiff
Defendant.

Witnesses
1
2

Dated the day of 19

No 2

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.

(Section 24)

In the Court of the District Judge of
No of 19

To

WHEREAS an application, dated the day of 19 , has been made to this Court by the in Suit No of 19 now pending in the Court of the at, in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at —

You are hereby informed that the day of 19 has been fixed for the hearing of the application when you will be heard if you desire to offer any objection to it

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 3

NOTICE OF PAYMENT INTO COURT (O 24, r 2)

(Title)

Take notice that the defendant has paid into Court Rs. and says that that sum is sufficient to satisfy the plaintiff s claim in full.

X Y, *Pleader for the Defendant.*

To Z, *pleader for the plaintiff*

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(*Title.*)

To

WHEREAS the above named
has made application to this Court that
You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY $\frac{\text{PLAINTIFF}}{\text{DEFENDANT}}$ (O. 13, r. 1.)

(*Title.*)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or *pleader.*
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16.)

(*Title.*)

To

plaintiff (*or* defendant).

WHEREAS in the above suit application has been made to the Court by that the examination of , a witness required by the said in the said suit, may be taken immediately, and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause, to be stated*).

Take notice that the examination of the said witness will be taken by the Court on the day of 19 .

Dated the day of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED (O 14, r 6)

(*Title.*)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of imitation (*or state the point at issue whatever it may be*)

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or* affirmative] of such issue, will pay to the said the sum of Rupees *or* such sum as the Court shall hold to be due thereon) and I, the said will accept the said sum of Rupees (*or* such sum as the Court shall hold to be due) in full satisfaction of my claim, on the bond aforesaid [*or*, that upon such finding I, the said will do or abstain from doing, etc, etc]

Plaintiff
Defendant

Witnesses

1

2

Dated the day of 19 .

No 2

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.

(*Section* 24)

In the Court of the District Judge of

No of 19 .

To

WHEREAS an application dated the day of 19 , has been made to this Court by the in Suit No of 19 now pending in the Court of the at, in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at —

You are hereby informed that the day of 19 has been fixed for the hearing of the application when you will be heard if you desire to offer any objection to it

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 3

NOTICE OF PAYMENT INTO COURT. (O 24, r 2)

(*Title*)

Take notice that the defendant has paid into Court Rs and says that that sum is sufficient to satisfy the plaintiff s claim in full

X Y, Pleader for the Defendant.

To Z, *pleader for the plaintiff.*

(*Note*—If the request is directed to a foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the penultimate line of this form.)

No 9

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.

(O. 26, rr. 9, 11.)

(*Title.*)

To

WHEREAS it is deemed requisite, for the purpose of the suit, that a commission for should be issued, You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r 13.)

(*Title.*)

To

WHEREAS it is deemed requisite for the purposes for this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 ; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O 32, r 3.)

(*Title.*)

Minor Defendant.

To *Natural Guardian.*

WHEREAS an application has been presented on the part of the Plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you *

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* Here insert the name of guardian.

Forms—Miscellaneous.

App. H.

are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you* or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM (O. 33, r. 6)

(Title.)

To

WHEREAS has applied to this Court for permission to institute a suit against *in forma pauperis* under Order XXXIII of the Code of Civil Procedure, 1908 ; and whereas the Court sees no reason to reject the application , and whereas the day of 19 , has been fixed for receiving such evidence as the applicant may adduce in proof of this pauperism and for hearing any evidence which may be adduced in disproof thereof.

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. *(Section 145)*

(Title.)

To

WHEREAS you did on become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit, and whereas a decree was passed on the day of 19 , against the said defendant for the payment of , and whereas application has been made for execution of the said decree against you :

Take notice that you are hereby required on or before the day of 19 , to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

---

* Here insert the name of guardian.

No 14

REGISTER OF CIVIL SUITS (O 4, r 2)

COURT of the of at

REGISTER OF CIVIL SUITS in the year 19 .

Date of presentation of plaint	No of suit	Plaintiff			Defendant			Claim			Appearance			Judgment			Appeal		Execution					Return of Execution		
		Name	Description	Place of residence	Name	Description	Place of residence	Particulars	Amount or value	When the cause of action accrued	Day for parties to appear	Plaintiff	Defendant	Date	For whom	For what, or amount	Date of decision of appeal	Judgment in appeal	Date of application	Date of order	Against whom	For what and amount if money	Amount of costs	Amount paid into Court	Arrested	Minute of other Return than Payment or Arrest and date of every Return

NOTE —Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only or the first defendant only, as the case may be, need be entered in the register

Forms—Miscellaneous.

App. H.

No 15

REGISTER OF APPEALS (O 41, r 9)

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 19

Date of memorandum.	No of appeal.	APPELLANT			RESPONDENT			DECREE APPEALED FROM				APPEARANCE			JUDGMENT		
		Name	Description.	Place of residence	Name	Description	Place of residence	Of what Court	No of Original Suit	Particulars	Amount of Value	Day for parties to appear	Appellant	Respondent	Date	Confirmed, reversed or varied.	For what, or amount.

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. [S. 506.] (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Parties to suit may apply for order of reference

(2) Every such application shall be in writing and shall state the matter sought to be referred.

Alterations in the rule:—

1 The word "interested" in clause (1) has been added after the word "parties." See notes below under the head "All the parties interested must join in the application"

2 The words "in person, or by their respective pleaders, specially authorized in writing in this behalf," which occurred in the old section after the word "apply" and before the words "to the Court" have been omitted

Scope of the Schedule —The present Schedule deals with arbitration under three heads (*a*) —

I *Where a suit has been instituted* and all the parties interested agree to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court and they are governed by the provisions of paras. 1 to 16 of this Schedule The first step is to apply to the Court for an order of reference under para 1 If *all the parties interested* have joined in the application, an order of reference will be made under para 3

II *Where parties without having recourse to litigation agree to refer their differences* to arbitration and it is desired that the agreement of reference should have the sanction of the Court In that case the parties to the agreement or any of them may apply to the Court under para 17 to have the agreement filed in Court and to make an order of reference thereon If an order of reference is made, all further proceedings will be under the supervision of the Court, and they will be governed by the provisions of paras. 3 to 16 *so far as they are consistent with the agreement (para 19) See paras 17 to 19*

III Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order *to give effect to the award* In that case any person interested in the award may apply to the Court under para. 20 to have the award filed in Court See paras. 20-21

(*a*) *Ghulam Khan* v *Muhammad Hassan* (1902) 29 Cal 167, 29 I A 51

Arbitration.

Sch. II, para. 1.

All the parties interested must join in the application.—In order to give jurisdiction to the Court to make an order of reference under this and para 3 it is necessary that *all the parties interested* must apply to the Court (*b*) If all the parties interested do not apply, and an order of reference is made the order is illegal and if an award is made on such reference, the award also is illegal (*c*) Thus where in a suit for partnership accounts brought by *A* against *B* and *C*, *A* and *B* alone applied to the Court to refer the matters in dispute to arbitration, and an order of reference was made it was held on an objection raised by *B* to the validity of the award that *C* not having joined in the application, the order of reference as well as the award made in pursuance thereof were illegal (*d*) But when the part not referred can be separated from the part referred, para 12 (a) would apply So in a suit where some of the defendants were adults and some were minors for whom no guardian *ad litem* was appointed, and the minors were not interested in the dispute of the plaintiff with the adult defendants, it was held that the Court was not justified in refusing to file the award made on a reference by all parties for the part which related to the minors and which was invalid could be separated from the other part The proper procedure was to modify or correct the award under para 12 (a) of this Schedule (*e*)

The word interested is new It has been added to give effect to a recent Allahabad decision (*f*) It refers to the succeeding words any matter in difference between them A party to a suit who is not interested in a matter in difference between the other parties to the suit need not join in an application under this paragraph for an order of reference *A* sues *B* and *C*, praying as against *B* for a declaration of his title to certain property and as against *C* for possession of the property *A* and *B* alone apply to the Court to refer to arbitration the question as to the *ownership of the property* The Court has jurisdiction to make an order of reference, though *C* has not joined in the application for the question of ownership is not in issue between *A* and *C* But *C* not being a party to the reference, the award is not binding upon him, though it is binding as between *A* and *B* (*g*)

It has been held by the High Court of Allahabad that a defendant who does not put in an appearance and does not contest the suit is not a party within the meaning of this paragraph The mere fact, therefore, that such a defendant has not joined in the application for an order of reference will not invalidate an award (*h*) On the other hand, it has been held by the High Courts of Calcutta (*i*) and Madras (*j*), that the mere

[illegible]

A person however, who is not a necessary party to a suit is not a party interested within the meaning of this para (*l*) See O 1, r 10 (2)

(*b*) *Gulam Khan* v *Muhammad Hassan* (1902) 29 Cal 167 29 I A 51

(*c*) *Joy Prokash* v *Sheo Golam* (1885) 11 Cal 37

(*d*) *Indur Subbarami* v *Kandadai* (1903) 26 Mad 47 *Dooli Chand* v *Mamuji Musaji* (1916) 21 C W N 387 41 I C 295

(*e*) *Raghunath Sukul* v *Ramrup* (1923) 2 Pat 777 76 I C 2 (24) A P 33

(*f*) *Indan Mal* v *Sadiq Ali* (1902) 24 All 229

(*g*) *Bhaloka* v *Anundo* (1879) 4 C L R 65 *Indan Mal* v *Sadiq Ali* (1902) 24 All 229 *Bhagannulu* v *Seethuramaswami* (1923) 44 Mad L J 359 73 I C 202 (23) A M 502

(*h*) *Ishardei* v *Keshab Deo* (1910) 32 All 657 7 I C 68 *Ajudhia Prasad* v *Badar-ul Husain* (1917) 39 All 489, 495 41 I C 357, contra *Hasica* v *Malbub* (1911) 8 All L J 645 10 I C 559 *Salta* v *Dharam* (1913) 35 All 107 18 I C 609

(*i*) *Girija* v *Kanai* (1918) 27 Cal L J 339 *Seth Dooly Chand* v *Mamuji* (1916) 21 Cal W N 387 41 I C 295 *Lalurain Nathmull* v *Nandlal* (1920) 47 Cal 553 55 I C 747 [F B]

(*l*) *Salta* v *Dharam* (1913) 35 All 107 18 I C 609 *Ajudhia Prasad* v *Badar-ul-Husain* (1917) 39 All 489 493 41 I C 357

"Apply."—This section requires that all the parties interested should not only agree to a reference, but that they should all *apply* to the Court for an order of reference (*m*) Therefore, if one of the parties interested agrees to a reference, but he changes his mind subsequently and does not join in the application, the application for an order of reference should be refused (*n*)

Matter in difference—This most be a matter in difference in the suit itself (*o*) Where an award comprises matters which are not in dispute in the suit, and adjudicates upon the rights of a person who was not a party to the suit and who was interested in some of them, and the findings with reference to the matters in question in the suit could not be separated from those not so in question, the award is otherwise invalid within the meaning of para 15 (1) (c), and it should be set aside under that para so far as it deals with matters in difference in the suit (*p*)

Application shall be in writing—The provision requiring the application to be in writing is directory only, and not imperative, hence an award is not invalid merely because the application for the order of reference was not made in writing (*q*) In a recent case before the Judicial Committee where the agreement was in writing but it was not signed by one of the parties, it was held that para 1 of this Schedule did not require that the writing should of necessity be signed (*r*), and it has also been held that the record made by the Court of an oral application is sufficient (*s*) But where a pardanishin lady was a party and the application was signed by her pleader who was not authorized by his vakalatnama to do so, the award was held to be invalid (*t*) For form of application for an order of reference, see the Appendix to this Schedule, form No 1

Before judgment—A suit may be referred to arbitration after a reference is made to the High Court (*u*)

"Court."—Section 107 of the Code provides that an appellate Court shall have the same powers as a Court of original jurisdiction It follows therefore that an appellate Court can act under this paragraph and refer matters in dispute in the appeal to arbitration if all the parties interested agree to a reference (*v*) But a Court to which certain issues have been referred for trial under O 41 r 25, cannot act under this paragraph, as the duty of such Court is to *try* the issues as directed by the appellate Court and to return to the appellate Court its findings thereon together with the evidence (*w*) Similarly a Court dealing with petitions under the Provincial Insolvency Act, 1907, has no power to refer the proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent (*x*)

Revocation of arbitrator's authority—When a matter is referred to arbitration *by an agreement between the parties without the intervention of a Court of Justice*, the agreement to refer to arbitration cannot be revoked by any party without good cause and

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Cal 61 Abdul Ha[illegible] v [illegible] ud-din (190[illegible]) 30 All 3

(*r*) *Umed Singh v Sohag Mal* (1916) 43 I A 1 43 Cal [illegible]0, 3[illegible] I C 161

(*s*) *Mal[illegible] v Manohar* (19[illegible]4) 46 All 203 [illegible]9 I C 816 ([illegible]4) A A 540

(*t*) *[illegible]ndra Nath v Dwarka Nath* (1924) 25 C W N 83[illegible]

(*u*) *Ram Lal v Deoraj* (1921) 44 All 91 64 I C 601 (22) A A 178

(*v*) *Dulla v Khedu* (1911) 33 All 645 11 I C 935 Suresh Chunder v Ambica Churn (1891) 18 Cal [illegible]07

(*w*) *Nand Ram v Fakir Chand* (1[illegible]) 7 All [illegible]23

(*x*) *Ladha Singh v Lhag S[illegible]h* (1916) Punj Rec no [illegible]0, p 143 34 I C [illegible]49

Arbitration.

Sch. II, paras. 1-3.

a mere arbitrary revocation will not be permitted by the Court (*y*). Where a claimant did not proceed with the reference for a period of nine months without any just cause, it was held that it amounted to a good cause sufficient to entitle the other party to revoke the submission (*z*). Similarly if the arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and this fact is not disclosed to the other party, the non disclosure is a sufficient cause for revoking the submission upon discovery of the fact (*a*).

But when a matter is referred to arbitration *by an order of the Court*, the Court alone can revoke the authority of the arbitrator, and that too in the cases specified in paras. 5, 8 and 15. The Court has no power to revoke the authority of an arbitrator in any other case. Thus where after an order of reference was made under para 3, the defendant applied to the Court for an order to revoke the authority of the arbitrator and to appoint a new arbitrator in his place on the ground that he had come to know of certain facts which showed that the arbitrator was not worthy of the confidence reposed in him, it was held that the Court had no power to make the order, as the case did not come either under para 5, 8 or 15. It was further held that the objection raised by the defendant could only be considered *after* the award was made and filed in Court, and that too to the extent permitted by para 15 (*b*). Note the words "or being otherwise invalid" in para. 15, cl (c).

Where a party dies after application but before order of reference—The death of a party to an application made under this rule for a reference to arbitration before the order of reference is made does not operate as a revocation of the authority of the proposed arbitrator, therefore, if the right to sue survives, it is competent to the Court to make an order of reference after substitution of the representative of the deceased party (*c*). All that is necessary is substantial representation without strict adherence to the rules of the Civil Procedure Code as to legal representatives and guardians *ad litem* (*d*).

Withdrawing from suit pending arbitration.—See notes to O. 23, r 1, under the same head, p 763 above

Execution proceedings—This Schdule does not apply to execution proceedings and a reference to arbitration by an execution Court is without jurisdiction (*e*).

Form—For form or application for an order of reference, see the Appendix to this Schedule, form No 1.

Appointment of arbitrator

2. [S. 507, 1st para.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference.

3. [S. 503.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and

(*y*) *Pestonji* v *Manokjee* (1868) 12 M I A 112, 113 *Sultan Muhammad* v *Sheo Prasad* (1898) 20 All 145, *Perumalla* v *Perumalla* (1904) 27 Mad 112, *Kunj Lall* v *Banwari Lall* (1919) 4 Pat L J. 394, 399, 48 I C 711.

(*z*) *Coley* v *Da Costa* (1890) 17 Cal 200

(*a*) *Mahomed* v *Hakiman* (1902) 29 Cal 278.

(*b*) *Halimbhai* v *Shankar* (1886) 10 Bom 381; *Chatarbhuj* v. *Raghubar* (1914) 36 All 354, 23 I C 758

(*c*) *Dutta* v *Kheda* (1911) 33 All 645, 11 I C 935.

(*d*) *Binayakdas* v *Sasi Bhusan* (1921) 26 C. W N. 804 70 I C 469, (2..) A C 2.6

(*e*) *T Hang* v *Sonawangdi* (1925) 52 Cal 559, 87 I C 633, (25) A. C 612

Sch. II, para. 3.

shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit.

The word "making" has been substituted for the word "delivery" In fact the word "delivery" was construed as meaning "making" See notes below under the head "Making of award"

Fixing of time or the making of award.—The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory, but imperative Hence this provision should be strictly followed At the same time it has been held that if no time is fixed for delivery of the award in the order of reference, but the Court subsequently makes an order for enlarging the time (para 8), and fixes in that order the time within which the award should be made, the omission to fix the time in the order of reference is not fatal to the award (*f*) Rankin, J, has described the provisions as to reasonable time as the main pillar of the scheme of the Schedule By the reference the Court parts with control of the suit temporarily, for the time limit will bring the matter back to the Court and enable it to resume control and either to grant further time or to supersede the arbitration under para. 8 If the Court fixes no time limit, it surrenders control, and jurisdiction is involved because such an order professes to abrogate jurisdiction. Accordingly a reference which gave the arbitrators leave to extend for such further time as *they may allow themselves* was held to be invalid and the arbitratorn was superseded (*g*) See para 15, cl (1) (c) and notes thereto

Making of award.—An award is said to be 'made' when it is completed and signed by the arbitrators Hence it is sufficient if the award is *made*, that is, completed and signed by the arbitrators, within the period limited under this paragraph, it is not necessary to the "making" of the award that it should actually reach the hands of the Court within such period. The validity of the award depends upon the *making* of it within the period allowed, and it is immaterial on what date it is actually delivered to the Court Thus where the time fixed by the Court for the delivery of an award in a suit pending before it was 16th April 1900, and the award was completed and signed on the 16th April, but did not reach the hands of the Court until the 17th of April, it was held that the award was within time (*h*)

Clause (2)—Where a matter is referred to arbitration, the Court should not deal with it in the same suit except in the manner provided in this Schedule Hence the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, for there is no paragraph in this Schedule corresponding

(*f*) *Raja Har Narain v. Chaudhrain Bhagwant Kuar* (1891) 13 All 300 18 I A 55 *Lachman Das v. Abparkash* (1908) 30 All 169

(*g*) *Jolandra v. Jogendra* (1923) 27 C W N 420, 50 I C 459, (23) A C 410

(*h*) *Arumugam v. Arunachalam* (1899) 22 Mad 22, *Emersey v. Shamji* (1889) 13 Bom 119, *Sita Ram v. Bhawani* (1904) 26 All 105 *Asad ul lah v. Muhammad* (1905) 27 All 459

Arbitration.

Sch. II, paras. 3, 4.

to O 23, r 1 (i). Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph 5 (j). Nor is it open to the Court to hear the suit on the merits, unless the arbitration has been superseded under para 5, 8 or 15 (k). Similarly, the Court has no power to confirm an order passed by the arbitrators making payments of their fees a condition precedent to the hearing of the reference, there being no paragraph in this Schedule empowering the Court to make an order in that behalf (l). On the same principle where an award is once set aside, on the ground, e g, that one of the parties to the reference had died before the termination of the arbitration proceedings, the Court has no power to to send back the case to the arbitrators for decision (m)

Form.—For form of order of reference, see form No. 2 to the Appendix to this Schedule

Where reference is to two or more, order to provide for difference of opinion

4. [S. 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(a) by the appointment of an umpire; or

(b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or

(c) by empowering the arbitrators to appoint an umpire, or

(d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Decision of majority.—*Where the order of reference did not provide that the* decision of the majority of arbitrators should prevail, and two of the *five arbitrators* refused to act, it was held that an award by the remaining three who constituted the majority was not valid (n)

Empowering arbitrators to appoint an umpire.—*The arbitrators* have no power to appoint an umpire, unless they are authorized in that behalf (o).

Delegation of duty by arbitrator.—An arbitrator cannot *delegate* his duties to a third person (p). But he may delegate to a third person the performance of acts of a ministerial character. Thus where an arbitrator employed his son to take *some*

(i) *Sheoambar* v *Deodat* (1887) 9 All 168; *Debi Charn* v *Bepra* (1902) 7 Cal W N 186
(j) *Halimbhai* v *Shanker* (1886) 10 Bom 381
(k) *Jamna* v *Nasib* (1902) 24 All 312
(l) *Steel* v. *Robarts* (1881) 6 Cal 802
(m) *Fuchkauri Ram* v *Nand Lal* (1908) 30 All 505
(n) *Gurupathappa* v *Narasingappa* (1884) 7 Mad 174
(o) *Smith* v *Lutha* (1893) 17 Bom 129.
(p) *Jamna* v *Nasib* (1902) 24 All. 312

measurements instead of taking them himself, it was held that the award was not by that reason invalid (q)

Power of Court to appoint arbitrator in certain cases.

5. [Ss. 507 (2), 510, 511.] (1) In any of the following cases, namely —

(a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstancess showing that he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice and after giving the other party an opportu-
[illegible] an
[illegible] pro-
ceed with the suit

Notice to appoint arbitrator.—Where an order of reference is made on the joint application of A and B and the arbitrator refuses to act and A serves B with notice to appoint a new arbitrator, the appointment of the new arbitrator must be made both by A and B, and not by B alone (r)

Duty of Court under this paragraph.—In the event of the happening of any of the events mentioned in this paragraph, the Court *must* adopt one of the two courses pointed out in the paragraph, namely, appoint a new arbitrator, *or* make an order superseding the arbitration. Thus where one of three arbitrators refused to act, and the

(q) *Buta v. Municipal Committee of Lahore* (1902) 29 Cal 854 29 I A 168

(r) *Chuta Ram v. Sajan Mal* (1918) Punj Rec no 112 p 359 48 I C 395

Arbitration.

Sch. II, para. 5.

Court neither appointed a new arbitrator nor made an order superseding the arbitration, it was held that the award made by the other two was invalid (s)

Appointment of new arbitrator or umpire.—Under the Code of 1882, the Court had no power, on the happening of either of the events referred to in cl (a) of this paragraph, to appoint a new arbitrator without the consent of all the parties to the reference, the reason being that the corresponding Section 507 of that Code contained the words ' and [if] the parties desire that the nomination shall be made by the Court ' (t) But the said words have been omitted in cl (a), and the Court has power under this paragraph to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in cl (a) In cases covered by cl (b), it is open to the Court to appoint only one new arbitrator in place of several old arbitrators (u) But the Court has no power to appoint an arbitrator or umpire under sub para (2) unless notice is given as required by sub para (1) and the party served with the notice has been given an opportunity of being heard (v)

The power of the Court to appoint a new arbitrator or umpire may be limited by agreement. *A* and *B* submitted to arbitration on the terms that the umpire should be *selected from seven persons named* The umpire first selected *refused to act*, and the Court appointed a new umpire who was not one of the seven persons named. It was held that the umpire not being one of the seven named in the agreement, the award of the umpire was invalid (w)

An irregularity of procedure in the appointment of a new arbitrator is cured by consent of parties So when one of three arbitrators refused to act and the two remaining arbitrators co opted a third and the parties consented, the award was held to be valid (x)

Where arbitrator refuses to act.—If an arbitrator refuses to act, the Court cannot compel him to act Thus where an arbitrator refused to act, and the Court instead of accepting his refusal directed him to proceed and make an award, it was held that the award was invalid. The finality of an award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are *willing* to settle the disputes between them (y) But an arbitrator has full

try the suit, an order superseding arbitration may be implied (a)

Order superseding arbitration.—When once a matter is referred to arbitration *by an order of the Court the Court has no power to hear the suit* on the merits, unless the arbitration has been superseded by an order under this paragraph (b) or under paragraph 8 or 15

Form.—For form of order for appointment of new arbitrator, see the Appendix to this Schedule, form No 3

50 I C 6[illegible]5 *Thakar Das* v *Ram Das* (1925) 7 Lah. L J 163 88 I C 975 ([illegible]) A L 374

(w) *Barracko* v *Souza* (1872) 7 Mad H C 72

(x) *Mahmud Sheikh* v *Messrs Kanknarah & Co* (1924) 28 C W N 634 81 I C [illegible], ([illegible]) A C 665

(y) *Shibcharan* v *Ratiram* (1885) 7 All 20 *Baldeo Mal* v *Kanhaiya Lal* (1921) 43 All 101, 59 I C 667

(z) *Har Narain* v *Bhagwant Kuar* (1888) 10 All 137

(a) *Mangar* v *Jhaloo* (1920) 5 Pat L J 6[illegible]2, [illegible]7 I C 473

(b) *Jamna* v *Narib Ali* (1902) 24 All. 312.

6 [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or umpire appointed under paragraph 4 or 5

7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it

Summoning witnesses and default

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court

8 [S. 514] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period, or may make an order superseding the arbitration, and in such case shall proceed with the suit

Extension of time for making award

Alteration in the rule—The words either before or after expiration of the period fixed for the making of the award are new They give effect to decisions under the old section (c) But they do not abrogate the ruling of the Privy Council in *Raja Har Narain* v *Chaudhrain* (d) that r 3 is not merely directory but is mandatory (e)

Extension of time for making award—If the time originally fixed for making an award has expired and no award is made the Court may extend the time for making the award It is not necessary that the application to extend the time should be made *before* the expiry of the period originally fixed for making the award The application may be made even *after* the expiry of the time originally fixed (f) But it must be made *before* the award is made The Court has no power to enlarge the time for the making of an award after the time for making it has expired *and after the award has been made* (g) Sec 148 of this Code does not alter the law laid down in this

(c) *Jamna* v *Nasib Ali* (190?) 24 All 312
(d) (1881) 13 All 300 18 I A 55
(e) *Robindra* v *Jogendra* (1923) 27 C W N 420 80 I C 459 (23) A C 410
(f) *Harinarain* v *Bhagwant* (1888) 10 All 137
(g) *Raja Har Narain* v *Bhagwan* (1891) 13 All 300 18 I A 55 *Lakshminarayana* v *Somasundaram* (189?) 15 Mad 384 *Rama Manohar* v *Lal Behari* (1892) 14 All 343

Arbitration.

Sch. II, paras. 8-10.

respect (h) An award made after the expiration of the period allowed by the Court may be set aside under paragraph 15 (1) (c) The application for extension of time need not necessarily be in writing (i)

Where by an order of reference power is given to the *arbitrator* to extend the time for making the award, he can only extend the time *before* the time originally fixed for making the award has expired (j)

Estoppel—The parties to a reference may be *estopped* by their conduct from impeaching the validity of an award on the ground that it was made after time (k)

Appeal—An appeal lies from an order superseding an arbitration where the award has not been completed within the period allowed by the Court [s 104, sub s (1), cl (a)]

Where umpire may arbitrate in lieu of arbitrators

9 [s. 515.] Where an umpire has been appointed he may enter on the reference in the place of the arbitrators,—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree

Award to be signed and filed

10 [s 516] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them, and notice of the filing shall be given to the parties

Award need not be signed by arbitrators in each other's presence—It is quite enough if all the arbitrators agree to the terms of the award and sign it
There is no provision [illegible] (l)
But the award must [illegible]
necessarily at the same [illegible]
while it is on the file of the Court is invalid (o)

Necessity of arb [illegible]
referred to arbitration, [illegible]
at the last meeting whe [illegible]
of the award (q)

(h) Shib Krishna v Satish Chunder (1911) 38 Cal 522 12 I C 13 doubted in Lallo Kumari v Upendra Nath (1919) 4 Pat L J 265 270 50 I C 52

(i) Nalchand v Ambaram (1924) 26 Bom L R 280 80 I C 200 (24) A B 380

(j) Co-operative Hindustan Bank v Bhola Nath (1914) 19 C W N 165 31 I C 597

(k) Lallo Kumari v Upendra Nath (1919) 4 Pat L J 265 270 50 I C 52

(p) Nand Ram v Fakir Chand [illegible]

"Together with any depositions and documents."—The Court has jurisdiction to compel arbitrators to give up documents that may have been filed before them as exhibits during the course of the arbitration. Also if the original records of the suit are handed to the arbitrators to enable them to proceed with the arbitration, and they fail to return them, the Court can compel them to return the records (q)

Notice of the filing shall be given—It is a material irregularity within the meaning of s. 115, if the Court gives judgment without issuing notice, and the judgment will be set aside in revision (r)

Delivery of award.—The act of an arbitrator in delivering an award to the proper officer of the Court for the purpose of being filed in Court is not an "application" within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator to the Court (s)

Form.—For form of award see the Appendix to this Schedule, form no 5

Statement of special case by arbitrator or umpire.

11. [S. 517] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Special case.—The special case must be on a point of law only (t)

Appeal.—An appeal lies from an order on an award stated in the form of a special case [s. 104, sub-s. (1), cl (b)] Where the arbitrators differ on certain matters referred to them, but instead of referring their differences to an umpire as provided by the order of reference, they submit *their own opinions* in the form of a special case for the opinion of the Court, such submission is not an *award* stated in the form of a special case and no appeal therefore lies from any order made upon such submission (u)

Form.—For form of special case see the Appendix to this Schedule Form No 4

Power to modify or correct award

12 [S 518] The Court may, by order, modify or correct an award,—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred, or

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or

(q) *Nursing* v *Nuffer* (1890) 17 Cal 832
(r) *Rangasami* v *Muttusami* (1888) 11 Mad 144 *Chaturbhuj* v *Ganesh* (1898) 20 All 474
(s) *Roberts* v *Harrison* (1881) 7 Cal 333
(t) *Laxman* v *Ramchandra* (19 5) 48 Bom 663 84 I C 378 (25) A B 22
(u) *Purshottamdas* v *Ramgopal* (1910) 35 Bom 130, 8 I C 171

Arbitration.

Sch. II, paras. 8-10.

respect (h) An award made after the expiration of the period allowed by the Court may be set aside under paragraph 15 (1) (c) The application for extension of time need not necessarily be in writing (i)

Where by an order of reference power is given to the *arbitrator* to extend the time for making the award, he can only extend the time *before* the time originally fixed for making the award has expired (j)

Estoppel—The parties to a reference may be *estopped* by their conduct from impeaching the validity of an award on the ground that it was made after time (k)

Appeal—An appeal lies from an order superseding an arbitration where the award has not been completed within the period allowed by the Court [s 104, sub s (1), cl (a)]

Where umpire may arbitrate in lieu of arbitrators

9 [S. 515.] Where an umpire has been appointed he may enter on the reference in the place of the arbitrators,—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree

Award to be signed and filed

10 [S 516] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them, and notice of the filing shall be given to the parties

Award need not be signed by arbitrators in each other's presence—It is quite enough if all the arbitrators agree to the terms of the award and sign it There is no provision of law requiring them to sign in the presence of each other (l) But the award must be signed by all the arbitrators before it is filed (m), but not necessarily at the same time and place (n) An award signed by one of the arbitrators while it is on the file of the Court is invalid (o)

Necessity of arbitrator's presence at meetings—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award (p)

"Together with any depositions and documents."—The Court has jurisdiction to compel arbitrators to give up documents that may have been produced before them as exhibits during the course of the arbitration. Should the original records of the case have been handed to the arbitrators to enable them to proceed with the arbitration, and they fail to return them, the Court can compel them to return the records (q).

Notice of the filing shall be given.—It is a material irregularity within the meaning of s. 115, if the Court gives judgment without issuing notice, and the judgment will be set aside in revision (r).

Delivery of award.—The act of an arbitrator in delivering an award to the proper officer of the Court for the purpose of being filed in Court is not an application within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator to the Court (s).

Form.—For form of award see the Appendix to this Schedule, Form No. 3.

Statement of special case by arbitrators or umpire.

11. [S. 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Special case.—The special case must be on a point of law only (t).

Appeal.—An appeal lies from an order on an award stated in the form of a special case [s. 104, sub-s. (1), cl. (b)]. Where the arbitrators differ on certain matters referred to them, but instead of referring their differences to an umpire as provided by the order of reference, they submit *their own opinions* in the form of a special case for the opinion of the Court, such submission is not an *award* stated in the form of a special case, and no appeal therefore lies from any order made upon such submission (u).

Form.—For form of special case see the Appendix to this Schedule, Form No. 4.

Power to modify or correct award.

12. [S. 518.] The Court may, by order, modify or correct an award,—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(q) *Nursing* v. *Nuffer* (1890) 17 Cal. 832.
(r) *Rangasami* v. *Muttusami* (1888) 11 Mad. 144; *Chaturbhuj* v. *Ganesh* (1898) 20 All. 474.
(s) *Roberts* v. *Harrison* (1881) 7 Cal. 333.
(t) *Laxman* v. *Ramchandra* (1925) 48 Bom. 663, 84 I.C. 378, ('25) A.B. 22.
(u) *Purshottamdas* v. *Ramgopal* (1910) 35 Bom. 19, 8 I.C. 171.

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Sch. II, paras. 12-14.

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Power to modify or correct.—The Court has no power to modify or correct an award except in the three cases mentioned in this paragraph A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator (*t*)

Where a part of the award is upon a matter not referred to arbitration —Where the matters in dispute in a suit are referred to arbitration, but the question of cost is not referred, and the arbitrators make an award containing a direction that the defendant should pay the plaintiff's costs, the Court has power under this paragraph to modify the award by striking out the direction for the payment of costs, the case being one in which the part of the award upon the matter not referred could be separated from the other part (*u*) An award that goes beyond the terms of the reference is to that extent *ultra vires* (*x*) But where no such separation is possible, the Court should remit the award to the reconsidertion of the same arbitrator under paragraph 14, cl (a).

Clause (c)—This clause is new An arithmetical error is no ground for setting aside an award (*y*)

Appeal —An appeal lies from an order modifying or correcting an award, see sec. 104, sub sec (1), cl (c)

Order as to costs of arbitration

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Where award or matter referred to arbitration may be remitted

14 [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

(*a*) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*t*) *Tarma Dal* v *Bipju* (1916) Punj Rec no 78 p 243 35 I C 687, *Gopal Dinker* v *Ganesh Narayan* (1921) 45 Bom 512, 59 I C 785 *Aftab Begum* v *Haji Abdul* (1924) 22 All L J 816 81 I C 525 (24) A A 600

(*u*) *Dagdusa* v *Bhukan* (1885) 9 Bom 82 See also *Amolak Shah* v *Charan Das* (1913) Punj Rec no 52, p 202, 17 I C 684

(*x*) *Mumtaz Ali* v *Farhat Ali* (1901) 23 All 394 *Bala* v *Municipal Committee of Lahore* (1902) 29 Cal 854 29 I A 168

(*y*) *Sham Lal* v *Parshottam Das* (1920) 42 All 277, 58 I C 585

(c) where an objection to the legality of the award is apparent upon the face of it.

Sch. II, para. 14.

Remission of award when the award has left undetermined any of the matters referred to arbitration.—The ground for holding an award to be invalid on account of its not disposing of *all* the matters referred, appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. Hence this condition may be waived by the consent of all the parties before the arbitrators (z)

Where the issues in a suit were referred to arbitration, and there was no distinct and separate finding by the arbitrators on *each* of the issues, but there was a decision *on the whole matter in controversy between the parties*, it was held that the award could not be said to have left undetermined any of the matters referred to arbitration, and it should not therefore be remitted to the reconsideration of the arbitrator (a) A separate finding on each issue is not necessary, when the whole matter in issue between the parties is decided by the arbitrators (b) But where several issues in a suit are referred to arbitration, and the arbitrator decides by the award only one issue, the award must be remitted to his reconsideration (c) If the arbitrator fails to reconsider the award, the award becomes void see paragraph 15. Even if parties come to an agreement as regards some of the matters referred to arbitration, the award should contain a determination of those matters, though it be in terms of the agreement, otherwise the award would be open to the objection that it has left those matters undetermined (d)

Award patently illegal—This is the rule in *Hodgkinson* v *Fernie* (e) which limits the right of interference by the Court to the case where a question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. This rule was extended in *Sandaner* v *Isser* (f) to a case where an award referred to a contract and construed it The Court of Appeal held that they were entitled to look at the contract and come to the conclusion that it was wrongly construed *Sandaner* v *Isser* has been doubted and in *Champsey Bhara & Co* v *Jivraj Balloo* (g) the Privy Council said An error of law on the face of the award means in their Lordships view that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator, stating the reasons for his judgment some legal proposition which is the basis of the award and which you can say is erroneous " In this case cotton had been rejected by a buyer on a final award that it was of inferior quality under Rule 52 of the Rules of the Bombay Cotton Trade Association This rule gave the buyer the option of invoicing rejected cotton back at the market rate—an option which he would of course only exercise if the market rate had risen But here the market rate was below the contract rate and the defaulting seller claimed to recover the difference The award allowed the claim and in the preamble of the award narrating the events which led up to the dispute and the reference to arbitration mention was made of the contract and the letter of rejection for inferiority The Bombay High Court seized upon this recital and said that as the contract referred to the Rules and as the rejection was under Rule 52 the arbitrators must have wrongly construed the option in

(z) *Mokund Ram* v *Salig Ram* (1894) 21 Cal 590 21 I A 47 *Bhagwan Das* v *Shiv Dial* (1913) Punj Rec no 42 p 2[illegible] at p 332 17 [illegible]

[illegible] v *Madan* (1925) 52 Cal 100 88 I C [illegible] 49, (1925) A [illegible] C 599

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Sch. II, paras. 14, 15.

the rule as an obligation, and that this was an error patent on the face of the award The Privy Council however said that the rule in *Hodgkinson* v *Fernie* (g2) does not mean that if in the narrative a reference is made to the contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties depend to see if that contention is sound. They also observed that the arbitrators were entitled to put their own construction on Rule 52 Where the only question in a suit was whether a Hindu was born blind and therefore not entitled to inherit and the suit was referred to arbitration and the arbitrator made an award whereby the blind man was declared to be entitled to a life interest in a certain portion of the property, it was held on an objection to the award under cl. (c) of this paragraph that the award was not so patently illegal that it could be remitted to the reconsideration of the arbitrator (h)

Appeal —No appeal lies from an order under this paragraph remitting an award to the reconsideration of arbitrators Where an award is remitted to the reconsideration of the arbitrator and the arbitrator submits a fresh award and a decree is passed in accordance with the revised award no appeal lies from the decree on the ground that the order of remittal was wrong (r 16) and that the original award ought to have been accepted and acted upon (i) But where an award is remitted to the reconsideration of the arbitrator and the arbitrator refuses to reconsider the award (which consequently becomes void under paragraph 15) and the Court proceeds to try the case and passes a decree in the ordinary way [para 15 sub para (2)] the legality of the order remitting the award may be challenged on appeal from such decree (j), see sec 105

Grounds for setting aside award

15 [S 521] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it But no award shall be set aside except on one of the following grounds, namely —

(*a*) corruption or misconduct of the arbitrator or umpire,

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire,

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

(g2) (1857) 3 C B N S 187
(h) *Madepalli* v *Madepalli* (1918) 41 Mad 1022 44 I C 644
(i) *Subbiah* v *Subramania* (1908) 31 Mad 4 9
(j) *George* v *Vastian Soury* (1899) 22 Mad 202

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Sch. II. para. 15.

Points of distinction between s. 521 of the Code of 1882 and this paragraph:—

1. *Award made after expiration of period allowed by Court.* See notes below under the same head, p. 1088.
2. *When the award is otherwise invalid.* See notes under the same head, p. 1089.
3. Clause (2) is new.

Misconduct.—The term "misconduct" does not necessarily imply moral turpitude; it includes neglect of the duties and responsibilities of the arbitrators, and what Courts of Justice expect from them before allowing finality to their awards (*k*). Nor does it necessarily imply corruption (*l*).

Acts amounting to misconduct.—The following acts have been held to amount to misconduct on the part of an arbitrator affording a ground for setting aside an award:—

1. Irregularities in procedure which amount to no proper hearing of the matters in dispute (*m*), e.g., hearing and receiving evidence from one side in the absence of the other side without giving the other side affected by such evidence the opportunity of meeting and answering it (*n*).
2. Proceeding with arbitration in the absence of one of the arbitrators (*o*).
3. Refusing to hear witnesses produced by the parties (*p*).
4. Arbitrators improperly adding another to their number (*q*).
5. Where three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to be signed by all of them, it was held that it amounted to misconduct, and the award was set aside (*r*).

Acquiescence in acts amounting to misconduct.—It is misconduct if some of the arbitrators are not present at some of the meetings. But if this procedure is adopted with the concurrence of all the parties or if it is acquiesced in by them, it is not open to any of the parties to impeach the award on that ground (*s*).

Acts not amounting to misconduct.—An arbitrator is not bound by technical rules of procedure. Hence it is not a valid objection to an award that the arbitrator did not act in strict conformity with the rules of evidence (*t*). But he should not make private inquiries behind the backs of the parties (*u*) unless authorized by the wide terms of the reference (*v*). Again the rule of evidence which declares that letters written "without prejudice" should not be admitted in evidence being a rule founded upon natural justice is as binding upon arbitrators as upon Courts of Justice, and an arbitrator is wrong in receiving and acting upon such a letter. But if no objection is taken by the other side to the admissibility of such letter, and an award is made, the award will not be

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(*k*) *Ganga Sahai* v. *Lekhraj* (1887) 9 All. 253; *Amir Begum* v. *Badruddin Husain* (1914) 36 All. 336, 23 I. C. 625 [P. C.]; *Tyebbhai* v. *Abdul Husein* (1923) 25 Bom. L. R. 392, 85 I. C. 424, ('24) A. B. 149.

(*l*) *Kali Charan* v. *Sarat Chunder* (1903) 30 Cal. 397.

(*m*) *Amir Begum* v. *Badr-ud-din* (1914) 36 All. 336, 343, 23 I. C. 625 [P. C.].

(*n*) *Curselji* v. *W. Crowder* (1894) 18 Bom. 299; *Mohammed Afzal* v. *Abdul Hamid* (1925) 7 Lah. L. J. 463, 88 I. C. 161, ('25) A. L. 570.

(*o*) *Thammiraju* v. *Bapiraju* (1889) 12 Mad. 113; *Nand Ram* v. *Fakir Chand* (1885) 7 All. 523.

(*p*) *Rughoobur* v. *Maina Koer* (1883) 12 C. L. R. 564.

(*q*) *Phiran* v. *Baloran* (187[illegible]) 7 N. W. P. 367.

[illegible] 36 L. J. [illegible] 85 [illegible] 3 [illegible] All. L. J. 117, 65 I. C. 779, ('22) A. A. 64.

(*t*) *Husain Bakhsh* v. *Lachhman Das* (192?) 20 All. L. J. 125, 64 I. C. 934, ('2?) A. A. 69.

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set aside on the ground of misconduct (*w*) Where it is provided in an agreement for [illegible] relied upon by the plaintiff should not be taken into con-

[illegible]

but a rule of evidence introduced *pro hac vice* (*x*)

It is not misconduct on the part of the arbitrator to delegate to a third party the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred (*y*) "Misconduct" cannot be presumed from the mere fact that the arbitrator is the relative of one of the parties (*z*) The mere fact that the arbitrator has failed to account for the delay in making the award is no ground for presuming fraud (*a*)

In *Bula* v *Municipal Committee of Lahore* (*b*), certain matters in dispute between *A* and *B* were referred to arbitration The agreement of reference was drawn up by *A*'s counsel The arbitrator, feeling doubtful as to the meaning of a certain clause in the agreement, wrote to *A* to obtain his counsel's opinion on the meaning of that clause *A* obtained the opinion, and sent it on to the arbitrator. *B* was not informed of this until after the award was made It was [illegible]
and discreet for the arbitrator to have [illegible]
B of the opinion, the omission to do this did not amount to [illegible],
was no ground for impeaching the good faith of any of the parties concerned

Evidence of arbitrator.—Where a charge of dishonesty or partiality is made against an arbitrator, any relevant evidence he can give is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on such charges is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final (*c*)

Appeal from decree based on an award on ground of misconduct.—No appeal lies from a decree passed in accordance with an award, on the ground of misconduct of the arbitrator (*d*) The only remedy available to the party aggrieved by the award is to apply to have it set aside under this paragraph. See notes to paragraph 16, under the head "Invalid award," p 1092 below

Fraudulent concealment of any matter which ought to have been disclosed—Where the arbitrator was the retained pleader of the plaintiff, and this fact was not discl[illegible] the defendant before the arbitrator was appointed, the awar[illegible]
have been disclose[illegible]
who are proposing to submit their dispute to the arbitrament of any [illegible] individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (*e*)

Award made subsequent to order superseding arbitration—If an order is made, superseding the arbitration under paragraph 5 or 8 or under cl. (2) of this paragraph, or if the period fixed for making the award has expired, the arbitrators

(*w*) *Howard* v *Wilson* (1879) 4 Cal 231
(*x*) *Aishabai* v *Essaji* (1914) 38 Bom 60, 19 I C 934
(*y*) *Bula* v *Municipal Committee of Lahore* (1902) 29 Cal 854 29 I A 168
(*z*) *Nainsukh* v *Umadai* (1885) 7 All 273
(*a*) *Sarlappa* v *Deechand* (1902) 26 Bom 132
(*b*) (1902) 29 Cal 854, 29 I A 168
[illegible] v *Pangi* (1893) 21 Mad 403
(*e*) *Kali Prosanno* v *Rajani Kant* (1888) 25 Cal 141

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have no longer seisin of the reference, and they are *functi officio*, and cease to have any more power to make an award than the man in the street (*f*) Similarly an arbitrator is *functus officio* after the award is made and he cannot thereafter add to or alter the award (*g*)

Award made after expiration of period allowed by Court.—Clause (c) of s 521 stopped at the words the suit which occur in cl (1) sub cl (c), of this para It was followed by another clause which ran thus And no award shall be valid unless made within the period allowed by the Court The latter clause has now been omitted, and instead thereof we have the words ' or, after the expiration of the period allowed by the Court added into sub cl (c) The effect of this alteration is that the only remedy now open to the party impeaching an award on the ground that it was made after the expiration of the period allowed by the Court is to apply under this paragraph *to set aside the award* If no application is made to set aside the award under this paragraph, or if the application is made but refused, the award becomes final, and *no appeal* will lie from a decree based upon the award (*h*) [Under the Code of 1882 it was held that an appeal lay from a decree based upon such an award (*i*)] If the application to set aside the award is granted, and an order is made under sub para (2) superseding the arbitration, the order is appealable under s. 104 sub s (1), cl (a). See notes to r 16 below, No appeal lies from a decree based on an award, etc ," p 1091, and notes to paragraph 3, " Making of award, ' p 1077 above

Another consequence of the alteration is that whereas under s 521 of the old Code an award out of time was a nullity (*j*), it is not so under the present rule Under the present rule, it is merely voidable, and if not sought to be set aside within the period of limitation [Limitation Act, 1908, art 158], it is binding upon the parties

When the award is otherwise invalid.—The words "or being otherwise invalid at the end of sub cl (c) are new Under the Code of 1882 it was held that when an award was not a valid and legal award, an appeal would lie from the decree based upon such award even though the decree might be in accordance with the award The leading case on the subject was *Kali Prosanno Ghose* v *Rajani Kant* (*k*) decided by the High Court of Calcutta in the year 1898 The object of adding the words " or being otherwise invalid into sub cl (c) is to supersede the Calcutta and other decisions which allowed an appeal from a decree based upon an *invalid* award, and to give effect to the principle of finality in cases of arbitration enunciated by their Lordships of the Privy Council in *Ghulamkhan* v *Muhammad Hassan* (*l*), and followed in recent cases (*m*) The result is that the only remedy now open to a party seeking to impeach an award as being invalid is to apply under this paragraph to have it set aside If he fails to do so, or if an application is made but refused, the award becomes final, and *no appeal* will lie from a decree based upon the award. See notes to paragraph 16 under the head " Invalid award," p 1092 It is worth while noting that the Special Committee which introduced these alterations intended to allow an appeal from an order under this paragraph setting aside or refusing to set aside an award (*n*), but no such proviso is to be found in s 104

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822 18 I C 69 *supra Kahan Singh* v *Mohan Lal* 34 I C 177

(*j*) *Chuha Mal* v *Hari Ram* (1886) 8 All 548 ,

903

(*n*) See *Gazette of India* 1907, Part V, p 183

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Sch. II, paras. 15, 16.

An award is not illegal merely because it is based on evidence given by one of the parties on a special oath administered under the Indian Oaths Act with the consent of the other party (o)

An award is invalid if the arbitrators go beyond the scope of the suit and decide matters which are not in suit and which concern persons who are not parties to the suit. Rankin, J, said such an award cannot be treated partly as an award on a reference by the Court and partly as an award by private agreement, for there is no provision for such simultaneous arbitration and the jurisdiction for the different types of arbitration must not be confused (p) The Privy Council reserved their opinion as to whether there may not be an exception to this comprehensive statement as to simultaneous arbitration, but held that such an award was not in accordance with the order of reference and therefore "otherwise invalid" under para. 15 (q)

Appeal from order under this paragraph.—Except in the case provided by s. 104, cl. (a), no appeal lies from an order under this paragraph setting aside or refusing to set aside an award (r) If the objecting party does not appear in support of his objection, the Court has no option but to pronounce judgment in accordance with the award (s), and the decree made thereon cannot be set aside under O 9, r 13, because it is not an ex parte decree (s2), But if the order under this paragraph is made by a Chartered High Court, it amounts to a "judgment" within the meaning of cl. 15 of the Letters Patent, and is appealable under that clause See notes to s. 104 under the head, "Letters Patent appeal," p. 252. See also notes to paragraph 21 below under the head "Appeal," p. 1105.

It has been held by the High Courts of Calcutta, Madras and Bombay and by the Chief Court of the Punjab that though no appeal lies from an order setting aside an award, the legality of the order may be challenged on appeal from the decree that may be ultimately passed in the suit (t) [see s. 105]. A different view has been taken by the High Court of Allahabad (u)

Revision.—An order under this paragraph setting aside or refusing to set aside an award is not subject to revision (v) But an order superseding arbitration may be attacked under s. 105 in appeal from the decree in the suit (w).

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

Judgment to be according to award

(o) *Bhagirath v. Ram Ghulam* (1882) 4 All 283
(p) *Ramprutap v Durgaprasad* (1924) 28 C W N 424 83 I C 300 (24) A C 567
(q) *Chamria v. Chamria* (1926) 53 I A 1 53 Cal 258 92 I C 633 (26) A PC 293
(r) *Zahur Ahmad v. Taslim-un-nissa* (1925) 23 All L J 891 89 I C 404 ('26) A A 55
(s) *Raghunath Rai v. Bridhi Chan* (1924) 3 Pat 839 83 I C 26, (24) A P 603
(s2) (1924) 3 Pat 839, 83 I C 26, ('24) A P 603 *supra*
(t) *Ambica v. Vaidyar* (1885) 11 Cal 172 175 *Achuthayya v. Thimmayya* (1908) 31 Mad. 315, *Damodar v. Raghunath* (1902) 26 Bom 551 *Juma v Mubarak khan* (1912) Punj Rec no 97 p 337 15 I C 62
(u) *Ganga Prasad v. Aura* (1906) 28 All 408
(v) *Damodar v Raghunath* (1902) 26 Bom 551 *Kali Charan v. Sarat Chunder* (1903) 30 Cal 397 *Ram Jawaya Mal v. Devi Ditta Mal* (1916) Punj Rec no 117 p. 361, 34 I C 192 *Chimanlal v Keshavlal* (1923) 47 Bom 721, 73 I C. 484 ('23) A B 402 *Shah Muhammad v. Rahimullah* (1925) 47 All. 121 85 I C 502 ('25) A A 453
(w) *Rudra Prasad v. Mathura Prasad* (1925) 47 All 916 89 I C 173 ('25) A A 566.

Sch. II, para. 16.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

"After the time for making such application has expired."—That is, after 10 days from the date on which the award is filed in Court and notice of the filing has been given to the parties: see Limitation Act, 1908, sch 1, art 158, as amended by Act 18 of 1919 Before the amendment the period of 10 days commenced from the date on which the award was submitted to the Court See the preamble to Act 18 of 1919 The amendment seems to have been suggested by the judgments of the learned judges in the undermentioned Calcutta case (y)

No appeal lies from a decree based on an award except in so far as such decree is in excess of or not in accordance with the award.—In references to arbitration the general rule is that, as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot object to his decision either upon the law or upon the facts It is now well established that where a matter is referred to an arbitrator, he is the sole and final judge of all questions not only of fact but of law (a) Thus where an award was impeached on the ground that it was against law, their Lordships of the Privy Council said. "They [arbitrators] may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award" (b) And this principle has been carried so far that if parties submit to an arbitrator the decision of a bare point of law, and he gives an erroneous decision, his award is binding notwithstanding (c) In all these cases the Court would say to the party seeking to set aside the award "You have constituted your own tribunal, you are bound by its decision" (d) The present paragraph gives effect to "the principle of finality" of awards by declaring that no appeal shall lie from a decree based on an award, except is so far as the decree is in excess of, or not in accordance with, the award (e) The only cases in which the Code allows an appeal from a decree based on an award are—

(1) where the decree is *in excess* of the award, as where the decree gives interest which the arbitrators have not awarded (f), or

(2) where the decree is *not in accordance with* the award

In this respect there is no difference between a decree based upon a private award (para 21) and a decree based upon an award made through the intervention of the Court (g)

Is a decree based on an award which has been *modified* by the Court under paragraph 12 a decree *in accordance with* the award? It has been held by the High Court of Allahabad that it is not, and hence an appeal lies from the decree Thus where an award, directed the defendant to make certain payments to the plaintiff by instalments, and

(y) *Sotacland* v *Hurry Bux* (1919) 46 Cal 721 53 I C 46

(a) *Adams* v *Great North of Scotland Ry Co* [1891] A C 31, *Montgomery & Co, in re* (1895) 78 L T 406

(b) *Gulam Khan* v *Muhammad Hassan* (1902) 29 Cal 167, 29 I A 51, *Kokil Singh* v *Ramasray* (1924) 3 Pat 443, 81 I C 994 (24) A P 488

(c) *Steff* v *Andrews* (1816) 2 Maddock, 6

[illegible]

(f) *Mohun Lall* v *Joy Narain* (1874) 23 W R 105

(g) *Bahadur Singh* v *Negi Puran Singh* (1908) 30 All 151 *Kulsum* v *Ali Akbar* (1917) 39 All 401 411, 39 I C 730

Arbitration.

Sch. II, para. 16.

the award was modified by the Court under paragraph 12 by omitting the direction as to payment by instalments, and a decree was passed on the award as so modified, it was held that an appeal would lie from the decree (*h*) The soundness of this decision is open to question It is submitted that a decree *is* in accordance with an award within the meaning of this paragraph, if it is in accordance with the award as modified under paragraph 12, though it may not be in accordance with the *original* award Paragraph 16 says The Court shall proceed to pronounce judgment *according to the award* ' It is clear that when an award is modified under paragraph 12, the only award according to which judgment could be pronounced is the modified award Moreover, the decision runs counter to ' the principle of finality ' which finds expression in the Code

Where an application made under para 15, cl (c), to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and a decree is subsequently passed in accordance with the award, no appeal lies from the decree, the decree being in accordance with the award Nor does any appeal lie from the *decree* under the Letters Patent (*i*) See notes to paragraph 15, Award made after expiration of period allowed by Court ' p 1089 above, and notes, ' Appeal from order under this paragraph,' p 1090 above See also notes to s 104, Letters Patent appeal, p 282 above

Invalid award.—Under the old section it was held by the Courts in India, that though a decree might be in perfect accordance with an award, an appeal would lie from the decree, if the award upon which the decree was based was *invalid* The reason given was that that section presupposed a valid and legal award, and not an award upon which no decree could be passed (*j*) A different view, however, was taken by their Lordships of the Privy Council in *Ghulam Khan* v *Muhammad Hussain* (*k*), decided in the year 1902 After that expression of opinion two of our High Courts held that no appeal lay under s 522 from a decree passed on an award on the ground that the award was invalid (*l*) Under the present Code it is quite clear that no appeal lies from a decree, where such decree is passed in accordance with the award, though the award may be invalid. But the party aggrieved by the award may apply under para 15, cl (1), sub cl (c), to have the award set aside If he does not avail himself of that remedy, the award becomes final, and no appeal lies from the decree based upon the award (*m*) This change has been introduced by the insertion of the words "or the award being otherwise invalid in para 15, cl (1), sub cl (c) The object is to give finality to awards as stated in the notes to paragraph 15 under the head " Where the award is otherwise invalid The effect of this alteration is that no appeal lies under this Code when a decree has been passed under the present paragraph upon an award, except in so far as the decree is in excess of, or not in accordance with, the award (*n*) The result is that all those cases, in which it was held under the Code of 1882, that a decree though it be in accordance with the award may be challenged by way of appeal on the ground that there was no valid and legal award, are no longer law.

(*h*) *Jawahar* v *Mul Raj* (1886) 8 All 449

(*i*) *Shib Kristo Daw & Co* v *Satish Chandra* (1912) 39 Cal 822 18 I C 69

(*j*) *Lachman* v *Brijpal* (1884) 6 All 174 *Sham Lal* v *Misri Kunwar* (1907) 29 All 496 *Kali Prosanna Ghose* v *Rajani Kant* (1898) 25 Cal 141 *Nandram* v *Nemchand* (1893) 17 Bom 357 *Shib Lal* v *Chaturbhuj* (1909) 31 All 4?0 2 I C 363

(*k*) (190) 29 Cal 167, 29 I A 51

(*l*) See *Chairman of the Purnea Municipality* v *Siva Sankar Ram* (1906) 33 Cal 899 902-903 *Kanakku* v *Nagalinga* (1909) 32 Mad 510, 4 I C 871

(*m*) *Mahomed* v *Valli* (1924) 26 Bom L. R 171, 79 I C 723 (24) A B 324

(*n*) ... *Mahomed* v *Valli* ... 171, 79 I C 723, (24) A B 324 See also *Shib Kristo Daw & Co* v *Satish Chandra* (1912) 39 Cal 822, 18 I C 69

Sch. II, para. 16.

Illustrations

(a) An order of reference made on the application of *some only* of the parties interested is illegal [see paragraph 1] Therefore an award made in pursuance of such order is also illegal According to the old section an appeal would lie from a decree upon such an award (*o*) But no appeal lies under this paragraph and the only remedy open to the party aggrieved by the award is to apply to the Court under paragraph 15, cl (1), sub cl (c), to set aside the award Such an application should be made within 10 days from the date on which the award is submitted to the Court See paragraph 1

(b) An award made *after* the expiration of the period fixed by the Court under paragraph 3 or enlarged by the Court under paragraph 8, is invalid According to the old section an appeal would lie from a decree based on such award (*p*) No appeal lies under the present paragraph but the party aggrieved by the award may apply to have set aside under paragraph 15 See notes to para. 15, "Award made after expiration of period allowed by Court"

(c) An award must be signed before it is filed and it must be signed by all the arbitrators An award signed by *some* only of the arbitrators is illegal Similarly an award signed by an arbitrator *after* the same has been filed in Court is illegal According to the old section an appeal would lie from a decree based on such award (*q*) No appeal lies under this paragraph, but the party aggrieved by the award may apply under paragraph 15 to have it set aside (*r*)

(d) The matters in difference in a suit between *A* and *B* are referred to the arbitration of *C* *C* is the retained pleader of *A*, but this fact is not disclosed to *B* [see para 15] *C* makes an award The award is illegal According to the old section an appeal would lie from the decree (*s*) No appeal lies under the present paragraph, but *B* could apply to have the award set aside under paragraph 15

An appeal lies from a decree based upon a judgment pronounced in contravention of the provisions of this paragraph, though the decree may be in accordance with the award.—It has been held by the High Court of Allahabad that if a decree is passed on an award *before the time for making the application to set aside the award has expired*, an appeal will lie from the decree, though the decree may be in accordance with the award (*t*) But in such cases the Bombay and Lahore High Courts interfere by way of revision (*u*) The Allahabad High Court has held that where an application to set aside an award has been refused by the Court *without considering it*, and a decree is passed on the award, an appeal will lie from the decree, though the decree may be in accordance with the award The reason given is that the word "refused" in this paragraph means refused *after judicial consideration* (*v*)

Second appeal.—A second appeal will lie to the High Court where the decree of the Court of first instance is in accordance with the award, and such decree is set aside by the first appellate Court The reason is that no appeal lies from a decree passed

(*o*) *Indur v Kandadai* (1903) 26 Mad 47 *Joy Prokash v Sheo Golam* (1885) 11 Cal 37 *Shib Lal v Chaturbhuj* (1909) 31 All 450 2 I C 363

(*p*) *Chuli Mal v Hari Ram* (1886) 8 All 548 *Lachman Das v Abparkash* (1908) 30 All 169

(*q*) *Nandram v Nemchand* (1893) 17 Bom 357 *Ramesh Chandra v Karunamoyi* (1906) 33 Cal 498

(*r*) *Khudiram v Chandcharan* (1916) Pat L J 306 35 I C 358

(*s*) *Kali Prosanno Ghose v Rajani Kant* (1898) 25 Cal 141

(*t*) *Najm ud din v Albert Puech* (1907) 29 All 584

(*u*) *Raojibhai v Dahyabhai* (1921) 45 Bom 832, 59 I C 811 *Bhagat Darbari v Bhika* (1921) 3 Lah L J 457 *Bhikhalal v Acharatlal* (1925) 49 Bom 535, 87 I C 910, (25) A B 341

(*v*) *Ibrahim v Mohsin* (1896) 18 All 422

Arbitration.

Sch. II, para. 16.

in accordance with an award, and the first appellate Court acts *without jurisdiction* in entertaining the appeal and setting aside the decree passed in accordance with the award (*w*) In a similar case the High Court of Calcutta held that no second appeal lies, but that the High Court may *revise* the order under s 115 (*x*)

A second appeal will also lie where the Court of first instance sets aside the award and passed a decree on the merits, and the first appellate Court sets aside the decree and passes a decree *in accordance with the award* *The mere fact that the decree of* the first appellate Court is in accordance with the award is no ground for refusing the appeal (*y*)

Revision.—We have seen that no appeal lies from a decree passed in accordance with an award. Section 115 provides that where no appeal lies from a decision, an application may be made to the High Court for a *revision* of the decision No such application, however, should be admitted in the case of an award. In the case of an award, revision would be more objectionable than an appeal If an application for revision were admissible in a case where the decree is in accordance with the award, the finality of any award would be open to question (*z*) Thus where an application was made for revision on the ground that there was no valid order of reference and that the award was therefore a nullity and that no decree ought to have been passed on such an award, the High Court of Allahabad expressed the opinion that the application should not be entertained (*a*) But in a later case where the lower Court dealing with the objections set aside the award because of a supposed defect in the reference, the Allahabad High Court interfered in revision on the ground that the Court had acted without jurisdiction (*b*) The better opinion seems to be that revision is admissible for the purpose not of interfering with the arbitrator but with the exercise of jurisdiction by the Courts below, i e, the procedure and order of the judge dealing with the objections (*c*) See notes above, An appeal lies from a decree based upon a judgment," etc

Where the Court acts as arbitrator.—Where a reference is made to the presiding Judge, the parties must be deemed to have agreed to accept his decision as final Hence no appeal lies from the decision of the judge in a such case (*d*) Nor is the decision subject to the provisions of the present Schedule so as to entitle either party to object to the decision as if it was an award under this schedule A decree passed in accordance with such a decision must be regarded as a consent decree and it comes within the purview of O 23, r 3 The same principle applies even if the reference is made to the presiding Judge and another person jointly (*e*) A Judge to whom a reference is made has no power to alter his decision once it is given In this respect his position is that of an arbitrator who has no power to alter an award once it is made by him (*f*) See notes to s 21 above

(*w*) *Krishnan* v *Mulla* (1899) 22 Mad 172
(*x*) *Baikanta Nath* v *Sila Nath* (1911) 38 Cal 4[illegible] 9 I C 296
(*y*) *Sh[illegible]ma Charan* v *[illegible]* (1904) 8 C W N 390 *Ganga Prasad* v *[illegible]* (1906) 28 All 408
[illegible]
Sayad Zain v *Kalabhai* [illegible]
(*e*) *Chinna* v *Venkatsami* (1919) 42 Mad 6[illegible] 628 51 I C 8[illegible]7
(*f*) *Baikanta Nath* v *Sila Nath* (1911) 38 Cal 421 9 I C 296

Distinction between valuer and arbitrator.—*A* sues *B* for a declaration that he is entitled to one half share of certain property An order is made by consent that *A* should pay *B* a quarter of the value of the property to be settled by a certain referee nominated by the parties The order is not one passed under paras 2 and 3 and the decision of the referee is not an award on which a judgment could be pronounced under the present paragraph (*h*) But the terms of the agreement between the parties may be such that the valuer may be invested with the power of an arbitrator in which case the valuation made by him may operate as an award In *Jackson* v *Barry Railway Co* (*i*), the building contract contained the following clause 'In the event of any question or dispute arising between the company and the contractor as to [then followed the enumeration of several questions], such questions or disputes shall be referred to the engineer whose decision shall be conclusive and binding on both parties It was assumed that the above clause was an agreement to refer to arbitration, and the only question argued was whether in view of a letter written by the engineer to the contractor *after* intimation to the parties to proceed with the arbitration the engineer had rendered himself incapable of acting as an arbitrator It was contended on behalf of the contractor that the true inference from the letter was that the engineer had so completely made up his mind against him that he would not be patiently listened to and receive an honest decision, but this contention was overruled

Order of reference on agreements to refer

17. [S. 523.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court

Application to file in Court agreement to refer to arbitration

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed

(*h*) *Chooney Money* v *Ram Kinkur* (1901) 28 Cal 155 *Macnaghten* v *Rameshwar* (1903) 30 Cal 831

(*i*) [1893] 1 ch. 238 *Ives* v *Williams* [1894] 2 ch 478

Arbitration.

Sch. II, para. 17.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, *if there is no such provision* and the parties cannot agree, the Court may appoint an arbitrator.

Alteration in the paragraph.—In cl 4 the words "and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or, if *there is no such provision and the parties cannot agree, the Court* may appoint an arbitrator" are substituted for the words "and shall make an order of reference thereon, and may also nominate the arbitrator when he is *not named* therein and the parties cannot agree as to the nomination'

Does not apply.—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies See notes to s 89, p. 234 above

Scope of the paragraph.—Paras 1 to 16 deal with cases in which the parties to a suit agree to refer the matters in difference between them in the suit to arbitration and apply to the Court for an order of reference The application in such a case must *be made by all the parties to the suit* interested in the matters in difference proposed to be referred to arbitration This and the subsequent paragraph refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration (*j*) In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon Where such an order is made, the provisions of paras 2 to 16 apply to the proceedings in so far as they are consistent with the agreement so filed (*k*) [para 19] When a sub mission *is filed in Court under this paragraph, the submission is said to be made a rule of* the Court

Agreement to refer to arbitration matters in difference in a pending suit.—*A* brings a suit against *B* While the suit is pending, the parties agree to refer the matters in dispute in the suit to arbitration without the intervention of the Court, that is, without obtaining an order under para 1. Can the award made on such a refer ence be filed under this schedule? Can it be recorded as an adjustment under O. 23, r 3? *We have already dealt with these questions in the notes to O 23, r. 3, under the*

as an adjustment because O 23, r 3, is subject to section 89. This is the opinion of the Calcutta High Court (*l*) There is nothing, however, to prevent parties compromising their suit on the terms of an invalid award. In a Patna case (*m*) parties came to an

(*j*)

(*k*)

(*l*) *Chamaria* v *Durgaprasad* (192[illegible]) 23 C W N [illegible] 424, 83 I C 300, (24) A C 567 See also the dissenting Judgment of Mukerji, J in *Gajendra* v. *Durga* (192[illegible]) 47 All 637, 6[illegible], 83 I C 768, (2[illegible]) A A 303

(*m*) *Kokil Singh* v *Pamasray* (1924) 3 Pat 44 81 I C 991, (24) A P 4[illegible]

agreement to arbitrate in a pending suit and applied the same day to the Court to withdraw the suit The suit was accordingly dismissed and the award made and filed under paras 20 and 21 This was quite correct, for the agreement was virtually conditional on the Court surrendering its jurisdiction by allowing the suit to be withdrawn An agreement to refer to arbitration the partition of a testator s estate does not encroach upon the jurisdiction of the Court in which proceedings for the probate of the will are pending and is therefore valid (n)

The agreement must be in writing.—This paragraph does not apply unless the agreement to refer is in writing (o)

Agreement to refer future differences to arbitration.—Where a charter party contains a clause that any disagreement that *may* arise [i e , arise *in future*] between the contracting parties as to the proper interpretation of the charter should be referred to arbitration, the agreement, though it refers to *future* differences, can be filed under this paragraph (p) Agreements to refer *future* differences are not outside the scope of this section.

Numbered and registered as a suit—It has been held that in spite of these words a proceeding under this para is not a suit, for a suit is commenced by filing a plaint (q) The High Court of Calcutta has held that a proceeding under para 21 is a suit (q2) *It is submitted however that these words make it a* statutory suit, otherwise the words would have been Numbered and registered as if it were a suit '

"Sufficient cause."—Where an agreement is to refer to several specified arbitrators and one of the arbitrators dies before the application is made under this paragraph, the Court should not make an order of reference under this paragraph (r) But it is otherwise if the agreement contains an express provision that in case of death of any arbitrator, another arbitrator may be appointed in his place (s) During the pendency of a private arbitration one of the parties died and the arbitrator thinking he had no power to join the legal representative refused to go on On an application to file the agreement it was held that the Court had no power to order the arbitrator to proceed (t) In another similar case (u) the Court appointed a new arbitrator under para 5, which is made applicable by para 19 if its exercise is not inconsistent with the agreement of reference

"Arbitrator appointed in accordance with the provisions of the agreement."—Thus where an agreement provides for a reference to a European merchant the Court has no power to appoint an Indian merchant (v)

Where the agreement to refer has been duly revoked.—Where an agreement to refer has been revoked for good cause by one of the parties thereto, the Court is not competent to order it to be filed under this paragraph (u) See notes to para. 1 under the head *Revocation of arbitrator s authority*

(n) *Shankar* v *Ramchandra* (1923) 25 Bom L R 437 73 I C 415 (1923) A B 365

(o) *Tincowry* v *Fakir Chand* (1903) 30 Cal

(p)

(q)

6 Pat L J 257

(q2) *Guru Charan* v *Uma Charan* (1921) 26 C W N 240 70 I C 985

(r)

(s)

(t)

(u)

Arbitration.

Sch. II, paras. 17, 18.

Umpire —If an agreement filed under this paragraph does not contain any provision for the appointment of an umpire in the event of the arbitrators being unable to agree, the Court has no power under this paragraph to appoint an umpire (x)

Appeal.—An order under this paragraph filing or refusing to file an agreement to refer to arbitration is now appealable as an *order* [s 104, sub s (1) cl (d)] Under the Code of 1882 it was appealable as a *decree* (y)

Revision.—The mere fact that the application is not numbered and registered as a suit as required by cl (2) of this paragraph is no ground for interfering in revision, such an irregularity is not a material irregularity within the meaning of s 115 ( )

Stay of suit where there is an agreement to refer to arbitration

18. [*New Cf* **Arbitration Act 9 of 1899, s. 19.**] Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit

History of the section.—This paragraph is a reproduction with slight alterations of section 19 of the Indian Arbitration Act The latter section is based on s 4 of the English Arbitration Act 1889 which again is based on the Common Law Procedure Act, 1854 s 11 As to the history of the last mentioned section, see *Doleman & Sons* v *Ossett Corporation* (a)

By s 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void To that section there was an exception to the effect that if the parties have agreed to refer their dispute to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary Courts The exception also recognized the right to sue for specific performance of the agreement. Then came the Specific Relief Act of 1877 which by s 21 took away the right to sue for the specific performance of the agreement, but preserved the right to the party who was willing to abide by the agreement to object to a trial of the suit filed by the other party Lastly, we have paragraph 22 of this Schedule which has repealed that portion of s. 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit In lieu thereof we have the present paragraph which enables a party who is willing to abide by

(x) *Muhammad Abid* v *Muhammad Asghar* (1886) 8 All 64
(y) *Ghulam Khan* v *Muhammad Hassan* (1902) 29 Cal 167 29 I A 51 See also *Venkatachala* v *Rangiah* (1916) 30 Mad 3.3 3.4 3.. 12 I C 3.2
(z) *Wali Muhammad* v *Ibhawal Lakhsh* (1914) Punj Rec no 23 p 101 .1 I C 9.5
(a) [1912] 3 K B 257 .66-2 0

Arbitration. Sch. II, para. 18.

the agreement to apply for a stay of the suit filed by the other party But the application must be made at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. If the application is not so made, the suit will proceed, and any award made by the arbitrator after the institution of the suit is a nullity. The reason is that as soon as a suit is brought in respect of the subject matter of the reference, the arbitrators become *functus officio* (*b*) The Calcutta High Court has held that though

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the arbitrator whose jurisdiction has been restored by the stay order may complete their proceedings and make a fresh award (*c*) The rule does not apply when the award deals with a question that is not in issue in the suit (*d*)

"At the earliest possible opportunity and in all cases where issues are settled at or before such settlement."—The corresponding words in s 19 of the Indian Arbitration Act, 1899, are, "at any time after appearance and before filing a written statement or taking any other steps in the proceedings" It has been held under the English Arbitration Act, 1889, that were the defendant did not know what was the subject matter of the action, and asked for a statement of claim, the mere request for the statement of claim was not a step in the proceedings (*e*) But where the defendant was unaware that the contract contained an arbitration clause and asked for an order of discovery and the order asked for was made, it was held that he had taken a step in the proceedings and therefore was not entitled to a stay (*f*)

"Institutes any suit."—These words show that the present rule refers only to suits instituted *after* the agreement to refer to arbitration has been made *A* sues *B* in respect of certain matters The parties then agree to refer the matters to arbitration Subsequently *A* declines to proceed with the arbitration, and writes to *B* that he will proceed with the suit *B* applies for an order staying the suit The Court has no power under this paragraph to stay the suit, for the suit was instituted *prior* to the agreement (*g*)

"No sufficient cause."—The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists (*h*)

"May make an order staying the suit."—The Court has a *discretion* under this paragraph as to staying a suit instituted by one party to a submission against the other party At the same time it must be remembered that it is the *prima facie* duty of the Court to act upon the agreement between the parties (*i*) "If parties choose to determine for themselves that they will have a domestic forum instead of

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C 583, (22) A L 369
liams [1894] 2 ch 478
ner & Co v *Turpin* [1918] 1 K B

Howse (1908) 35 Cal 199, *Perurs*
di (1910) 34 Bom 372, 4 I C 133,
under Sec 19 of the Arbitration

v *Durgaprasad* (1919) 46 Cal
C 60 *Hodgson* v *Railway Pas-*
ssurance Co (1882) 9 Q B D 188,
Ishar Das v *Durga* (1921) 3
1, 60 I C 776
le, *Clegg* v *Clegg* (1890) 44 C D
v *Johnson* (1899) 40 C D 579,
u v *Durgaprasad* (1919) 46
Cal 1041, 51 I C 60

(*d*) *Jai Narain Babu Lal* v *Narain* (1922) 3 Lah

Arbitration.

Sch. II, paras. 18, 19.

resorting to the ordinary Courts, then since that Act of Parliament [that is the Common Law Procedure Act, 1854, s 11, which corresponds to the present paragraph] was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement (j) If however the arbitration proves abortive, the Court may remove the stay and proceed with the trial of the suit (k)

Denial of agreement.—Where one of the parties denies the agreement to refer set up by the other party, it is within the province of the Court to decide whether there is such an agreement (l)

Validity of agreement to refer.—To bring a case within this paragraph there must be a subsisting agreement to refer capable of being carried into effect A suit therefore cannot be stayed under this paragraph if the submission has been revoked for good cause (m) Nor can it be stayed if the original contract containing the arbitration clause is followed by another agreement *materially* altering the original contract, the reason being that in such a case the arbitration clause ceases by virtue of the alteration to have any effect But a mere extension of time for the performance of that which a party under the original contract is bound to perform does not amount to a *material* alteration, and the arbitration clause does not cease to operate in such a case (n) See Pollock and Mulla s Indian Contract Act, notes to s 28

Stay refused—Where an arbitration clause does not cover all the matters *in respect of which the suit is brought, the Court will not, as a rule, split the suit into* two parts, one to be tried by the arbitrator and the other to be tried in Court the Court *will, in such a case try the whole suit (o) Where fraud is charged, the Court will in* general refuse to refer the dispute to arbitration if the party charged with the fraud desires a public inquiry (p)

Appeal.—An appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration, see s 104, sub s (1), cl (e)

Provisions applicable to proceedings under paragraph 17

19. [S. 524] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Does not apply.—This paragraph does not apply to cases to which the Arbitration *Act applies.* See notes to s 89, p. 234 above.

"So far as they are consistent with any agreement filed under para-

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award

(j) *Willesford* v [illegible] 479 per Lord Selborne

(k) *Laxman* v *Marjunath* (1921) 45 Bom 1181 64 I C 259

(l) *Sheo Larshi* v *Indore Malwa United Mills* (1917) Punj Rec [illegible] 38 I C 503

(m) *Deutsche Springst ff Actien Gesellschaft* v *Briscoe* (1888) 20 Q B D 177

(n) *Lachminarain* v *Hoare Miller & Co* (1914) 41 Cal 35 [illegible] 217

(o) *Turnock* v *Sartoris* (1890) 43 C D 150

(p) *Russell* v *Russell* (1880) 14 C D 471

Arbitration

Sch. II, paras. 19 20.

make their award within a fixed period and that they shall have no power to enlarge the time for making the award the stipulation in the agreement will prevail to the exclusion of the provision in paragraph 8 But the words so far as they are consistent with any agreement filed under paragraph 17 would not preclude the Court from setting aside an award for misconduct of the arbitrators though there may be a clause in the agreement that the award should be accepted as final (q) Nor do they preclude the Court from appointing a new arbitrator under paragraph 5 in place of one who refuses to act, provided there is no clause in the submission expressly excluding the power of the Court to make such an appointment (r)

Arbitration without the intervention of a Court

Filing award in matter referred to arbitration without intervention of Court

20. [S. 525.] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed

Old section.—This paragraph corresponds to s 525 of the Code of 1882 except that in cl (1) the words any Court having jurisdiction over the subject matter of the award have been substituted for the words ' Court of the lowest grade having jurisdiction over the matter to which the award relates See notes below, " Court to which application should be made under this paragraph

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies, see notes to s 89 p 234 above

Pending suit.—See notes to para. 17 above under the head ' Agreement to refer to arbitration matters in a pending suit p 1096 above See also notes to O 23 r 3 Adjustment submission and award, p 768 above

Scope of this and subsequent paragraph—The present paragraph and paragraph 21 refer to cases where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award (s)

This paragraph is no bar to a regular suit to enforce an award—Under the corresponding section 525 of the Code of 1882 it was held that a party interested

(q) *Burle v. Kalappa* (1883) 6 Mad 368

(r) *Bala v. Seethamma* (1894) 17 Mad 498 *Fazal Ilahi v. Prag Narain* (19) 44 All 5 3 67 I C 739 ('2-) A A 133

(s) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal 167 182 29 I.A 51

Arbitration.

Sch. II, para. 20. in an award may *at his option* avail himself of the summary remedy provided by that section to enforce the award, or he may bring a regular suit to enforce the award (*t*) *There is nothing in the present Code to preclude such a suit Rather, such a suit is saved by s 89* as appears from the words 'save in so far as is otherwise provided by any other law for the time being in force" (*u*) See notes to para. 21, "Res judicata," p 1106 below

A valid award constitutes a bar to a suit on the original demand.—An award duly passed in accordance with the submission of the parties is equivalent to final judgment *Hence if an award is made for a partition of joint property no party to the reference can sue* for partition The award is an answer to the suit, though no decree may have been passed on the award (*v*)

Court to which application should be made under this paragraph.—It is the subject matter of the *award*, and not the subject matter of the *reference*, that determines the jurisdiction of the Court under the present paragraph Under the old *section the application* to file the award had *to be made to* "*the Court of the lowest* grade having jurisdiction over the matter to which the award relates," and these words were held by the High Court of Calcutta to mean "the Court of the lowest grade having jurisdiction over the subject matter of the *reference* ' (*w*) The words "subject matter of the award ' have been substituted in this paragraph for the words "matter to which the award relates to make it clear that an application under this paragraph may be made to any Court having jurisdiction over the subject-matter of the award So when the subject matter of an award was the management and control of three temples outside the district of Berar and the question of the application of the revenue was between members of the founder s family not resident in Berar, the Privy Council held that the District Judge of Berar had no jurisdiction to entertain an application to *file it* (*x*)

Limitation.—The application under this paragraph should be made within 6 months from the date of the award Limitation Act, 1908, sch I, art. 178 (*y*) The date of the award means not the date the award bears but the date on which it was given to the parties (*z*), *i e*, the date of publication (*a*) The application is not a suit and therefore the applicant cannot claim the benefit of section 6 of the Limitation Act (*b*) See notes to para, 17, 'numbered and registered as a suit ' on p 1097 above

Where an award is delivered in parts.—If the agreement to refer provides that the matters in dispute may be taken up and dealt with *seriatim* and that the award may be delivered bit by bit each portion decided may be dealt with as a distinct award. under this paragraph (*c*)

Lost award.—When an award has been lost, the procedure of this rule cannot be resorted to and the parties must be referred to a regular suit (*d*)

"Where any matter has been referred to arbitration."—*Do the words "any matter refer only to a matter in respect of which a suit can be entertained by a Civil Court under s 9 of the Code?*—This paragraph provides that when *any matter* has been referred to arbitration without the intervention of a Court, and an award has been made

(*t*) *Subbarayo* v *Sadasiva* (1897) 20 Mad 490 *Bhajahari* v *Behary Lal* (1906) 33 Cal 881
(*u*) *Natha Mal* v *Muhammad Shafi* (1917) Punj Rec no 12 p 44 at p 48 39 I C 349
(*v*) *Krishna* v *Baliram* (1896) 19 Mad 290 *Bhajahari* v *Behary Lal* (1906) 33 Cal 881 *Muhammad Newaz Khan* v *Alam Khan* (1891) 18 Cal 414, 18 I A 73
(*w*) *Narsingh Das* v *Ajodhya* (1904) 31 Cal 203
(*x*) *Ramdas* v *Kishanchand* (1924) 51 Cal 361 51 I A 72 83 I C 331 (24) A I C 9.
(*y*) See *Ram Lagan* v *Ashraf Nath* (1915) 38 All 85 91 31 I C 899
(*z*) *Dutto Singh* v *Dosad Bahadur* (1883) 9 Cal. 575
(*a*) *Kunj Lall* v *Banwari Lall* (1919) 4 Pat L. J. 324 48 I C 711
(*b*) *Ma Thein Tin* v *Maung Ba* (1923) 1 Rang 2.6 76 I C 493 (23) A R 2.6
(*c*) *Shookmukhi* v *Nobin Chunder* (1879) 4 C L R 92
(*d*) *Musst Khodeja* v *Ghulam Nabi* (1920) 1 Lah 45

thereon, any person interested in the award may apply that the award be filed in Court. Paragraph 21 provides for the passing of a decree on the award. Suppose now that the matter referred to arbitration is one as to which a Civil Court has no jurisdiction to entertain a suit under s 9 of the Code e g, disputes about *man pan*, and an award is made thereon. Has the Court jurisdiction to file such an award and pass a decree thereon under paragraph 21? It has been held by the High Court of Bombay that it has and that it is not against the policy of the law to give effect to such awards (*e*). The result is that rights which are not at all civil rights may be the subject matter of an arbitration and award and of the decree of a Civil Court. It would be interesting to know how the decree, if disobeyed, would be enforced. However this may be it is clear that where a matter is such that on grounds of public policy it can be disposed of only by a Court, it cannot form the legitimate subject of a reference, and if such a matter is referred to arbitration, and an award has been made thereon the Courts should refuse to pass a decree thereon. Thus the right to succeed to the trusteeship of a *public* charitable trust is not a right which can be settled by *arbitration*. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph (*f*).

Numbered and registered as a suit.—See notes to para 17 under the same head over p 1097 above.

21. [S 526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Filing an enforcement of such award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Points of distinction between s 256 of the Code of 1882 and this paragraph —

1. The words "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon," have been added into cl (1) to negative the view held by the High Court of Bombay under the old section that the Court had no power to determine questions relating to the factum and validity of the agreement to refer and of the award, and to give effect to the view held by the other High Courts. See notes below "Where the Court is satisfied that the matter has been referred to arbitration &c."

   This word "proved" has been substituted for the word "shown". In fact it was held under the old section that the word "shown" meant proved (*g*). See notes below under the head "Proved".

(*e*) *Rajna endra* v *Gururao* (1913) 37 Bom 442, 1 I C 882

(*f*) *Muhammad Ibrahim* v *Al al* (1910) 3 All 503, 6 I C 219

(*g*) *Jagan Nath* v *Mannu Lal* (1894) 16 All 231; *Dhanjbhai* v *Mathurbhai* (1904) 28 Bom 287

Arbitration.

Sch. II, para. 21.

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89, p. 234 above.

When the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon.—These words are new. In the absence of these words in the corresponding section of the Code of 1882 it was held by the High Court of Bombay that where an application was made under that section to file an award and the other party raised objections to the factum or validity of the submission and award, the Court had no jurisdiction to inquire whether the parties had or had not referred the matters in dispute to arbitration, and the Court should therefore reject the application and refer the applicant to a *regular suit* to enforce the award (*h*). On the other hand it was held by the High Courts of Allahabad (*i*), Calcutta (*j*) and Madras (*k*) that the Court had the power under that section to determine all questions relating to the existence and validity of the alleged agreement to refer and of the award, and that the applicant must not be referred to a separate suit. The present paragraph supersedes the Bombay decisions, and gives effect to the decisions of the other High Courts.

"Proved."—It is not sufficient to allege grounds of objections under paras. 14 and 15. It is necessary that the ground of objection should be *proved*. See notes above under the head "Points of distinction," etc.

Grounds of objection under paras. 14 and 15.—Where a matter has been referred to arbitration *under an order of the Court*, the Court has power in the cases mentioned in para. 14 to remit the award to the reconsideration of the arbitrator. Thus if an award determine any matter not referred to arbitration, the Court may remit the award under para. 14, and if such matter can be separated without affecting the determination of the matters referred, the Court may amend the award by striking out that portion of the award which is in excess of the reference, and enforce the award as to the rest of it. In the case, however, of an arbitration *without the intervention of the Court* [paras. 20-21] it was held by the High Courts in a series of cases that if the award determines matters outside the scope of the reference, the Court must refuse to file the award even when the matter not referred can be separated from that which was referred, the reason given being that the Court had under this para. only two courses open to it, namely, to file the award or refuse to file it, and that it had no power to remit or amend the award (*l*). This, however, is incorrect, for para. 21 refers to para. 14 where the principle of separation is recognized. The point is concluded by the decisions of the Privy Council (*m*) that the part of the award which is good should be filed and the remainder that is bad rejected.

An arithmetical error, according to the Allahabad High Court, does not render the award invalid (*n*). But the Lahore High Court has held that the Judge has no power to correct an arithmetical mistake even with the consent of the party affected, the reason given being that a Court acting under this paragraph must either

(*h*) *Tejpur v. Mahomed* (1896) 20 Bom. 98.
(*i*) *Amrit Lal v. Dasrut Lal* (1895) 17 All. 21; *Ganesh v. Kasli* (1906) 28 All. 6[illegible].
(*j*) *Mahomed v. Hakiman* (189[illegible]) 25 Cal. 7[illegible]7.
(*k*) *Chinnamunayya v. Thadi Gangireddy* (189[illegible]) [illegible] 4 6 26 I. C. 696; *Kunj Lall v. Banwari Lall* (1919) 4 Lat. L. J. 334, 4 1 40 4[illegible] I. C. 711; *Dhanpat Lal v. Kahan Devi* (1914) Punj. Rec. no. 80, p. 308, 23 I. C. [illegible].
(*m*) *Ruda v. Municipal Committee of Lahore* (1902) 9 Cal. 834, 29 I. A. 164; *Amir Begum v. Badruddin Husain* (1914) 36 All. 336, 23 I. C. 625, followed in *Shaikh Mahomed v. Shaikh Abdul Rahim* (192[illegible]) 4 Lat. 670, (2[illegible]) A. I. 610.
(*n*) *Sham Lal v. Purshottam Das* (19[illegible]) 42 All. 7[illegible], 3[illegible] I. C. [illegible]53.

file the award as it is or refuse to file it (o) But this is inconsistent with the Privy Council ruling referred to above

Award made after long delay.—Where the agreement to refer was made in 1905 and the award was not made until 1910 and the Court came to the conclusion that it would probably not have been made at all but for one of the parties having brought a criminal complaint against one of the arbitrators, the Court refused the application to file the award. The Court presumed from the circumstances of the case that the reference must have been abandoned (p)

Award made after revocation of submission.—An award made after the agreement to refer has been revoked by one of the parties thereto for good cause cannot be filed under this paragraph (q)

Appeal—An appeal lies from an *order* under this paragraph filing or refusing to file an award [s 104, sub s (1), cl (f)] even though no express order is made (r) But no appeal lies from the order passed on appeal (s) see s. 104 (2) (t) But s 104 refers to appeals within British India and does not take away the right of appeal to Privy Council given by section 109 (u) Again though an appeal lies from an *order* made under the paragraph, no appeal lies from a *decree* passed on an award except in so far as the decree is in excess of or not in accordance with the award (v) [see sub para (2)] Suppose now that an order is made directing an award to be filed, and a decree is passed based on the award before an appeal is preferred from the order It is the right to appeal from the order lost, because a decree is drawn up? It has been held that it is not, and it has been further held that if the Appellate Court sets aside the order, it is competent to it to declare that the decree based on the order is vacated (v2) See notes to para 15, "Award made after expiration of period allowed by the Court," p 1089 above

The making of a decree is no bar to an application to restore a petition of objection which has been dismissed for default of appearance (w) *A* applies to file an award under para 20 *B* objects to the filing of the award on certain grounds On the dat fixed for the hearing of the objections *B* does not appear Thereupon his objections are disallowed and an *ex parte* decree is passed against *B* in accordance with the award. *B* thereupon applies under O 9 r 13, to set aside the *ex parte* decree and to hear his objections to the award The application is rejected *B* then appeals from the order rejecting the application. Is the order appealable? Yes, it is appealable under O 43, r 1 (d) by which it is provided that an appeal lies from an order rejecting an application for an order to set aside an *ex parte* decree *in a case open to appeal* The case is one open to appeal for the question between the parties was whether or not the award should be filed as a decree of the Court, and any *order* made upon it would be appealable under s. 104, sub s (1), cl (f) (x)

(1916) 38 All 380 387 35 I C 633 *Ram Ditt v Amar Singh* (1912) Punj Rec no 1-3 p 490 10 I C 51-, *Lachmi Narain v*

(23) A R 199

(v2) See 19 C W N 948 28 I C 5-7 and other cases cited in f n (t)

Arbitration.

Sch. II, paras. 21, 23.

Res judicata.—It has been held by the High Court of Allahabad that the refusal of a Court to file a private award on the ground of misconduct of the arbitrator does not operate as *res judicata* in respect of a suit subsequently brought to enforce the award, the reason given being that the doctrine of *res judicata* pre-supposes a former *suit* and a decree in that suit, and that the order of refusal is not a decree, but merely an order (*y*). This decision has been followed by the Bombay High Court (*z*). The Calcutta High Court has held that the bar of *res judicata* would only apply to grounds of objection referred to in paras 14 and 15 heard and finally decided (*a*).

Withdrawal of suit.—The fact that an application has been made under para. 20 does not preclude the applicant from withdrawing the application under O. 23, r. 1 at any time *prior* to the pronouncement of judgment and preparation of the decree. It is true that a suit alone can be withdrawn under O. 23, r. 1, but an application filed under para. 20 is numbered and registered as a *suit* (*b*).

Exclusion of certain words in the Specific Relief Act 1877.

22. [*New. Cf.* **Arbitration Act 9 of 1899, s. 3.**] The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this Schedule apply.

Last thirty-seven words of sec. 21 of the Specific Relief Act.—The said words are— "but if any person who has made such a contract [that is, a contract to refer to arbitration] and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." These words have been omitted in view of the provisions of para. 18 above.

Forms.

23. [*New.*] The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

(*y*) *Kunji Lal* v. *Durga Prasad* (1910) 32 All. 484, 6 I. C. 127; *Hiralal Ram* v. *Lakshmi Rai* (19[illegible]) 43 All. 103, 60 I. C. 6[illegible]6.

(*z*) *Rajmal* v. *Maruti* (19[illegible]1) 45 Bom. 329, 59 I. C. 755; *Abdul Aziz* v. *Chandu* (19[illegible]) [illegible]7 Bom. L. R. 652, 83 I. C. 68, ('2[illegible]) A. B. 418.

(*a*) *Guru Charan* v. *[illegible] Charan* (19[illegible]1) 26 C. W. N. 940, 70 I. C. 985.

(*b*) *[illegible] Shankar* v. *Maida Koer* (1904) 31 Cal. 516.

APPENDIX.

No 1

Application for an Order of Reference

(Title of suit)

1 This suit is instituted for *(state nature of claim)*

2 The matter in difference between the parties is *(state matter of difference)*

3 The applicants being all the parties interested have agreed that the matter in difference between them shall have referred to arbitration

4 The application therefore apply for an order of reference

A B
C D

Dated the day *of* 19

Note —If the parties are agreed as to the arbitrators it should be so stated

---

No 2

Order of Reference

(Title of suit)

Upon reading the application presented on the day of 19 , it is ordered that the following matter in difference arising in this suit, namely —

---

be referred for determination to *X* and *Y*, or in case of their not agreeing then to the determination of *Z*, who is hereby appointed to be umpire, and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply

Given under my hand and the seal of the Court this day of 19

Judge.

No 3

Order for Appointment of New Arbitration

(Title of suit)

Whereas by an order, dated the day of 19 *state order of reference and death, refusal, etc , of arbitrator*], it is by consent ordered that]

Arbitration.

Sch. II. *Z* be appointed in the place of X deceased (or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made on or before the day of 19

Given under my hand and the seal of the Court, this day of 19

Judge

No 4

SPECIAL CASE

(*Title of suit*)

In the matter of an arbitration between *A B* of and *C D* of the following special case is stated for the opinion of the Court —

[*Here state the facts concisely in numbered paragraphs*]

The question of law for the opinions of the Court are —

First, whether ——————————————————

Secondly whether ——————————————————

X
Y

Dated the day of 19

No 5

AWARD

(*Title of suit*)

In the matter of an arbitration between *A B* of and *C D* of —

WHEREAS in pursuance of an order of reference made by the Court of and dated the day of 19 the following matter in difference between *A B* and *C D*, namely,

——————————————————

has been referred to us for determination,

Now we having duly considered the matter referred to us, do hereby make our award as follows —

We award—

(1) that ——————————————————

(2) that ——————————————————

Dated the day of 19

X
Y

THE THIRD SCHEDULE.

Execution of Decrees by Collectors

1. [S 321] Where the execution of a decree has been transferred to the Collector under section 68, he may—

Powers of Collector

(*a*) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment debtor to raise the amount of the decree, or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold, or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary

Clause (a)—See O 21 r 83

Payment by Instalments—A Collector to whom a decree for sale of mortgage property has been transferred for execution under s 68 is limited to one of the three courses specified in this paragraph and may not depart from them much less may he do what the Court itself could not do in such a case—allow payment of the debt to be *made by instalments (c) Nor has the Collector jurisdiction when mortgaged property* is sold under O 34 r 12 free of a prior mortgage encumbrance to settle accounts as to what is due on each mortgage (*d*) When the Collector receives sale proceeds they are assets held by the Court and so an application for ratable distribution must be made before receipt of sale proceeds by the Collector (*e*)

2. [S 322] Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as the thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided

Procedure of Collector in special cases

(*c*) *Mahalaji v Hari* (1883) 7 Bo[illegible] 33[illegible]

(*d*) *Abdul Shakur v Muhammad Maladin* (19[illegible]4) 46 All 414 [illegible] I C [illegible] ([illegible]) A A 507

(*e*) *Dattatrya v Pundlik* (19[illegible]0) — Bom L R 1001 58 I C 99[illegible]

Execution by Collectors

Sch III, paras 3, 4

Notice to decree holders and to persons having claims on property

3. [S 322 A] (1) In any such case as is referred to in paragraph 2 the Collector shall publish a notice allowing a period of sixty days from the date of its publication for compliance and calling upon—

(a) every person holding a decree for the payment of money against the judgment debtor capable of execution by sale of his immoveable property and which such decree holder desires to have so executed and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending to produce before the Collector a copy of the decree and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder

(b) every person having any claim on the said property to submit to the Collector a statement of such claim and to produce the documents (if any) by which it is evidenced

(2) Such notice shall be published by being affixed on a conspicuous part of the Court house of the Court which made the original order for sale and in such other places (if any) as the Collector thinks fit and where the address of any such decree holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise

Power of Collector to hear objections to execution of decree transferred to him for execution —*Where a decree for money is transferred for execution to the Collector under s. 68 he is not authorized under this paragraph to hear any objection by the parties interested in the property advertised for sale to the sale of that property nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached* (f)

Amount of decrees for payment of money to be ascertained and immoveable property available for their satisfaction

4. [S 322 B] (1) Upon the expiration of the said period the Collector shall appoint a day for hearing any representations which the judgment debtor and the decree holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem

(f) Onkar Singh v Mohan Kua (1898) 20 All 4[illegible]

necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry

(2) Where there is no dispute as to the fact or extent of the liability of the judgment debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale and shall, pending the reference, stay proceedings relating to the subject thereof The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector who shall then draw up a statement as above provided in accordance with such decision

Where District Court may issue notices and hold inquiry

5. [S 322 C.] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court, and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector

Effect of decision of Court as to dispute

6. [S. 322 D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree

Execution by Collectors.

Sch III, para 7

Scheme for liquidation of decrees for payment of money

7. [S 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

(*a*) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,

(*b*) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(*i*) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

(*ii*) by mortgaging the whole or any part of such property; or

(*iii*) by selling part of such property; or

(*iv*) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*v*) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property

which he deems sufficient If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government

The words 'Local Government have been substituted for the words Chief Controlling Revenue Authority which occurred in the corresponding s 3?3 C P C 1882

Recovery of balance (if any) after letting or management

8. [S 324] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and if on the expiration of the said six weeks, the said balance is not so paid the Collector shall sell such property or part accordingly

Mortgage —Instead of selling the Collector may mortgage the property (g)

Collector to render accounts to Court

9. [S. 324 A] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the

(g) *Bechansang* v *Naran Moti* (19?) ? Bom L R ?1? ?6 I C 846 (?) A B 2 7

Execution by Collectors.

Sch. III, para. 9.

property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him

(3) The balance shall be applied by the Court—

(*a*) in providing for the maintenance of such members of the judgment debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit, and,

(*b*) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct, or

(*c*) where the Collector has proceeded under paragraph 2,—

(*i*) in keeping down the interest on incumbrances on the property,

(*ii*) where the judgment debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit, and

(*iii*) in discharging rateably the claims of the original decree holder and any other decree holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment debtor or such other person as the Court directs

Accounts.—The Collector, though bound to render accounts under this paragraph cannot be compelled to give up the account books in Court, nor does this paragraph require him to pay the balance into Court (*h*)

(*h*) *Pupali v Kalyan Singh* (1904) 6 Bom L R 825

Sale how to be conducted

10. [S 325.] Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot,

(*b*) adjourn the sale for a reasonable time whenever, for reason to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property,

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Restrictions as to alienation by judgment debtor or his representative and prosecution of remedies by decree-holders

11. [S. 325 A] (1) So long as the Collector can exercise or perform in respect of the judgment debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money

(2) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived

"Incompetent to mortgage."—A mortgage by a judgment debtor of his property, while it is under the management of the Collector to whom decrees against the judgment debtor have been transferred for execution, is absolutely void and not merely

Execution by Collectors.

Sch III, paras 11-13

void as against the Collector and those claiming under him (i)

"Alienate"—The word alienate in this paragraph contemplates a transfer which is to take effect immediately and not after death It does not therefore include a disposition of property by will (j)

Alienation subsequent to certification of adjustment—An intimation by a decree holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment debtor and the recording of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O 21 r 2 After the adjustment has been so certified the prohibition against alienation imposed by this paragraph no longer subsists and it is competent to the judgment debtor to mortgage sell or alienate his property (k)

Limitation—When the property of the judgment debtor was taken under management by the Collector and released more than 12 years after the date of the decree that period was excluded in the computation of limitation both under the Limitation Act and section 48 of the Code (l)

Procedure where property is in several districts.

12. [S 325 B] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Powers of Collector to compel attendance and production.

13. [S 325 C] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents

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(i) *Gaurishankar* v. *Ch[illegible]* (1918) 45 I A 10 46 Cal 183 48 I C 312 dissenting from *Magniram* v. *Yakub* (1917) 36 Bom 510 16 I C 50 The observations at the end of the judgment in *Gangaprasad* v. *Gangabaksh* (1907) 9 All 415 can no longer be supported since the decision in *Gaurishankar's* case

(j) *M[illegible] Sayeed* v. *Muhammad Ismail* (1910) 33 All [illegible] 8 I C 834

(k) *Kus[illegible]chand* v. *[illegible]andram* (1911) 35 Bom 516 12 I C 57[illegible]

(l) *Shaya[illegible] Kara[illegible]* v. *Collector of Benares* (19[illegible]0) 4[illegible] All 118 [illegible] I C 74[illegible]

THE FOURTH SCHEDULE.

(*See Section* 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year	No	Short title	Amendment
1870	VII	The Court Fees Act, 1870	In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set off or counter claim" and after the word "Act" the words "or of cross objection" shall be inserted From article 11 of Schedule II, the words "from an order rejecting a plaint or" shall be omitted For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely — "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908"

APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for Establishing High Courts of Judicature in India (a) (24 & 25 Vict, C 104); [*6th August* 1861]

[Repealed and re-enacted with slight modifications by the Government of India Act, 1915]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows —

High Courts may be established in the several Presidencies of India

1 It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William*, aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf

Constitution of High Courts

2 The High Court of Judicature at *Fort William* in *Bengal* and at the Presidencies of *Madras* and *Bombay* respectively, shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may, from time to time, think fit and appoint who shall be selected from—

1st Barristers of not less than five years standing, or

2nd Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period, or

3rd Persons who have held judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years, or

4th Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court

Provided that not less than one third of the Judges of such High Courts, respectively, including the Chief Justice shall be Barristers and not less than *one third* shall be Members of the Covenanted Civil Service

3 Provided always that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency shall be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court

Certain existing Judges herein named to be the first Judges of the High Court

4 All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty s pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor General of *India* in Council or Governor in Council of the Presidency in which such High Court is established

Tenure of Office of High Courts

5 The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents

Precedence of Judges of High Court

6 Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued his service in the High Court being reckoned as service in the Supreme Court and except as aforesaid it shall be lawful for the Secretary of State in Council of *India* to fix the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same Provided always such alterations shall not affect the salary of any Judge appointed prior to the date thereon

Salaries &c, of Judges of the High Courts

7 Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice the Governor General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office or until the Chief Justice has return ed from such absence, and upon the happening of a vacancy in the office of any other Judge

Provision for vacancy of the office of Chief Justice or other Judge

qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor General in Council or Governor in Council as aforesaid, shall see cause to cancel the appointment of such acting Judge

High Courts Act.

Abolition of Supreme Courts and Sudder Courts

8 Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William* in *Bengal*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder Adawlut and Foujdarry Adawlut in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdarry Adawlut in the same Presidency shall be abolished :

And the records and documents of the several Courts so abolished in each Presidency shall become and be, records and documents of the High Court established in the same Presidency

Jurisdiction and powers of High Courts

9 Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established as Her Majesty may by such Letters Patent as aforesaid, grant and direct subject however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts

Subject and without prejudice to legislative powers of the Governor General in Council.—*See notes to cl 44 of the Letters Patent, infra.*

High Courts to exercise same jurisdiction as Supreme Courts

10 *Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establish High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively*

Repealed by 28 Vict, c 15, s 2

Existing provisions applicable to Supreme Courts to apply

11 Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council, or [illegible]

the ti[illegible]

applic[illegible]

ively, [illegible]

Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor General of *India* in Council.

12 From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively

Provisions as to pending proceedings in abolished Courts

13 Subject to any laws or regulations which may be made by the Governor General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice

Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts

14 The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid

Chief Justice to determine what Judges shall sit alone or in the Division Courts

15 Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table, and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts, provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of *Fort William* of the Governor General in Council, and in *Madras* or *Bombay*, of the Governor in Council of the respective Presidencies

High Court to superintend and to frame rules of practice for Subordinate Courts

16 It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in *India*, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the

Her Majesty may establish a High Court in the North Western Provinces

Governor General or Governor of the Presidency in which such High Court is established, shall as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories

Other or supplementary Charters may be granted within three years after establishment of a Court

17 *It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any* time within three years after the establishment of any High Court under this Act by her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance

Territorial limits of jurisdiction of Court may be altered by order in Council

18. *It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet*

Repealed by 28 Vict, c 15, s 2

Interpretation of terms

19 The word "Barrister" in this Act shall be deemed to include Barristers of *England* or *Ireland*, or members of the Faculty of Advocates in *Scotland*, and the words "Governor General and Governor" shall comprehend the officer administering the Government

GOVERNMENT OF INDIA ACT, 1915

An Act to consolidate enactments relating to the Government of India.

29th July 1915.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows

* * * *

Part IX

The Indian High Courts

Constitution

Constitution of high courts

101 [Ch Act, ss 2, 19]—(1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint Provided as follows —

(i) the Governor General in Council may appoint persons to act as additional judges of any high court for such period not exceeding two years, as may be required and the judges so appointed shall, whilst so acting, have all the powers of a judge of the high court appointed by His Majesty under this Act,

(ii) the maximum number of judges of a high court, including the chief justice and additional judges, shall be twenty

(3) A judge of a high court must be—

(a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing or

(*b*) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a district judge, or

(*c*) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years, or

(*d*) a person having been a pleader of a high court for a period of not less than ten years.

(4) Provided that not less than one third of the judges of a high court, including the chief justice but excluding additional judges, must be such barristers or advocates as aforesaid, and that not less than one third must be members of the Indian Civil Service

(5) The high court for the North Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta.

Tenure of office of judges of high courts

102 [Ch Act, s 4]—(1) Every judge of a high court shall hold his office during His Majesty's pleasure.

(2) Any such judge may resign his office, in the case of the high court at Calcutta, to the Governor General in Council, and in other cases to the local Government

Precedence of judges of high courts

103 [Ch Act, s 5]—(1) The chief justice of a high court shall have rank and precedence before the other judges of the same court

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents

Salaries &c of judges of high courts

104 [Ch Act, s. 6]—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage, for the chief justices and other judges of the several

high courts, and may alter them, but any such alteration shall not affect the salary of any judge appointed before the date thereof

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein

(3) If a judge of a high court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary

(4) If a judge of a high court while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months salary

Provision for vacancy in the office of chief justice or other judge

105 [Ch Act, s 7]—(1) On the occurrence of a vacancy in the office of chief justice of a high court, and during any absence of such a chief justice, the Governor General in Council in the case of the high court at Calcutta, and the local Government in other cases, shall appoint one of the other judges of the same high court to perform the duties of chief justice of the court, until some person has been appointed by His Majesty to the office of chief justice of the court, and has entered on the discharge of the duties of that office, or until the chief justice has returned from his absence, as the case requires

(2) On the occurrence of a vacancy in the office of any other judge of a high court, and during any absence of any such judge, or on the appointment of any such judge to act as chief justice the Governor General in Council in the case of the high court at Calcutta, and the local Government in other

cases, may appoint a person, with such qualifications as are required in persons to be appointed to the high court, to act as a judge of the court, and the person so appointed may sit and perform the duties of a judge of the court, until some person has been appointed by His Majesty to the office of judge of the court, and has entered on the discharge of the duties of the office or until the absent judge has returned from his absence, or until the Governor General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting judge

"Upon the happening of a vacancy in the office of any other Judge of any such High Court"—These words refer to a Judge appointed to his office *by His Majesty* and not a person appointed under the section to act as a Judge (b)

Time for appointment of acting judge—There is no limit of time mentioned in this section within which the appointment of an acting Judge is to be made Such an appointment therefore is not invalid because it was not made immediately upon or within a reasonable time after the occurrence of the vacancy which it supplied (c)

Jurisdiction

Jurisdiction of high courts

106 [Ch Act, s 9]—(1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction, powers and authority as are vested in those courts respectively at the commencement of this Act

(2) [21 Geo 3, c 70]—The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

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(b) *Queen Empress v Ganja Ram* (1894) 16 All 136 142

(c) *Balwant Singh v Rani Kishori* (1897) 20 All 267 293

Sub-section (2).—This sub section reproduces in effect the provisions of sec 8 of the Statute 21 Geo 3 c 70 relating to the Supreme Court of Calcutta, cl 23 of the Charter of the Supreme Court of Madras, 1800, and cl 30 of the Charter of the Supreme Court of Bombay, 1823 There was no such provision in the High Courts Act, 1861 nor in any of the High Courts charters See Despatch from Secretary of State cl 17, p 1130 below

The High Court has power under the Specific Relief Act 1 of 1877 s 45 to make an order requiring the Chief Revenue authority to state a case and refer it to the High Court under s 51 of the Income Tax Act 7 of 1918, the power not being the exercise of original jurisdiction in any matter concerning the revenue, so as to be excluded by sub sec (2) (*d*)

107. [Ch Act, s 15]—Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

Powers of high court with respect to subordinate courts

(*a*) call for returns,

(*b*) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction,

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts,

(*d*) prescribe forms in which books entries and accounts shall be kept by the officers of any such courts, and

(*e*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in Council, and in other cases of the local Government

Power of superintendence. Civil proceedings.—The High Courts have under this section not only administrative but judicial powers In the exercise of its power of superintendence a High Court may direct a Subordinate Court to do its duty, and this power is not limited to cases in which the Subordinate Court declines to hear or deter

(*d*) *Alcock Ashdown & Co Ltd v Chief Revenue authority Bombay* (19 3) 50 I A [illegible] 7 47 Bom [illegible]42 [illegible]5 I C 39[illegible] ([illegible]3) A I C 134 The decision to the contrary in *Chief Commissioner of Income Tax v North Anantapur Gold Mines Ltd* (19[illegible]1) 44 Mad 71[illegible] 64 I C 6[illegible] is no longer good law

Government of India Act.

S. 107.

injustice (*f*)

The power of revision conferred upon a High Court by s. 115 of the Civil Procedure Code is limited to cases in which no appeal lies to the High Court. There is no such limitation upon the power of superintendence conferred upon a High Court by the present section (*g*) All that is necessary is that the Court over which the power of superintendence is sought to be exercised should be subject to its appellate jurisdiction If the Subordinate Court is one from which an appeal lies to the High Court, though it be in certain specified cases only, then that Court is subject to the appellate jurisdiction of the High Court and that is sufficient to attract the power of superintendence conferred by this section, and that power may therefore be exercised over the Subordinate Court even in cases where a direct appeal does not lie (*h*)

Power of superintendence: Criminal proceedings.—In the exercise of its power of superintendence the High Court will interfere with an order under s 145 of the Criminal Procedure Code 1898, when the Magistrate has acted without jurisdiction, or has exceeded his jurisdiction, or where there has been a material irregularity in the proceedings which amounts to a refusal to exercise jurisdiction or to an usurpation of jurisdiction, or which has prejudiced a party to the proceedings (*i*) In case of a difference

Agency Courts.—Under rule 14 of the Rules of 1920 framed under the Ganjam and Vizagapatam Agency Courts Act 24 of 1839 and under the present section, the High Court has power to transfer to its file cases pending before the Agency Commissioner (*l*)

Defence of India Act, 1915—The High Court has no jurisdiction to superintend the proceedings of commissioners appointed under the Defence of India Act, 1915 (*m*)

Rent Act.—It has been held by the High Court of Calcutta that it has power under this section to revise the orders of the Rent Controller under the Calcutta Rent Act (*n*). The High Court of Rangoon has held that it has no power to interfere with the orders of the Rent Controller under the Rangoon Rent Act (*o*)

(*e*) *Tej Ram* v. *Harsukh* (1876) 1 All 101 *Mul* ... *Sulema*... v *Fatima* (1887) 9 All 104, *Abdullah* v *Salaru* (1896) 18 All 4, *Madho Ram In re* (1899) 21 All 181 *Corporation of Calcutta* v *Bhupati Roy* (1899) 26 Cal

(*f*) I

(*g*)

(*h*)

(*i*) I

refused]

(*j*) *Moiram* v. *Marjan* (1919) 24 C W N 97, 54 I C 169 *Indian Iron & Steel Co* v *Banso* (1920) 32 Cal L J 54 59 I C 403

(*k*) *Nambia* v *Sudalai Muthu* (1923) 44 Mad L J 642 76 I C 872, (23) A M 59

(*l*) *Maharajah of Jeypore* v *Rajah Gangaraju* (1923) 46 Mad 726 72 I C 745, (23) A M 604

(*m*) *Meonanlan* v. *King-Emperor* (1918) 3 P L J 531, 46 I C 977

(*n*) *Chatterjee* v *Tribedi* (1921) 49 Cal 524 68 I C 274 (22) A C 427, *Allen Brothers & Co.* v *Tarlon & Co* (1922) 49 Cal 931, 70 I C 371, (23) A C 169

(*o*) *Mohideen* v *Lakshi Ram* (1925) 3 Rang 410 91 I C 617, (26) A R 33 (F B)

Land Acquisition Act.—The High Court has no power under s 115 of the Civil Procedure Code or this section to interfere with an order of the Collector refusing to make a reference under s 18 of the Land Acquisition Act (p) See notes to s 115, 'Subordinate Court,' on p 312 above

Municipal Commissioner.—A Municipal Commissioner sitting as an Election Court is not subject to the superintendence of the High Court under this section nor is he subject to the appellate jurisdiction (q)

When present section to be resorted to.—The special power of superintendence conferred by this section is not as a rule to be exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision (r) That power is as a rule exercised in the following cases —

(1) where there is no remedy by revision or appeal (s)

(2) where it is doubtful whether the High Court has the power to revise under s 115 of the Code of Civil Procedure (t)

(3) where the order passed is of an extraordinary character, and there has been a gross failure on the part of the Subordinate Court to do its duty (u)

Appeal—No appeal lies under cl 15 of the Letters Patent from an order made by a High Court in the exercise of the power of superintendence under this section See cl 15 of the Letters Patent as amended in 1919

108 [**Ch. Act, ss 13, 14**]—(1) Each high court may by its own rules provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges of the high court of the original and appellate jurisdiction vested in the court

Exercise of jurisdiction by single judges or division courts

(2) The chief justice of each high court shall determine what judge in each case is to sit alone and what judges of the court, whether with or without the chief justice, are to constitute the several division courts

Original Jurisdiction—See notes to s 115 'Appeal' on p 320 above

Rules.—An order made by a judge in excess of the jurisdiction delegated to him by rules framed by the High Court under this section is a nullity (v)

Government of India Act.

Ss. 109, 110.

109 [28 & 29 Vict., c. 15, ss 3, 4, 6.]—(1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the high courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India.

Power of Governor-General in Council to alter local limits of jurisdiction of high courts

(2) The Governor General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section.

(3) His Majesty may signify, though the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor General notifies that he has received intimation of the disallowance, but no act done by any high court before such notification shall be deemed invalid by reason only of such disallowance

110 [13 Geo III, c 63, ss 15, 17, 21 Geo. III, c. 70, s. 1; 37 Geo. III, c 142, s 11, 39 & 40 Geo. III, c. 79, s. 3; 4 Geo. IV, c. 41, s. 7.]—(1) The Governor-General, each Governor, and each of the members of their respective executive councils, shall not—

Exemption from jurisdiction of high court

(a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only, nor

(b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction, nor

(c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts

111. [21 Geo. III, c. 70, ss 2, 3, 4.]—The order in writing of the Governor General in Council for any act shall, in any proceeding, civil or criminal, in any high court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject, but nothing in this section shall exempt the governor general, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent court in England

Written order by governor-general justification for act in any court in India

Law to be administered

112. [21 Geo III, c. 70, s. 17, 37 Geo. III, c. 142, s. 13]—The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject

Law to be administered in cases of inheritance and succession

Additional High Courts

113. His Majesty may, if he sees fit, by letters patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another high court and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act, and where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits and make such incidental, consequen-

Power to establish additional high courts

Ss 113, 114

tial and supplemental provisions as may appear to be necessary by reason of the alteration

Advocate General

114. [53 Geo III c 155, s 111 21 & 22 Vict c 106 s 29] —(1) His Majesty may by warrant under His Royal Sign Manual appoint an advocate general for each of the presidencies of Bengal Madras and Bombay

(2) The Advocate General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty s Attorney General in England

* *

DESPATCH FROM SECRETARY OF STATE.

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST LETTERS PATENT OR CHARTER

Judicial, No 24.

INDIA OFFICE,
London, 14th May, 1862.

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter (v), under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25, Victoria, Chapter 104, for establishing High Court of Judicature in India, and request that you will take immediate measure for instituting the Court, the first Judges of which including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court

2 This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature, possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court

3 Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question

4 It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous It has been, *consequently, deemed unnecessary* that the Charter should exhibit *on the face of* it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds

(v) The Letters Patent, dated the 14th May, 1862, forwarded with this despatch were afterwards revoked by further Letters [illegible] 28th December 1865, [illegible]

Despatch from Secretary of State.

5. But the Charter is intended positively to declare all such Civil, Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it *supplementary or additional to its main purpose, namely, the fusion of the afore said Courts*

6 *Moreover, the words giving authority to confer on the Court such jurisdiction* and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within *the meaning of the sections*, may require It has been, however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely the establishment of new Courts.

7 Another reason for the form which the present Letters Patent assume, is to be found in the provisions of section 17 of the Act of last Sessions By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court *is to be permanently fixed* On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they *make, or any amendments* they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future *Letters Patent*

8 I proceed to notice, in order, such of the provisions of the Charter as appear to *me to call for special remark*

Clause 6

9 By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries subject however, in both cases, to the approval and confirmation of the Governor General in Council This provision does not refer to the *setting of tables of fees, where fees are allowed, which under section 15 of the Act, is* required to be done by the Court

10 The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which of course must be uniformly applicable to all the officers of the Court Constituted as the High Court will be, it will merit all the confidence you can repose in it, but as a question of policy, the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive

11 In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed

Clauses 7 10

Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex officio* Vakeels These terms are employed in the Charter simply to express the functions of these several classes of practitioners The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the Court is authorised by the Charter to make and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12 The provisions in the Act, section 2, clause 4, which declares that Pleaders of the Sudder Court, 'who shall have been admitted as Pleaders of the High Court," shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the bar of the High Court This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court

13 With reference to the concluding sentence of clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by clause 17 No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though for the future, presided over by a Judge of the High Court The Attorneys, therefore, will, as heretofore, practice in accordance with the rules of the Insolvent Court itself

Clause 10

14 By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court

15 The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act

Civil Jurisdiction
Clause 11

16 As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding

Despatch from Secretary of State.

provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so

17 The terms of clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil Procedure Act VIII of 1859, and are intended to include every description of case over which the Mofussil Courts have jurisdiction By the 8th section of the 21st George III, C 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue Further, a decision* of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the *Supreme Court in matters matrimonial between others* than Christians, and even expres[s] administer a remedy in such case[s] Charter to do away with all such without trenching on the proper province of legislation It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing

Clause 12

*Ardaseer Cursetji v Perozeboye

18 I shall be glad to be furnished with your opinion, after consultation with the Judges of the Courts, as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court, but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to say, 300 or 500 Rupees

19. It has been suggested that the Small Cause Court should be placed on the same footing *as a Zillah Court in its subjection to the High Court as a Court of appeal* and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent

the measure can be carried into effect by an Act of the Governor General in Council.

20. As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the civil jurisdiction exercised by the Supreme Court By Clause 13, however, the High Court is empowered

Clause 13

* Reported in 6 Moo I A 348

to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William' in this and in several other clauses, may appear to require explanation The Court about to be established is called in section 2 of the Act, 24 and 25, Victoria, C 104, a Court 'for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter By section 8, the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction, power, and authority except when otherwise provided, are vested in the High Court But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William and also over some of the Non Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency The result is, that the High Court "for the Bengal Division,' succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division As this is the result of the Act, it might not have been necessary to notice it in the Charter But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words

Clauses 14 and 15

22 Clauses 14 and 15 give effect to the recommendation of the law Commissioners that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court, the appeal shall lie to her Majesty in Council.

23 It will appear, from a subsequent clause on the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India of which Act XXIII of 1861 forms a part By section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal A difficulty however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction differ as to the judgment to be given For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contain no provision To call in a third Judge and to re try the case with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose

Despatch from Secretary of State.

24 The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will until otherwise provided, continue as at present This as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect And the clauses on which I am now commenting are probably superfluous But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself I trust, however, that measures may be taken ere long for effecting great

Clauses 18 19, and 20

any classes of our Indian subjects

25 *Under clauses 21, 22, and 38, no change will be effected by the Charter in* the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country It appears, however, to Her Majesty's Government that some modification of the existing practice both at the capital and in the provinces, is necessary and on these points, I shall address you in a separate despatch

Clauses 21 22 and 38

26 The Sudder Court exercises no original jurisdiction, but by clause 23, original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside

Clause 23

27 The remaining clauses of the Letters Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by section 10 of the Act under the authority of which the High Court is established.

Clauses 24 28

28 As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta

29. Clause 30, respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

Clause 30

Despatch from Secretary of State,

30 With reference to this clause, it has been considered whether the precedence of section 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangement for exercise of the Court s jurisdiction out of the usual place of sitting vested in the Chief Justice On the whole it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Gov ernor General in Council. But it is scarcely for me to add that Her Majesty s Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter

Clauses 31 and 32

31 The Supreme Court exercises at present, Admiralty Jurisdiction under its Charter The Chief Justice has Vice Admiralty Jurisdic tion under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C 79 section 25, for the trial and adjudication of prize causes and other maritime questions arising in India By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited, by the expression other maritime questions in general, mention is made of all the jurisdictions conferred as above mentioned in the clauses of the Charter providing both for the civil and criminal maritime jurisdiction of the High Court

Clauses 33 and 34

32 The clauses respecting testamentary and intestate jurisdiction do not call for any remark

Clause 35

33 Her Majesty s Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to matters matrimonial in general as they now are under the Supreme Court and this they believe to be effected by clause 35 of the Charter But they consider it expedient that the High Court should possess in addition the power of decreeing divorce which the Supreme Court does not possess in other words that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England established in virtue of 20 and 21 Vic C 85 and in regard to which further provisions were made by 22 and 23 Vic C 61 and 23 and 24 Vic C 144 The Act of Parliament for establish ing the High Court however does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act and some of them the Crown clearly could not so import such for instance as those which prescribe the period of re marriage or those which exempt from punishment clergymen refusing to re marry adul terers All these are in truth matters for Indian legislation and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords

34 The object of the proviso at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial as, for instance in a suit for alimony between Armenians or Native Christians With any such jurisdiction it is not intended to interfere

Despatch from Secretary of State.

35 Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th section of the Act By section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native langauge will obviate the expense and delay of translating the proceedings

Clause 36

36 Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment

Clause 37

37 In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change with its necessary inconvenience, is unavoidable The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable For instance, clause 40 is introduced as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments

38 It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public I should wish, therefore, that one of the first objects of the Judges as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules which might then be reduced into a complete shape by the authority of the Privy Council at Home

39 In forwarding the Letters Patent to the Judges of the High Court you are requested to furnish them with a copy of this despatch I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties It is possible that omissions may be discovered by the legal authorities in India which may impede the proper action of the Courts, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration

40 I cannot conclude this despatch without expressing the deep interest felt by Her Majesty s Government in the success of this important measure The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success And Her Majesty's Government look with confidence to the zealous exertions and cordial co operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it in every respect adequate to its ends, and satisfactory to the people and to the Government

I have the honour to be,

My Lord

Your Lordship s most obedient humble Servant

(Signed) C WOOD

APPENDIX II.

Letters Patent for the High Court of Calcutta.

(*December* 28, 1865)

[*N B—The Letters Patent for the High Courts of Madras and Bombay are mutatis mutandis in almost the same terms*]

Recital of Acts 24 & 25 Vic c 104

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith To all to whom these presents shall come, greeting Whereas by an Act of Parliament passed in the twenty-fourth and twenty fifth years of Our reign, entitled "An Act for establishing High Courts of Judicature in India' it was, amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice and as many judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty

and Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby and save as by such Letters Patent might be otherwise directed subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts (*a*)

Revocation of Letters Patent of 1862.

1 Now know ye that We, upon full consideration of the premises, and of Our special grace certain knowledge and mere motion, have thought fit to revoke and do by these presents (from and after the date of the publication thereof as hereinafter provided and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May one thousand eight hundred and sixty two except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third dated the twenty sixth March one thousand seven hundred and seventy four establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby

High Court at Fort William to be continued.

2 *And We do by these presents grant direct and ordain* that notwithstanding the revocation of the said Letters Patent of the fourteenth of May one thousand eight hundred and sixty two the High Court of Judicature called the High Court of Judicature at Fort William in Bengal shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and that the said Court shall be and continue a

(*a*) Certain paragraphs of the preamble which follow here have been omitted

Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

Judges of the said High Court to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges or acting Chief Justice or Judges, of the said High Court, until further or other provisions shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act for establishing High Courts of Judicature in India.

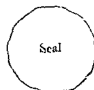
Clerks &c. of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment *with the salary thereunto annexed until he be removed from* such office and employment, and he shall be subject to the like power of removal regulations, and provisions as if he were appointed by virtue of these Letters Patent.

Declaration to be made by Judges.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, *A B.*, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"



6 And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription, "The Seal of the High Court at Fort William in Bengal." And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act, and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant the said High Court shall be and is hereby authorized and empowered to demand, seize and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession

Writs &c to run in name of the Crown and under the Seal

7 And We do hereby further grant, ordain, and appoint that all writs summons, precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court

Appointment of Officers

8 And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to

Cls. 8-10. appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of Justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent (b) And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively, and as the Governor General in Council shall approve of Provided always and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long they shall hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Admission of Advocates, Vakeels and Attorneys

Powers of High Court in admitting Advocates Vakeels and Attorneys

9 And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet, such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

In making rules for the qualification &c of Advocates Vakeels and Attorneys

10 And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakeels and

(b) The words "And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor General in Council and shall be either confirmed or disallowed by the Governor General in Council" which occurred in this clause were omitted by the Amending Letters Patent dated 11th March 1919

Cl. 10.

Attorneys-at-Law of the said High Court, and shall be empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

Power to remove or suspend on reasonable cause.—The words "on reasonable cause" are not confined to purely professional misconduct, but embrace all causes which may afford reasonable ground for suspension or removal (*c*). As to what is reasonable cause, see the undermentioned cases (*d*).

An attorney is an officer of the Court, and any person aggrieved by the misconduct of an Attorney has the right to invoke the disciplinary jurisdiction of the Court (*e*).

Proceedings in the disciplinary jurisdiction are not of a criminal nature and the rules of Criminal Procedure such as filing a written statement by the accused do not apply (*e1*).

Professional etiquette affecting counsel.—It is unprofessional for counsel to cross examine a witness as to facts about which he has no instructions but are within his personal knowledge. When counsel during the hearing of a case calls for the production of a book, which is produced and handed to him by his opponent with certain pages marked as those only to which he may refer in respect of the subject matter of his cross examination, it is improper for counsel who calls for the book to inspect any of the other pages. There is nothing unprofessional in counsel giving evidence in a case in which he appears as counsel, though as a general practice it is undesirable (*f*). Where counsel accepts brief to appear at the trial of a case and is paid the consultation fee and the fee for attending the trial, he should return both the fees if after holding consultation he leaves for another place and is unable to attend the trial of the case the consultation must be deemed to be held with a view to his attending the trial (*g*).

Appeal.—See notes to clause 39 below.

Civil Jurisdiction of the High Court

Local limits of the ordinary original jurisdiction of the High Court

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety-four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction (*h*)

Local limits —Power is given by s 109 of the Government of India Act to the Governor General in Council to alter the local limits of the jurisdiction of High Courts

Issue of warrant —The High Court has no power in the exercise of its ordinary original civil jurisdiction to issue a warrant against the person of a judgment debtor and appoint a special bailiff to execute it against the judgment debtor *wherever he might be found in the Presidency* (*i*) Such an order however, may be made for the arrest of a defendant who has been guilty of a contempt of Court (*j*) The reason is that an order for attachment for contempt is not an order made in exercise of the High Court's civil jurisdiction (*k*)

Original jurisdiction as to suits

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or

(*h*) In the Madras and Bombay Letters Patent the words an[illegible] by any law made by the Governor in Council [illegible] In the same Letters Patent for the words within the limits declared and prescribed &c are substituted within the limits of the local jurisdiction of the said High Court of Madras/Bombay at the date of the publication of these presents

(*i*) *Rajah of Ramnad* v. *Seetharam* (1903) 26 Mad 120

(*j*) *Hadjee* [illegible] v. [illegible] (18[illegible]0) 7 Bom H C [illegible]

(*k*) [illegible] v. [illegible] (1883) 7 Bom [illegible]

Cl. 12

personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.

end of this clause, ɔ try the following

I. *Suits for land or other immoveable property*—

(a) if the land or property is situated *wholly* within the local limits of the ordinary original civil jurisdiction of the said High Courts, or

(b)

II *Suits other than those for land*—

(a) if the cause of action has arisen *wholly* within the said limits, or

(b) where the cause of action has arisen *in part* only within the said limits if the leave of the Court shall have been first obtained, or

(c) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits

side the original jurisdiction of the Calcutta High Court If *A* fails to perform his contract and *B* sues *A* for *specific performance*, the suit is one for land, and it will not be entertained by the Court, the land being situated outside its jurisdiction But if *B* fails to perform his contract, and *A* sues *B* for specific performance, the suit is not one for land and hence the suit will lie in the Calcutta Court (*o*) Similarly, a suit by a mortgagee for specific performance of an agreement to execute a mortgage of land is a suit for land, and it will not be entertained by the Calcutta Court, if the land is situated beyond the original jurisdiction of the Court (*p*) And it has been laid down by the same High Court that *suits for redemption or foreclosure or for sale of mortgage property* are all suits for land and they will not be entertained by that Court if the land is situated beyond its original jurisdiction (*q*), also that a suit by a lessee for a declaration that a lease was a subsisting lease and for rents and profits is a suit for land, and it will not be entertained if the land is situated beyond its jurisdiction (*r*) In short the Calcutta High Court would appear to hold that suits of the kind mentioned in cls (a) to (e) of s 16 of the Code are all suits for land (*s*) The same view has been taken by the Madras High Court (*t*) According to the latter Court, a suit in which a decree is asked for operating directly on the land is a

(l) Balaram v Ramchandra (189–) 2– Bom 9–2

19 Cal 361 365

(o) *Land Mortgage Bank v Sudurudeen* (189–) 19 Cal 358 *Narendra Nath v Pralignol* (19–) 49 Cal 670 70 I C 92 (–) A C 443

(p) *Sreenath Roy v Cally Doss* (1880) 5 Cal 82 *Fatinchand v Gobind* (1921) 48 Cal 852, 66 I C 484 (2–) A C 3–

(q) *Kartic Chunder v Kissory Mohun Roy* (189–) 19 Cal 361 at p 36–

(r) *Ibrahim v Protas Chunder* (1909) 36 Cal 9 I I C 472

(s) *Sukhmdih Coal Co v Empire Coal Co* (191–) 42 Cal 942 951 952 31 I C 551

(t) *Velum v Krishnaswamy* (1904) 27 Mad 157, 161

Cl. 12. suit for land It has thus been held that a suit for maintenance in which the plaintiff pray that the amount may be charged on specific land is a suit for land, for if a charge is created by the decree, it can be enforced by a *sale* of the land (*u*)

fraud Now the defendant in *Hollar* v *Dadabhai* did not reside or carry on business in Bombay and the learned Judge seems to have overlooked the fact that the first con dition was wanting The case was adversely criticised on this ground in the last edition of this Commentary and that criticism has been entirely accepted by the Bombay High

cumstance which brought the case within *Holkar* v *Dadabhai* Nevertheless the Court overruling *Hollar* v *Dadabhai* said the suit was not competent. The Court entirely agreed with the Calcutta decisions and quoted with approval the dictum of Jenkins, C.J, in *Sudamdih Coal Co* v *Empire Coal Co* (*x*) that regard must be had to the substance of the suit in deciding whether it was a suit for land.

The Bombay decisions in the interval (*y*) are now of little importance, for they are all tainted by *Hollar* v *Dadabhai* and take no notice of the fact that the defendant resided out of jurisdiction But there are some exceptions. In *Vaghoji* v *Camaji* (*z*), Jenkins, C J, correctly summarised the principles on which the Courts in England exer cise jurisdiction in suits relating to land abroad and refused to make a declaration as to title of land outside jurisdiction. In *Yeshvadabai* v *Janardhan* (*a*), Fawcett, J, held following a Madras case (*b*) that a suit by a wife praying that her maintenance be secured by a charge on her husband's immoveable property which was situated in Bom bay was a suit for land. In *Rajah Kolalal* v *Malabar Timber Co* (*c*) the same learned Judge held that when the land was situated outside the local limits of the Court, the ex pression suit for land should be read subject to the proviso that the Bombay High Court in its original jurisdiction has a jurisdiction in personam similar to that exercised by a Court of equity in England and by a Mufassal Court under the proviso to sec. 16 of the Code and that if the defendant was within jurisdiction, the Court had jurisdiction to declare a charge on land situated outside Bombay And lastly in *Pranlal* v *Goculdas*(*d*) Pratt, J held that the Court had no jurisdiction to make a declaration as to which

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(*u*) *Sundara Bai* v *Tirumal* (1910) 33 Mad 131 3 I C 930

(*v*) (1[illegible]) 14 Bom 3[illegible]3

(*w*) (19[illegible]) [illegible] Bom 1 91 I C 847 ([illegible]) A B 1

(*x*) (191[illegible]) 42 Cal 942 31 I C [illegible]

(*y*) *Noradji* v *Rattonji* (1[illegible]) [illegible] Bom 701 (foreclosure of mortgage outside jurisdiction), *Hunsraj* v *Runchordas* (190[illegible]) 7 Bom L R 310 (specific performance of agreement to sell land outside jurisdiction) *Venkatrao* v *Akhamji* (1[illegible]4) [illegible] Bom L R [illegible]35 80 I C 442 (suit for sale by mortgagee) *Jasraj* v *Hiralal* (1924) 26 Bom L R [illegible] [illegible] I C 10[illegible] ([illegible]) A B. 419 (suit for sale by mortgagee), *Rajah Kolalal* v *Malabar Timber Co* (19[illegible]4) 48 Bom. 6[illegible] 80 I C 1049 ([illegible]) A B 412 (to declare a charge on land outside jurisdiction)

(*z*) (190[illegible]) 29 Bom 249

(*a*) (19[illegible]) [illegible] Bom L R 1172 81 I C 7[illegible]6 (24) A B 141

(*b*) *Sundara Bai* v *Tirumal* (1910) 33 Mad 131, 3 I C 930

(*c*) (19[illegible]4) 48 Bom 6[illegible] 80 I C 1049 (24) A B 412

(*d*) (19[illegible]) 27 Bom L R [illegible]70 83 I C 92, (2[illegible]) A B 333

of two mortgagees of land outside jurisdiction had priority referred to *Harendra Lal v Hari Dasi* (e) where in a mortgage suit for sale of land the Privy Council said that the Court would have no jurisdiction if the land was situate out of jurisdiction, and suggested that *Holkar v Dadabhai* should be overruled

Suits for the partition of land and suits for a declaration of title to land are suits for land and will not be entertained if the land is outside jurisdiction (*f*) A suit for damages for trespass to land is a suit for land (*g*) Suits for the recovery of title deeds are according to the Calcutta High Court not suits for land (*h*), but the Bombay High Court has held that they are, if a question of title to land is involved (*i*) This seems incorrect, for as said in *India Spinning and Weaving Co v Climax Syndicate* (*j*), it is difficult to see how a suit to recover title deeds can be beyond the jurisdiction of the Court if the defendant is within the jurisdiction

The Bombay High Court has held that an administration suit is not a suit for land although there are immoveable properties alleged to belong to the estate of the deceased beyond jurisdiction, and the High Court therefore can entertain such a suit and determine the question whether they belonged to the deceased at the time of his death If the suit is otherwise within jurisdiction, no leave under cl 12 is necessary merely because the immoveable properties or some of them are situated beyond jurisdiction (*k*) The High Court of Calcutta has held that a suit for administration, and as incidental to that suit, for a declaration that certain leases granted by the executors of the estate cannot stand as against the plaintiff (the beneficiary), is not a suit for land (*l*) In a Privy Council case where a suit was brought by three out of four executors against the fourth executor for his removal from the office of trustee and executor and for accounts of the assets of the deceased, and for administration of his estate, it was held that the suit was not one for land, and that the High Court of Madras had jurisdiction to entertain the suit, though the property left by the deceased was outside jurisdiction, as a part of the cause of action had arisen within the jurisdiction and the defendant was dwelling in Madras at the time of the institution of the suit (*m*) In a Calcutta case it was held that the High Court may entertain a suit by *an executor* for a *declaration* and *injunction* (though *not for possession*) in respect of the estate of the testator consisting of several immoveable properties, provided one at least of the properties is situated within its original jurisdiction and leave of the Court is obtained it is not necessary that the cause of action should arise within the local limits or be specifically with reference to that property which is situated within those limits (*n*)

We have seen that to constitute a suit a suit for land, the suit must have been brought for the purpose of acquiring possession of, or of establishing a title to, or an interest in, the land which is the subject of dispute But it does not follow that every suit which has *any* reference to land is therefore a suit for land (*o*) In the *Land Mortgage Bank v Sudurudeen Ahmed*, Trevelyan, J, said I decline to hold that wherever land has anything to do with a suit it is therefore a suit for land (*p*) Thus a suit by a trustee against

(*e*) (1914) 41 Cal 972 985 41 I A 110 120 23 I C 637

(*f*) 1 Cal 249 *supra* 1 Cal 95 *supra* 29 Cal 315 *supra*, 27 Mad 157 161 *supra* *Jairam v Atmaram* (1880) 4 Bom 482 25 Bom 249 *supra*

(*g*) *India Colliery Co v Bipin* (1912) 39 Cal 739 23 Bom 249, 17 I C 500 *supra* 42 Cal 942 31 I C 551 *supra* *British South Africa Co v Companhia de Mocambique* (1893) A C 602

(*h*) *Juggernath v Troynath* (1879) 4 Cal 322

(*i*) *Zuleikhabai v Ebrahim* (1913) 37 Bom 494, 17 I C 195

(*j*) (1926) 50 Bom 1, 94 I C 847 (26) A B 1

In *Krishnadoss v Ghanshamdoss* (1925) 49 Mad L J 311 90 I C 188 (25) A M 1084

(*n*) *Ganoda Sundary v Nalini* (1909) 36 Cal 28 1 I C 514

(*o*) *Juggodumba v Puddomoney* (1875) 15 B L R 318 329

(*p*) (1892) 19 Cal 358 367

Let Pat [Cal , Bom , and Mad]

Cl 12 h s co tru tees to enforce l s right under a deed of trust to act jo ntly r th tl e defendants as sheba t an l manager of la ds ded cated to an dol n which ne tl er tl e j la nt ff nor the defen lant l as *any be efic al erest* s ot a su t for land and may be entertained by the H gl Court tl ough the lands may be s tuate outs de jurisdict on *(q)* So a suit for an a ount an l l s olut on of partnersh p s not a su t for land be au e one a set of the part ersh p l appen to be a tea gar le i s tuate in the mufassal *(r)*

"All other cases"—suits for partition of moveable and immoveable prop rty, the latter being situated wholly outside jurisdict on —The w rd all o her a es n th s cla se do not include cases of su ts for m noveable plus n eable j rojert They refer to ca es n h cl moveable j roperty is not volved. Hen e f 1 ue *B* for j art t o of noveable and mn oveable property and tl e mmoveable j o rt tuat d wholly outs de jur l t on tl e su t must be d sm ed as to such projert e en f tl e lea e of tl e Court l as been obta ed Tl e rea on s tl at tl e nove able projerty be n tuated *holly* o t de juri d ct on tl e Court l s o j o er to grant leave to ue as regar ls su l proj erty *(s)* In sucl a ca e tl e j la t n a be amended th tl e lea e of tl e Cou t by o n tt ng tl eref on o m ch as relates to n o eable j roj erty an l tl e su t may be j roceede l tl far as t relate to oveable j roperty ( )

Su t for land of which a part is within jurisdiction —Where there are s eral m oveable j ropert es the f even one f then s tuated w thin jur d t on tl e Court can enterta n a su t for a part t o of all tl e j roj ert e n lu l ng tho e s tuate l uts de juri d t on j rov de l tl e lea e of tl e Court ha bee f r t obta ed Su l a c e omes th n the follo ng ord of cl 12 na el tl a d H gh Co rt l all be j o ered to detern ne u ts of every de rij t on f n tl e a e f su t f r l nd uel l nd l all be s tuated e tl er wholly *or ca e t e l a e of tl e Cou t shall ha e be n f st ol ned* *part* th n tl e lo al l m t *(u)* If o e of tl e j roj ert es are s tuat d tl n and some out le jurd t n but no lea e is obta ned tl e Court can j roceed o ly tl tl e suit so far as t r lates to tl e n mo able j roj ert e s tuated th n juri l t o ( ) S n larly f some of tl e j ropert es luded n a deed of n ortgage are tl n an l so e out de tl e jur d ct o tl e Court l as juri d t o on lea e to sue be ng ol ta n l to enterta n a su t on tl e nortgage n re j ect of all tl e j roj ert e nclud ng tho e s tuated out de juri d ct on ( ) but n t f the propert es out de juri d t o are the subject of a *separat mortgage (x)* Tl e ame rules aj j ly l ere son e f tl e j roj rt es are s tuated n Brit l In l l ome o t de B t sl In l a *(y)* See n tes Scoj e of tl e lau e j 1143 above

Leave of Court —Tl e lea e un l r tl clau e a cond t n j rece lent to jur d h t l e l t fulfilled b ol ta ng tl e ne r le e t su t rt a j n l t on t entertain the su t *(z)* Su l leave affords tl e very f l f the ju l t l n e t n u t be obta ned before tl e n t tut f tl e su t t a t e e la f e tl e t l a ken t t ted Tl e lea e gr nte l confine l

(q) J o nb J u dom 1 9 *unc anun S h Chu* (15 7 14 a 3 ... K 633 ... 9 1) 3 L R ... 3 M H (3 4

to the cause or causes of action set forth in the plaint at the time when the leave was granted · hence the plaint cannot be amended so as to alter the cause of action (*a*) But if the cause of action is not altered, there is no objection to an amendment (*b*) If a suit is brought in a Chartered High Court with leave of the Court, but there is nothing on the face of the plaint to show that any part of the cause of action arose within its jurisdiction, the plaintiff may be allowed to prove by evidence that part of the cause of action arose within the jurisdiction, and if it is necessary to amend the plaint by adding a statement that part of the cause of action arose within the jurisdiction, the amendment may be allowed, for such an amendment does not alter or add to the original cause of action (*c*) Where a defendant who does not reside within the jurisdiction and against whom the cause of action has arisen *in part* only within the jurisdiction, is added after the institution of the suit, leave under this clause must be obtained at the time of the application for adding him as a party, though leave was obtained when the suit was originally filed (*d*) The force of an order granting leave to institute a suit is exhausted when the suit is instituted in pursuance of the order Hence if the suit is withdrawn with liberty to bring a fresh suit upon the same cause of action, and a fresh suit is brought, there is nothing to prevent the Court from granting fresh leave to institute the fresh suit (*e*)

The leave under this section must be distinctly applied for and obtained, it cannot be implied from the fact that the plaintiff was granted leave to sue as a pauper (*f*) Nor can it be presumed from the fact that the Court orders a third party notice to be served on a party resident outside its jurisdiction. The defendant taking out such notice must apply for leave under Clause 12, and the leave must be endorsed on the notice as it is on a plaint (*g*) When it is said that the Court has no jurisdiction, this does not mean that there is no inherent jurisdiction, for the Court is competent to grant leave and to try the suit. Therefore this objection to jurisdiction may be waived and the decree is valid if the defendant has accepted the jurisdiction of the Court (*h*)

Cause of action.—See notes to s 20 of the Code, ' Cause of action, ' " Cause of action in suit on contracts," and " Cause of action in other suits, ' on pp 90 93 above

If the cause of action shall have arisen in part.—It has been said in two Bombay cases that the words " if the cause of action shall have arisen *in part* " refer to a *material* part of the cause of action (*i*) There is nothing, it is submitted, in the language of this clause to warrant such a construction, though the Court may, in the exercise of its discretion, refuse to grant leave to sue if a material part of the cause of action did not arise within its jurisdiction The High Court of Madras has held that in dealing with applications for leave to sue under this clause, the Court is not precluded from taking the question of convenience into consideration (*j*)

For other cases see notes to s 20 of the Code, ' Cause of action in suits on contracts," and " Cause of action in other suits " on pp 90 93 above

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(*f*) *Jairam* v *Atmaram* (1880) 4 Bom 482
(*g*) *Karim Elahi* v *Sher Ahmed* (1920) 45 Bom 24 59 I C 23 reversing *Well & Co* v *Sher Mahomed* (1910) 21 Bom L R 868
(*h*) *Ganesh Narayan* v *Manik Lal* (1924) 5 Pat L J 342 76 I C 194 (23) A P 62
(*i*) *Kessowji* v *Luckmidas* (1889) 13 Bom 404 *Pragdas* v *Dowlatram* (1887) 11 Bom 257, 267
(*j*) *Sesharyan* v *Askur Jung* (1907) 30 Mad 435

L. Pat. [Cal., Bom., and Mad.]

Cl. 12. **Defendant.**—The word 'defendant" in this clause means all the defendants where there are two or more defendants to a suit It is not sufficient that one of the *defendants dwells or carries on business within the jurisdiction (k)*

Jurisdiction over non-resident foreigners.—See notes to s 20 of the Code, ' Suits against non resident foreigners," on p 94 above.

The question whether the fact of carrying on business through an agent within the local limits of jurisdiction would give the Court jurisdiction over a non resident foreigner was raised before the Privy Council but was not decided (l) The Madras High Court has held that it does (m)

Dwell.—See notes to s. 20 of the Code, "*Dwell within the meaning* of clause 12 of the Charter," on p 88 above.

"Carries on business.'—See notes to s 20 of the Code, under the same head *on p 88 above.*

Personally works for gain.—See notes to s 20 of the Code, under the same head on p 89 above.

Suits against companies.—See notes to s. 20, "Suits against corporations Explanation *II*," on p *94 above*

Ordinary jurisdiction.—The "ordinary" jurisdiction of the High Court embraces all such as is exercised in the ordinary course of law, and without any special occasion or special order being necessary therefor (n)

Appeal.—The leave under this clause is granted on an ex parte application If an order is made granting leave, the defendant may apply to have the order set aside, or be [illegible]
as a se[illegible]
until the [illegible]
ap[illegible]
lar[illegible]
the [illegible]

The order granting or refusing leave by one Judge cannot be superseded by another Judge *except on appeal* from the order (r)

Waiver.—There are two classes of cases to be considered under this head, namely,—

(1) *where the plaintiff in his plaint alleges that portion of the* cause of action arose outside the local limits of the ordinary original civil jurisdiction and fails to take leave of the Court and the case comes on for trial,

(2) where the plaintiff in his plaint alleges that the *whole* cause of action arose within the local limits of the ordinary original civil jurisdiction, but it turns out at the trial that portion of the cause of action arose within and portion outside the local limits of the ordinary original civil jurisdiction.

In case (1) the defendant may by appearing and pleading waive the objection to the jurisdiction Thus it was held by the High Court of Calcutta (s), following *Moore v.*

(k) *Hadjee Ismail v Hadjee Mahomed* (1874) 13 B L R 91

(l) *Annamalai v Murugasa* (1903) 26 Mad 544, 30 I A 220

(m) *Janoo Hassan v Balchu* (1923) 45 Mad L J 471 76 I C 752 (24) A M 198

(n) *Narsinhoo v Turner* (1891) 16 I A 156

(o) *Kessowji v Lurkmidas* (1889) 13 Bom 404 *Nagamoney v Janakiram* (1895) 18 Mad 142.

(p) *Laghoji v Camaji* (1905) 29 Bom 249, *Hadjee Ismail v Hadjee Mahomed* (1874) 13 Beng L R 91

(q) *De Souza v Coles* (1867) 3 M H C 384; *Luthelinga v. Cundasawmy* (1875) 8 M H C 21

(r) *Luthelinga v Cundasawmy* (1875) 8 M H C. 21

(s) *King v Secretary of State for India* (1905) 35 Cal 394

Gamgee (*t*), in a case where the plaintiff alleged in his plaint that *portion* of the cause of action had arisen within the local limits of the ordinary original civil jurisdiction but no leave was obtained by the plaintiff under clause 12, and the defendant without raising any objection to the jurisdiction filed his written statement and applied subsequently for a commission to examine witnesses, that the defendant had waived his objection to the jurisdiction. This decision proceeded on the ground that the absence of leave under this clause did not go to the root of the jurisdiction of the Court This decision is hardly consistent with the observations of Sir Richard Couch in *Hadjee Ismail* v. *Hadjee Mahomed* (*u*), where the learned Judge said that an order under clause 12 was not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving jurisdiction to the Court which it otherwise would not have, and the judgment of Telang, J, in *Rampurtab* v *Premsukh* (*v*), in which it was said that such leave affords the very foundation of the jurisdiction

As to case (2) it has been held that where the plaintiff sets up a complete jurisdiction in the Court to try the case, and if it turns out at the trial that the Court had not complete jurisdiction, the defendant cannot be held bound by the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction (*w*).

S 21 of the Code, which is a new section, is not one of the sections mentioned in s 120. Does it therefore apply to Chartered High Courts? If it does, it follows that there *can be* a waiver of an objection as to *the place of suing*. But does not the word "revisional" in s. 21 show that the section was not intended to apply to Chartered High Courts, but to those Courts only to which ss 16, 17 and 20 apply? See in this connection cl 44 below.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Extraordinary original civil jurisdiction.

"When the High Court shall think proper to do so."—In a suit for immoveable property instituted in the Dinagepur Court, the defendant applied for its transfer to the Calcutta High Court under this clause, the grounds of the application being (1) that questions of difficulty arose in the suit, (2) that the defendant's witnesses lived in Calcutta, and that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expenses; (3) that the agreement upon which the suit was brought was executed in Calcutta, and (4) that even the plaintiff resided and carried on business in Calcutta. It was held that the case was a proper one for transfer to the High Court (*x*).

(*t*) (1890) 25 Q B D 244 But see p 247 of the Report
(*u*) (1874) 13 Beng L R. 91.
(*v*) (1891) 15 Bom 93
(*w*) *Shama Kanta Chatterji & Co* v *Aurum* (1917) 44 Cal 10, 38 I C 571
(*x*) *Harendra Lall* v. *Sarcamangala* (1897) 24 Cal. 183

Ls. 13, 14. **"Subject to its superintendence."**—Note that the words used in this clause are "subject to its superintendence," while those used in sec 15 of the Charter Act [now s 107 of the Government of India Act, 1915] are "subject to its appellate jurisdiction". The power of transfer contained in sec 15 of the Charter Act has nothing to do with the power of removal conferred by the present clause, and the Letters Patent make superintendence, not appellate jurisdiction, *the condition of the exercise of the power of removal* conferred by this clause. It has accordingly been held that the Court of the Political Resident at Aden being a Court *subject to the superintendence* of the High Court of Bombay within the meaning of the present clause, the High Court of Bombay has power to remove a suit from that Court to itself for trial and determination though the Aden Court is not subject to the *appellate* jurisdiction of the High Court (y)

Transfer of suit from Presidency Small Cause Court to High Court.—The High Court has power to transfer to itself a suit from the Presidency Small Cause Court, and the order for such transfer can be made, if allowed by the rules of the High *Court, by a single Judge* of that Court (z)

Powers of High Court in dealing with suits transferred under this clause.—The powers of the High Court in dealing with suits transferred under this clause would seem to be confined to the powers which, but for the transfer, might have been exercised by the Court from which the suit is transferred (a). See Cl 20 below

Joinder of several causes of action

14. And We *do further ordain that,* where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court *to call on the defendant to show cause* why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit

Joinder of causes of action.—Where a suit is founded upon two causes of action, one of which is alleged to have arisen *partly within* the jurisdiction of the Bombay High Court and the other *wholly outside* the jurisdiction, the High Court has power, after granting leave to sue in respect of the former cause of action under clause 12, to allow the plaintiff to join the latter in the same suit. There is nothing in the present clause to show that the power of the Court to make such an order under this clause is limited to cases where one of the causes of action has arisen *wholly within* the jurisdiction (b)

(y) *Municipal Officer v Ismail Hajee* (1906) 30 Bom 246 [P C] *Sheonandan v King Emperor* (1918) 3 Pat L J 581 606 607 46 I C 977

(z) *Maganlal v Bombay Co* (1905) 7 Bom L R 143 *Pirbhai v The Bombay Baroda and Central India Ry Co* (1872) 8 Bom H C 59

(a) *Besant v Narayaniah* (1915) 38 Mad 807 820 41 I A 314 322 24 I C 290

(b) *Dobson v The Krishna Mills Ld* (1910) 34 Bom 564 8 I C 648

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Appeal from the Court of original jurisdiction to the High Court in its appellate jurisdiction

15. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (*not being an order made in the execution of revisional jurisdiction and not being a sentence or order passed or made in the revision of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act,* 1915, *or in the exercise of criminal jurisdiction*) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.

Alterations in this clause.—The words in italics were substituted for the words "not being a sentence or order passed or made in any criminal trial" by the Amended Letters Patent of 1919.

Whether this clause is controlled by s. 104 of the Code.—See notes to s. 104 of the Code "Privy Council appeal," on p. 283 above.

Meaning of "judgment" as used in this clause:—

1. *Calcutta High Court*.—The leading case on the subject is that of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (c) decided by the High Court of Calcutta so far back as 1872. In that case Couch, C.J. said: "We think 'judgment' in clause 15 means a decision which *affects the merits* of the question between the parties *by determining some right or liability*. It may be either *final or preliminary or interlocutory*, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." This definition is now of some antiquity, and is rapidly becoming, if it has not already become, almost classical (d). The point actually decided in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* was that no appeal lies under this clause from an order directing the issue of a mandamus to the Justices of the Peace for Calcutta to compel them to refer to arbitration a question of compensation. The above decision was followed by a decision of the same Court in *Hajee Ismail* v. *Hajee Mahomed* (e), where it was held that an appeal lies under this clause from an

(c) (1872) 8 Beng. L. R. 433, 17 W. R. 364.
(d) *Per* Maclean, C. J., in *[illegible]* v. *Ram-[illegible]rick Dass* (1901) 5 Cal. W. N. [illegible].
(e) (1874) 13 Beng. L. R. 91.

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Cl. 15. order refusing to set aside an order granting leave to sue to the plaintiff under cl 12 of the Letters Patent Referring to the said order, Couch, C J, said "It is *not* a mere formal order or an order *merely regulating the procedure in the suit*, but one that has the effect of giving a *jurisdiction* to the Court which it otherwise would not have And it may fairly be said to *determine some right* between them, *viz.*, the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or, if they do not, to make them liable to have a decree passed against them in their absence" In a later case, Garth, C J, said "I think that the word judgment means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or *order of an interlocutory character* which merely decides some isolated point, not affecting the merits or the result of the entire suit (*f*)

The definition of 'judgment' in the case of *Justices of the Peace for Calcutta* (*g*) was adopted by a majority of the same High Court in a later case where it was held that an appeal lies under this clause from an order made by a single Judge of that Court under O 45, r 15, refusing to transmit for execution an Order of His Majesty in Council (*h*) The decision was affirmed on appeal to the Privy Council (*i*) Referring to the judgment of the majority their Lordships said These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under s 610 [now O 45, r 15] would or would not be a merely ministerial proceeding Mr Justice Pontifex [whose order was appealed from] had in fact exercised a judicial discretion, and had come to a decision of great importance which if it remained, *would entirely conclude any rights* of Kalisunderi for an execution in this suit. They held, therefore, that it was a judgment within the meaning of cl 15 In a later case, Sanderson, C J, said that the definition of judgment' given by Couch, C J, had never been regarded as absolutely exhaustive, and that in every case where the Court was called upon to decide whether the decision under appeal was or was not a 'judgment," regard must be had to the nature of the order (*j*)

2 *Bombay High Court* —The definition of 'judgment' as given in the two Calcutta cases cited above has been adopted by the High Court of Bombay In *Miya Mahomed* v *Zorabi* (*k*), Scott, C J, referring to the above Calcutta cases, said "For a considerable number of years in this Court those two decisions (*l*) have to my knowledge been regarded as the leading decisions to be followed on the question whether an order in any particular case is a "judgment within the meaning of clause 15 of the Letters Patent." The leading Bombay case is *Sonbai* v *Ahmedbhai* decided in the year 1872 (*m*)

3 *Madras High Court.*—Turning now to the Madras decisions the earlier leading case on the subject was *De Souza* v *Coles* (*n*) decided in the year 1868 The modern leading case is that of *Tuljaram* v *Alagappa* (*o*) decided by a Full Bench of that Court in 1910 In the former case, Bittlestone, J, said 'The word 'judgment' cannot be limited to the final judgment in the suit, but must be held to have the more general meaning of *any decision or determination affecting the rights or the interest of any suitor or*

(*f*) *Ebrahim* v *Fuckhrunnissa* (1878) 4 Cal 531
(*g*) (1872) 8 Beng L R 433
(*h*) *Kally Soondery* v *Hurrish Chunder* (1881) 6 Cal 594
(*i*) *Hurish Chunder* v *Kali Sundari* (1882) 9 Cal 482 10 I A 4

34 I C 634 where the cases are collected
(*k*) (1909) 11 Bom L R 241 2 I C 157 See also *Chara das* v *Chhaganlal* (1921) 45 Bom 428 432 59 I C 533
(*l*) 8 Beng L R 433 and 13 Beng L R 91, supra
(*m*) (1872) 9 Bom H C 398 followed in *Narrondas Dhanji in the matter of* (1890) 14 Bom 555
(*n*) (1868) 3 Mad H C 384
(*o*) (1910) 35 Mad 1, 8 I C 340

applicant When the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter it is we think, *impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from* ' This definition has now been rejected as too wide, and instead thereof, we have another definition of the term ' judgment laid down in *Tuljaram s case* In that case White, C J, said as follows —

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' The test seems to me to be not what is the form of the adjudication, but what *is its effect in the suit or proceeding* in which it is made *If its effect,* whatever its form may be, and whatever be the nature of the application on which it is made, is *to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceedings, I think the adjudication is a 'judgment' within the meaning of the clause* An adjudication on an application which is *nothing more than a step* towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent, I think, too, an order on an *independent* proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view *to rendering the judgment effective if obtained*),—*e g*, an order on an application for an interim injunction or for the appointment of a receiver is a ' judgment ' within the meaning of the clause "

It will be seen that the definition of ' judgment as stated by White, C J, is wider than that in *Justice of the Peace for Calcutta*, and narrower than the one in *De Souza v Coles* Referring to the former case White, C J, said that he was not prepared to say as was said in that case that ' judgment ' within the meaning of this clause must be a decision which affects the merits by determining some right or liability The learned Chief Justice added ' I think the decision may be a judgment for the purposes of the clause, though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding The result is that some orders which have been held not to be appealable by the Calcutta High Court have been held to be appealable by the Madras High Court *e g* an order under cl 13 of the Letters Patent transferring a suit from a subordinate Court to the High Court *(p)* Referring to the definition of ' judgment in *De Souza v Coles,* the learned Chief Justice said that it was too wide

4. *Allahabad High Court—L P, cl* (10) —The Allahabad High Court has not felt the necessity of defining the term judgment, because it has held that the right of *appeal given by the Letters Patent is in respect of an order made under the Code,* controlled by the provisions of s 104 above as understood by that Court. The result is that no order from which an appeal is not allowed under s. 104 and O 43, r 1, is appealable under the present clause *(q)* And, further, *no appellate order from which a* second appeal is excluded under that section can be appealed from under this clause *(r)* Conversely an order from which an appeal is allowed under s. 104 and O 43, r 1, to the High Court from a subordinate Court is an order from which an appeal will lie under this clause *(s)* The only definition hitherto given by that Court of the word judgment ' is that it must be such a judgment on the part of all the learned and honourable

(104, v C All 375 *Muhammad v Ihsan ullah* (189) 14 All 2–6, *Mansab Ali v Nihal Chand* (1893) 15 All 359 *Bansidhar v Gulab Kuar* (1894) 16 All 443 448

(r) *Piari Lal v Madan Lal* (1917) 39 All 191, 39 I C 460

(s) *Sadiq Ali v Anwar Ali* (1923) 45 All 66, 71 72, 70 I C 803, (23) A A 44

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Cl. 15. Judges who may constitute a Bench *as disposes of the suit* or the appeal before it (t) See notes to s 104 Letters Patent appeal, p 282

5 *Lahore High Court—L P cl* (10)—The High Court of Lahore has adopted the definition of judgment as given by White, C J, in *Tuljaram's* case referred to above under the head Madras High Court' (u)

6 *Rangoon High Court—L P, cl* (10)—In *Leo Eng Byan v Beng Seng & Co* (v), Robinson, C J after setting out the passage cited above from the judgment of White C J in *Tuljaram's case*, said as follows —

> With these dicta I am in general agreement I agreed that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a 'judgment', and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a 'judgment', nor can a mere formal order merely regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication"

In Mooljee Dharsee & Co v Moola (w) *a Divisional Bench of the same High Court*, after referring to the case of *The Justices of the Peace for Calcutta* and *Tuljaram's case* said as follows —

> The result of these rulings seems to be that the effect of the order as a whole must be considered If when considered as a whole the decision is one which, to use the language of Couch C J, affects the merits of the question between the parties by determining some right or liability then it will be appealable Almost every order does in a sense, *determine some right or liability, but that* this dictum of the learned Chief Justice was not to be understood in this wide sense is shown by the succeeding sentence where he states that a final judgment determines the whole case or suit and a preliminary or interlocutory judgment determines only a part of it

Interlocutory Orders.—All the High Courts are now agreed that no appeal lies under this clause from an order *merely regulating procedure* in a suit or from an order on an application which is *nothing more than a step towards obtaining a final adjudication in the suit* It has thus been held that no appeal lies from the following orders, namely, an order directing a party to produce and give inspection of documents (x) an order directing the issue of a commission for the examination of witnesses (y), an order refusing to try certain issues as preliminary issue ( ), an order refusing to frame an issue asked for by one of the parties (a), an order amending the title of a plaint so as to convert a summary suit into a short cause (b), an order under cl 13 of the Letters Patent transferring a suit from the Presidency Small Cause Court to the High Court (c) [though the contrary has been held on the last mentioned point by the High Court of Madras (d)] an order dismissing the defendant's application to take the plaint off the file on the

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(v) (1924) 2 Rang 469 473 474 84 I C 291 (25) A R 43

(w) (1925) 3 Rang 255 259 88 I C 740 (25) A R 225

(x) *Sonbai v Ahmedbhai* (1872) 9 Bom H C 398 *Ahmed v Aeshabai* (1909) 11 Bom L R 248 2 I C 167

4 Cal 531

(b) *Manilal v Manilal* (1925) 27 Bom L R 90 86 I C 100 (25) A B 159

(c) *Fl t an v Somaram* (1920) 47 Cal 1104 60 I C 963

(d) *Krishna v Thankachala* (1924) 47 Mad 136 73 I C 1054 (24) A M 90

ground that the suit was not for the benefit of the lunatic plaintiff (*e*), an order refusing to direct certain allegations in a party's pleading to be struck out as scandalous (*f*), an order refusing to give directions for the simultaneous trial of issues between the defendant and a third party (*g*), an order restoring a suit dismissed for default (*h*), an order settling the terms of a proclamation for sale (*i*), an order as to the sufficiency of security for stay of execution (*j*), and an order for security under O 38, r 5 (*k*) The decision in an earlier Madras case (*l*) that an appeal lies under this clause from an order fixing a distant date for the hearing of a suit has been disapproved in later decisions of the same Court (*m*) such an order is one relating merely to the date of hearing, and is not a ' judgment

But an appeal lies from the following orders namely an order directing a plaintiff to give security for costs (*n*), an order refusing a stay of execution (*o*), an order rejecting an application to set aside the abatement of a suit or appeal (*p*), an order refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court (*q*) an order directing payment to a party of a certain sum per month for his *maintenance pending the suit* (*r*), an order made by a single Judge of the Calcutta High Court dismissing a suit for want of prosecution under Chapter 10 rule 36, of the High Court Rules (*s*), an order giving plaintiffs leave to withdraw from the suit with liberty to take such action thereafter as they may be advised (*t*), an order for attachment (*u*), an order setting aside an abatement of suit (*v*), and an order rejecting an application under O 41, r 19 (*w*),

Whether wrong exercise of discretion may be a ground of appeal.—It has been held by the High Court of Allahabad that the fact of a matter being within the *discretion* of the original Judge is a ground for refusing to entertain the appeal (*x*) On the other hand, it has been held by the High Court of Madras that the fact that the making of an order was a matter of discretion is not a ground for refusing to entertain an appeal though it may be a good reason for declining to interfere with that discretion in appeal (*y*)

Orders in suits and appeals—We have already noted in their proper place what orders made under the Code are appealable under this clause and what orders are not so appealable The following is a list of such orders —

S 115 [revision]—see notes Appeal, ' p 320 above

O 1 r 3 [joinder of defendants]—see notes Appeal,' p 378 above

O 6, r 17 [amendment of pleadings]—see notes, Appeal, on p 465 above

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8 I C 340

1912 58 I C 1004

(*u*) *Haji Mohammed & Co* v *Eastern Japan Trading Co* (1923) 50 Cal 215 79 I C 242 (23) A C 639

(*v*) *Sarat Chandra* v *Madar Stone & Lime Co* (1922) 49 Cal 62 67 I C 917 ( ) A C 335

(*w*) *Mohar Chand* v *Habib* ( ) A L 617, 59 I C 795

(*x*) *Wall* v *Howard* (1895) 17 All 438 440

(*y*) *Tuljaram* v *Alagappa* (1912) 35 Mad 1, 9 17 I 8 I C 310

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Cl 15. O 9 r 9 [restoring of suit]—see notes Appeal p 501 above
O 9 r 13 [ex parte decree]—see notes Appeal on p 512a above
O 11 r 18 [inspection]—see notes Appeal p 532 above
O 14 r 3 [issues]—see notes Appeal p 548 above
O 20 r 15 [accounts]—see notes Letters Patent Appeal on p 585 above
O 21 r 58 [claims to property under attachment]—see notes Appeal, p. 669 above
O 22 r 9 [abatement]—see notes Letters Patent Appeal on p 750 above
O 22 r 10 [abatement]—see notes Letters Patent Appeal on p 754 above
O 23 r 1 [withdrawal from suit]—see note Letters Patent Appeal on p 764 above
O 25 r 1 [security for costs of suit]—see notes Appeal p 782 above
O 26 r 4 [evidence on commission]—see notes Appeal p 786 above
O 33 r 5 [leave to sue as a pauper]—see notes Letters Patent Appeal p 833 above
O 37 r 3 *[leave to defend in a summary suit]—see notes* Appeal p 883 above
O 39 r 1 [injunction]—see notes Appeal on p 896 above
O 41 r 5 [stay of execution pending appeal]—see notes Appeal p 920 above
O 41 r 10 [striking out appeal for failure to deposit security for costs]—see notes Appeal from order dismissing petition etc p 928 above
O 41 r 23 [remand]—see notes Letters Patent Appeal p 943 above
O 41 r 25 [order directing trial of issue]—see notes Appeal p 945 above
O 44 r 1 [leave to appeal in forma pauperis]—see notes Appeal p 960 above
O 45 r 3 *[leave to appeal to Privy Council]—see notes Appeal* p 963 above
O 45 r 7 [security for costs of appeal to Privy Council]—see notes Appeal, p 966 above
O 45 r 13 [stay of execution pending appeal to Privy Council]—see notes Appeal p 970 above
O 45 r 15 [execution of order of Privy Council]—see notes Letters Patent Appeal p 973 above
O 47 r 7 [review]—see notes Appeal p 988 above

Orders in proceedings other than suits and appeals—A judgment within the meaning of this clause need not be an adjudication in a *suit or appeal* as technically understood. An adjudication which terminates what may be called an original petition like an application for the custody of a minor may be a judgment so as to be appealable under this clause The following is a list of such adjudications —

1 *Habeas corpus*—An appeal lies under this clause from an order deciding the claim of relatives to the custody of a minor on a writ of *habeas corpus* (z)

2 *Leave to sue under cl 12 of the charter*—An appeal lies from an order refusing to set aside an order granting leave to sue under cl 12 of the Letters Patent, and also from an order refusing to grant leave to sue See notes to cl 12, Appeal p 1154 above

3 *Administrator General's Act* 3 of 1913—An appeal lies from an order allowing to the Administrator General commission at a certain rate (a)

4 *Probate and Administration Act* 1881 s 90 [now Indian Succession Act 39 of 1925 s 30]—An appeal lies from an order purporting to be made under s. 90 of the Probate and Administration Act at the instance of a beneficiary in a

(z) Narrondas Dhanji in the matter of (1890) 14 Bom 535
(a) Somasundaram v Administrator-General (1876) 1 Mad 148

case in which there is *no* restriction imposed by the will on the power of the executor to sell immoveable property forming part of the estate of the deceased Such an order is really one made without jurisdiction (*b*) An appeal also lies from an order granting probate (*c*)

5 *Limitation Act, s* 5—It has been held by the High Court of Calcutta that no appeal lies from an order refusing to excuse the delay in filing an appeal or application (*d*) The High Court of Bombay has held that an appeal does lie from such an order (*e*)

6 *Mandamus*—It has been held by the High Court of Calcutta in the leading case of *The Justices of the Peace for Calcutta* v *The Oriental Gas Co* (*f*), that no appeal lies from an order which directs a mandamus to issue to a public body to compel them to refer a question of compensation to arbitration, the reason given being that such an order does not determine any question whatever between the parties, but only initiates proceedings by which the liability of the public body to make compensation is to be ascertained and determined. This decision was dissented from by White, C J, in the Madras case of *Tuljaram* v *Alagappa* (*g*)

7 *Contempt*—An appeal lies from an order of committal for contempt (*h*) as well as from an order refusing an application to commit for contempt of Court (*i*)

8 *Vice-Admiralty jurisdiction*—An appeal lies from the decision of a single Judge of a Chartered High Court exercising Admiralty or Vice Admiralty jurisdiction (*j*)

9 *Arbitration Act* 9 *of* 1899—An appeal lies under this clause from an order refusing to set aside an award made and filed under the Arbitration Act (*k*) An appeal also lies from an order dismissing an application for a stay of proceedings under s 19 of that Act (*l*)

10 *Land Acquisition Act* 1 *of* 1894—See notes below, "Land acquisition appeal"

11 *Indian Companies Act* 6 *of* 1882—No appeal lies from an order refusing an application under s 169 of the Indian Companies Act for extension of time for serving notice of an appeal under that Act (*m*)

12 *Income Tax Act* 1922—No appeal lies from the decision of a single Judge in a Reference under s 66 of the Income Tax Act (*n*)

Orders made in the exercise of revisional jurisdiction.—The words "not being an order made in the exercise of revisional jurisdiction" were added into this clause by the Amended Letters Patent of 11th March 1919 The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of revisional jurisdiction (*o*) See notes to s 115, "Appeal," p 320 above

(*b*) *Indra Chandra Singh in the goods of* (1896) 23 Cal 580

(*c*) *Umrao Chand* v *Bindraban* (1895) 17 All

Cal 236

(*j*) *Chapman, in the matter of the ship* (1890) 17 Cal 66.

(*k*) *Campbell & Co* v *Jeshraj* (1918) 45 Cal 502, 46 I C 657 *Saya Iye* v *Kund ...* (1923) 1 Rang 661 76 I C 525 (1924) A R 47

(*l*) *Jojiall & Co* v *Gopiram* (1920) 47 Cal 611 58 I C 705

(*m*) *Wall* v *Howard* (1895) 17 All 438

(*n*) *Prabhat* v *Emperor* (1925) 52 Cal 516 87 I C 653 (1925) A C 598 *Lukat Shah* v *Collector of Lahore* (1925) 6 Lah 30 88 I C 500 (1925) A L 336 *Tata Iron and Steel Co Ld* v *Chief Revenue Authority of Bombay* (1923) 50 I A 212 47 Bom 724, 74 I C 469 (1923) A P C 145 [cl 43 of the Letters Patent]

(*o*) *Lyon* v *Lhidnath* (1921) 34 Cal L J 459

Let. Pat. [Cal., Bom., and Mad.]

Cls. 15-17. **Orders made in the exercise of the power of superintendence**—The words "not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act 1915" were added into this clause by the Amended Letters Patent of 11th March 1919 The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of the power of superintendence under s 107 of the Government of India Act, 1915

Points on which appeal may be heard—It has been held by the High Courts of Allahabad (*p*), Patna (*q*) and Lahore (*r*) that an appellant is not entitled in an appeal under this clause to be heard on points which have not been raised before the Judge from whose judgment the appeal is preferred (*rr*)

The appeal given to the Full Court under this clause is not confined to the points on which the Judges of the Division Court differ, the whole appeal is open before the Court for decision (*s*)

Land acquisition appeal—The decision of the High Court in a land acquisition appeal is not a "judgment" within the meaning of this clause so as to enable a party to file a further appeal to the High Court under this clause (*t*) See notes to cl 39, The decision must amount to a judgment decree, or order

Sentence or order in the exercise of criminal jurisdiction—An order granting sanction under s 195 (1) of the Criminal Procedure Code is one made in the exercise of criminal jurisdiction and is not a "judgment" within the meaning of this clause (*u*) See the undermentioned cases (*v*)

Review—It is competent to the High Court to review judgments in appeals preferred under cl 15 above (*w*)

16 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force

Appeal from Courts in the Province

17 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates

Jurisdiction as to infants and lunatics

(*p*) *Brij Bhukhan* v *Durga Dat* (1898) 20 All 258

(*q*) *Debi Charan* v *Sheikh Medhi* (1916) 1 Pat L J 485 490 35 I C 508

(*r*) *Ahmad Shah* v *Faujdar* (1920) 2 Lah L J 1 5 I C 0 7

31 Cal L J 447 57 I C 2 6

5 7 *Kuppuswami Aiyar re* (1916) 39 Mad 561 29 I C 109 *Appadu* v *Appadu* (1916) 39 Mad 472 28 I C 66

(*w*) *Venkata Subbarayudu* v *Sri Raja Krishna* (1917) 40 Mad 651 I C 8 3

Cls. 17-19.

of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta

"Within the Bengal Division of the Presidency of Fort William."—See the argument of counsel in *Besant* v *Narayaniah* (x)

Jurisdiction of Supreme Courts as to infants and lunatics—See cl 25 of the Charter of the Calcutta Supreme Court cl 32 of the Charter of the Madras Supreme Court and cl 42 of the Charter of the Bombay Supreme Court

18 And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India

Provision with respect to the insolvent Court

Laws relating to insolvent debtors in India—The law relating to insolvent debtors in the presidency towns is now contained in the Presidency Towns Insolvency Act 3 of 1919 Note that cl 12 does not control the provisions of this clause so as to limit the insolvency jurisdiction of the Court (y)

Law to be administered by the High Court of Judicature at Fort William in Bengal

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case, if these Letters Patent had not issued

By the High Court in the exercise of ordinary original civil jurisdiction

Law or equity to be applied to each case—See the undermentioned case ( ) See also Pollock and Mulla s Indian Contract Act, 5th ed. pp 2 5 The present clause is to be read with cl 44 below

(x) 41 I A 314 38 Mad 8c 24 I C 90
(y) Abd I I lat r v The Official Assignee of Madras (1916 40 Mad 10 36 I C [illegible]
[illegible] of Presidency Towns Insolvency Act 3 of 190
( ) Mad b Ch d r v Iaynour Do s (1o 4) 14 B n L R 6 at p 83

Cls 19-22. **Law or equity administered by the Supreme Courts**—See cls. 13, 17 and 18 of the Charter of the Supreme Court of Calcutta, cls. 21 22 and 31 of the Charter of the Supreme Court of Madras and cls. 28, 29 and 41 of the Charter of the Supreme Court of Bombay

Quære whether the English law should be applied in cases arising within the original jurisdiction of the High Courts though contrary to the rule of justice, equity and good conscience (a)

In the exercise of extraordinary original civil jurisdiction

20 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein

"The law which would have been applied by any local Court"—See notes to cl 13 above Powers of High Courts in dealing with suits transferred under this clause p 1156 above

By High Court in the exercise of appellate jurisdiction

21 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Criminal Jurisdiction

Ordinary original jurisdiction of the High Court

22 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such

(a) *Gurusami v. Chinna* (188?) 5 Mad 37 *Mool Chand v. Alwar Chetty* (1916) 39 Mad 548 | [illegible] 03

limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at *Fort William in Bengal, shall* have criminal jurisdiction over at the date of the publication of these Presents (*b*)

Jurisdiction as to persons

23 *And We do further ordain that the said High Court* of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Extraordinary original criminal jurisdiction

24 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General, or by any Magistrate or other officer specially empowered by the Government in that behalf

No appeal from High Court exercising original jurisdiction
Court may reserve points of law

25 And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

High Court to review on certificate of the Advocate General

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General, that in his judgment there is an error in the decision of a point or points of law, decided by the Court of original Criminal jurisdiction, or that a point or points of

(*b*) And also in respect of all such persons beyond such limits or over whom the said High Court of Judicature at Madras/Bombay shall have criminal jurisdiction at the time of publication of these presents —*Madras and Bombay Letters Patent*

Let. Pat. [Cal, Bom, and Mad.]

Cls. 26-28. law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

Review on certificate of Advocate-General—See the undermentioned case (c) If there is no error of law, the High Court cannot deal further with the case and cannot consider the question of alteration of sentence (d) But if there is an error of law the High Court has to decide the case finally on review (e)

27 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force

Appeals from Criminal Courts in the Provinces

Subject to its superintendence—Note that the words used in s 15 of the Charter Act [now s 107 of the Government of India Act 1915] are subject to its *appellate* jurisdiction while those in the present sections are subject to its superintendence (f) Compare cl 13 above

28 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officer now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer *or Court possessing criminal jurisdiction, as are now subject* to reference to, or revision, by the said High Court

Hearing of referred cases and revision of criminal trials

Now subject to reference to or revision by the said High Court—The High Court cannot under this clause revise an order of a Secretary to Government issuing a warrant under the Goondas Act (Bengal Act 1 of 1923) as such Secretary was not an officer possessing criminal jurisdiction in 1865 when the Letters Patent were issued (g)

( ) *Emperor* v *Fateh Chand* (1917) 44 Cal 477 38 I C 945

(f) *J ng Emperor* v *Barendra Kumar Ghose* (1923) 28 C W N 170 81 I C 393 (24) A C 57

(e) *Emperor* v *Pa chu Das* (19 0) 47 Cal 671

Cls. 29-32.

29 And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of some other Officer or Court

High Court may direct the transfer of a case from one Court to another

30 And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Offenders to be punished under Indian Penal Code

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court

31 And We do further ordain that whenever it shall appear to the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by the recited Act vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superin-
· art other than the usual place of
or at several such places by way
cases before the said High Court
at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Judges may be authorised to sit in any place or by way of circuit or special commission

Admiralty and Vice Admiralty Jurisdiction

32 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and

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Cls. 32-34. maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India as may now be exercised by the said High Court

Admiralty jurisdiction of Supreme Courts —See cl 26 of the Charter of the Calcutta Supreme Court, cl 41 of the Charter of the Madras Supreme Court, and cl 53 of the Charter of the Bombay Supreme Court

Necessaries supplied to a ship.—It was settled to be the law in England that *prior to* the passing of 3 and 4 Vict, c 65 the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship though perhaps it occasionally purported to exercise the jurisdiction where not prohibited (*h*) The same view has obtained in India (*i*), but there is a difference of opinion as to whether the extended powers *under* 3 and 4 Vict c 65, and 24 Vict c 10 became vested in the Indian High Court by virtue of the several Letters Patent (*j*) Assuming that the High Court in its Admiralty jurisdiction had no jurisdiction over claims for maritime necessaries under any previous enactment, such jurisdiction would now rest on the Colonial Courts of Admiralty Act 1890, which vests in it the power described in sec 5 of the Admiralty Act 1861 [24 Vict c 10] The effect of the two Acts is to invest the Indian High Courts with jurisdiction over claims for necessaries supplied to a ship elsewhere than in the port to which the ship Court belongs unless it is shown to the satisfaction of the Court that at the time of the institution of the suit the owner is domiciled in British India or Burma (*k*)

33 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction

34 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of

Testamentary and intestate jurisdiction

(*h*) *The Two Ellens* (1872) 4 P C 116 *The Henrich Bjorn* (1886) 11 A C 270

(*i*) *Murray v Lanyford* (1849) 1 Fulton 95 97 131 *The Asia* (1868) 5 Bom H C O C 64

(*j*) *The Portugal* (1870) 6 Beng L R 323 *The Asia* (1868) 5 Bom H C O C 64 *Bardot v The Augusta* (1873) 10 Bom H C 110

(*k*) *Madras Steam Navigation Co v Shalimar Works* (1915) 42 Cal 85 23 I C 463 [suit for damages for wrongful seizure]

Cls. 34,35.

probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons, dying intestate, whether within or without the said Bengal Division (*l*), subject to the order of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established. Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Ecclesiastical jurisdiction of Supreme Courts.—See cl. 22 of the Charter of the Supreme Court of Calcutta, cl. 37 of the Charter of the Supreme Court of Madras and cl. 47 of the Charter of the Supreme Court of Bombay.

Matrimonial jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects, professing the Christian religion. Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

"Our subjects professing the Christian religion.—The High Court has *no jurisdiction under this clause to grant a decree for restitution unless both parties are* Christians. It has therefore no jurisdiction under this clause to grant such a decree when the petitioner is a Christian, but the respondent is a Parsi. Nor is any such jurisdiction conferred upon it in suits for *restitution of conjugal rights* by the Indian Divorce Act, 1869 (*m*). See Indian Divorce Act, s. 4.

Respondent not within the Presidency.—The High Court has no jurisdiction to grant a decree for restitution against a respondent who was absent from the Presidency at the time the suit was instituted and remains absent. But *residence* at

(*l*) And we do further ordain that the said High Court of Judicature at Bombay/Madras shall have the like power and authority as that which may be now lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments and letters of administration of the goods chattels credits and all other effects whatsoever of persons dying intestate whether within or without the Presidency of Bombay/Madras.—*Madras and Bombay Letters Pate t.*

(*m*) *Nusserwanjee* v. *Meeonora* (1914) 38 Bom. 125, 20 I. C. 492. See also *Ardaseer* v. *Perozebaye* (1856) 6 M. I. A. 348.

Let. Pat. [Cal., Bom , and Mad.]

Cls. 35-37. date of suit of *both* pou es whale er the doruc e, is sufficient to give jurisdict on in suits of this nature (n)

Powers of single Judges and Division Courts

Single Judges and Division Courts

36 And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915 *(o)*, and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any points, such point shall be decided accordingly to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail

Where the Judges are equally divided —This clause is not controlled by s 98 of the Code and if the Judges are equally divided the opinion of the senior Judge prevails (p) From the decree passed in conformity with the opinion of the senior Judge an appeal lies under cl 15 and the whole appeal is open on appeal and not merely the points on which the Judges differed (q) See notes to s. 98 of the Code Letters Patent Appeal on p. 265 above *Where an application is made to the High Court under s. 195* clause (b) of the Criminal Procedure Code to revoke a sanction granted by a lower Court or to give a sanction refused by it and the Judges composing the bench hearing the application are equally divided in opinion, the case is governed by the present clause and not by s. 422 or s. 439 of that Code (r)

Civil Procedure

Regulation of proceedings—civil cases

37 And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought

(n) *Ibid*
(o) [illegible]

(p) *Bhaidas Sheelji v. Bai Gulab* (1921) 45 Bom 718 [illegible] *Justin Hud v. Arthur Francis* (19[illegible]) [illegible] Cal W N [illegible]

(q) [illegible] A C [illegible] [F B]

(r) *Bapu v. Bapu* (1911) [illegible] Mad [illegible] [F B] P [illegible] v J [illegible] (19[illegible]) [illegible] A B 113 *Suresh Chandra v. [illegible]* (19[illegible]) [illegible] Cal [illegible] [illegible] A C [illegible] [F B]

before the said High Court, including proceedings in its Admiralty, Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India

Regulation of proceedings—criminal cases

38 And We do further ordain that the proceedings in all criminal cases, which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

Power to appeal

39 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council in any matter not being of criminal jurisdiction from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents Provided, in either case, that the sum or matter at issue is of the amount or value of not less

Cl. 39.

than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000 ; or from any other final judgment, decree or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Decisions appealable to the Privy Council.—No appeal lies to His Majesty in Council under this clause, unless—

(i) the decision from which an appeal is sought to be preferred amounts to *a judgment decree, or order*

(ii) the decision is a *final* one, and

(iii) the decision is passed *on appeal*, or in the exercise of *original jurisdiction*

The decision must amount to a judgment, decree or order.—No appeal lies to the Privy Council from an *award* made by a High Court on appeal from a District Court under s 54 of the Land Acquisition Act, 1894 Such an award is not a judgment, decree or order within the meaning of this clause (*s*) Similarly no appeal lies from a decision of the High Court upon a case referred by the Chief Revenue Authority under s 15 of the Income Tax Act, 1918 The judgment given on such a reference is merely advisory (*t*)

The judgment, decree or order must be final.—See notes to s 109 of the Code under the head ' Final order, s 288 above.

The final judgment, decree or order must be one made on appeal or in the exercise of original jurisdiction.—Cl 10 of the Charter empowers the High Court to deal with professional misconduct by suspension or removal An order made under that clause is not in the exercise either of the original or appellate jurisdiction of the High Court, and is not therefore appealable to His Majesty in Council (*u*) But an order made in the exercise of the power of superintendence under s 15 of the High Courts Act (*v*) [now s 107 of the Government of India Act, 1915] or in the exercise

King Emperor (1919) 4 Pat L J [illegible] 52 I C 599 In re *Raghava Reddi* (192?) 43 Mad L J 332 69 I C 720 (?) A M 440

(*v*) *Hurdeo* v *Gridhari* (1874) 13 Beng L R 103 But see *Sunder Koer* v *Chandeshwar* (1903) 30 Cal 679, at pp 681 682

of revisional jurisdiction under section 115 of the Code (*u*), is appealable to the Privy Council It may here be stated that cl 15 of the Letters Patent was amended by the Amended Letters Patent of 11th March 1919 by adding into the clause certain words which make it clear that no appeal lies to the *High Court* under that clause from an order *made in the exercise of revisional jurisdiction or from an order made in the exercise of* the power of superintendence under s 107 of the Government of India Act, 1915 But if the order in revision is made by a single Judge, section 111 of the Code bars an appeal to the Privy Council (*x*)

"Made on appeal."—An order made by the High Court rejecting an application to amend a decree passed by that Court on appeal is not an order "made on appeal" within the meaning of this clause (*y*), nor is an order made by the High Court rejecting an application to review a judgment passed on appeal ( ) Such an order is not an order made *on appeal* against the judgment sought to be reviewed, it is an order *in the appeal* in which the judgment sought to be reviewed was given (*a*)

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid *not being of criminal jurisdiction, to grant permission to* such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal from interlocutory judgment

Appeal from interlocutory judgment.—No appeal lies to the Privy Council from an interlocutory judgment or order of a Judge of a High Court until such judgment or order has been subjected to an appeal to the High Court under cl 15 except in those cases in which by reason of the number of Judges who have *made such order an appeal* under cl 15 is given directly to the Privy Council (*b*) The High Court will not it seems, in the exercise of its discretion under this clause grant leave to appeal to the Privy Council upon a mere question of practice, such as an order for inspection of documents (*c*) or an order refusing the appointment of a receiver in a suit (*d*) But an order made by the High Court of Bombay under cl 13 of the Letters Patent transferring to itself a suit from the Court of the Resident at Aden raises a question of jurisdiction as distinguished from practice, and leave may be granted from such an order to appeal to the Privy

(*u*) *Secretary of State v British India Steam Navigation Co* (1911) 13 Cal L J 90 9 I C 183

(*x*) *Sita Narayana v Venkata* (1923) 46 Mad 9..8 75 I C 604 (..4) A M 399

(*y*) *Sunder Koer v Chandishwar* (1903) 30 Cal 679

( ) *Soudamonee v Maharaj Dheraj* (1866) 6 W R [Mi c R] 10.

(*a*) *Rajah Enaet v Ranee Rowshun* (1867) 10 W R [F B] 1 at pp 2 3

(*b*) *Sonbai v Ahmedbhai* (1871) 9 Bom H C 39.

(*c*) *Sonbai v Ahmedbhai* (1871) 9 Bom H C 2.3

(*d*) *Chundi Dutt v Padmanand* (1895) 22 Cal 9..

Let. Pat. [Cal., Bom., and Mad.]

Cls. 40-42. Council (*e*) But for this clause no appeal would lie from an interlocutory judgment or order (*f*)

Appeal in criminal cases, etc.

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the persons aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeals in Criminal cases *—See the undermentioned case (g)*

Rule as to transmission of copies of evidence and other documents

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed, such judgment and orders as We, Our heirs or successors in Our or Their Privy Council,

(*e*) *Municipal Officer Aden* v *Abdul Karim* (1904) 28 Bom 292

(*f*) *Tata Iron & Steel Co* v *Chief Revenue Authority* (1923) 47 Bom 724, 50 I A 212, 74 I C 469, ('23) A PC 148 citing *Gold Mining* v *La Banque Hochelaga* (1880) 5 A C 371

(*g*) *Barendra* v *Emperor* (1925) 52 I A 40, 52 Cal 197, 85 I C 47, ('25) A PC 1

shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

Calls for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper.

Powers of the Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor General in Council under section seventy one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section seventy-two of that Act and may be in all respects amended and altered thereby.

Alterations in this clause.—This clause was substituted for the original clause 44 by the Amending Letters Patent of 11th March 1919. The material alteration consists in substituting the words "powers of the Governor General in Legislative Council and also of the Governor General in Council" for the words "powers of the Governor General in Council".

Legislative powers of the Governor-General in Council.—The powers of the Governor General in Council to make laws are derived from the Indian Councils Act of 1861 (24 and 25 Vict. c. 67). By sec. 22 of that Act the Governor General in Council is given power to make laws in the manner provided including power to repeal or amend existing laws and including the making of laws for all Courts of justice and for all persons whatever British or Native, foreigners or others. But a proviso to that section enacts that there is to be no power to repeal or in any way affect any Act passed in the same session of Parliament with the Indian Councils Act. The High Courts Act of 1861 (24 and 25 Vict. c. 104) is such an Act and the Governor General in Council therefore has no power to alter its provisions unless such power is expressly given by the Act. Thus the Governor General in Council has no power to alter the provisions of that Act as to the qualifications of the judges of the High Courts (sec. 3) or the provisions of sec. 15 thereof giving the High Courts superintendence over the Courts which are subject to its appellate jurisdiction (*h*). But the Governor General in Council has power to remove any place or territory from the jurisdiction of a High Court, the

(*h*) *Queen v. Meares* (1874) 14 Beng. L. R. 106, 117.

reason being that such power is distinctly recognized by sec 9 of the said Act, and it is also consistent with the Letters Patent (cl 44) as required by the said sec 9 (i)

Further there is a proviso to sec 22 of the Indian Councils Act, which enacts that there is to be no power to repeal or in any way affect any provision of the Government f India Act of 1858 Sec 65 of the latter Act provides that all persons shall have and take the same suits remedies and proceedings against the Secretary of State for India in Council as they could have done against the East India Company Before the Government of India Act 1858 a British subject could sue the *East India Company* to determine his claim to any right over land The Governor General in Council has therefore no power under the Indian Councils Act to pass an Act taking away the right of a British subject to sue the *Secretary of State* in a Civil Court to determine his claim to any right over land (j) See now the Government of India Act, 1915, s 106 (2)

An order made in revision by a single Judge is final since the amendment of cl 15 and would therefore be appealable to Privy Council under cl 39, but as Letters Patent are subject to Imperial Legislation that appeal is taken away by Section 111 of the Code (k).

Provisions of former Letters Patent inconsistent with these Letters Patent to be void

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication, and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever

In Witness thereof We have caused these Our Letters to be made Patent Witness Ourself at Westminster, the twenty-eighth day of December, in the twenty ninth year of Our reign

(Sd) C ROMILLY.

(i) *Empress* v *Burah* (1879) 4 Cal 172 177 179 5 I A 178 *James Currie in the matter of* (1896) 21 Bom 405 409 410
(j) *Secretary of State* v *Moment* (1912) 40 I A 48 18 I C 22
(k) *Satya Narayana* v *Venkata* (1923) 46 Mad 958 75 I C 604, (24) A M 399

Letters Patent for the High Court of Allahabad.

(*March* 17, 1866.)

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865] **Cls. 1, 2.**

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint, and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor-General or Governor of the Presidency, in which such High Courts were established shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the fourteenth day of May, in the twenty fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record.

Establishment of High Court for the North Western Provinces

1 Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the North Western Provinces of the Presidency of the Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North Western Provinces, and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2 And We do hereby appoint and ordain that the High Court of Judicature for the North Western Provinces shall, until further or other provisions shall be made by Us, or Our heirs and successors, in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

[**Powers of Crown to appoint a sixth puisne Judge.**—A question having arisen as to the validity of the appointment of a *sixth* puisne judge, it was held that under clauses 1 and 2 it was quite competent to the Crown to appoint a sixth puisne judge (*l*) See High Courts Act, 1861, s. 16.]

(*l*) *Emperor* v *Ghura* (1914) 36 All 168, 22 I C 984

3 And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North Western Provinces previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commission to receive it —

Declaration to be made by Judges

I *A B*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature, for the North Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment '

4-8. [These clauses are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1865]

Civil Jurisdiction of the High Court.

9 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

Original Jurisdiction.—[Note that the High Court of Allahabad does not possess ordinary original civil jurisdiction]

10-11 —[These clauses are similar to clauses 15 and 16 of the Calcutta Letters Patent of 1865]

12 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North Western Provinces, as that with is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now is force

Jurisdiction as to infants and lunatics

13-14 [These clauses are similar to clauses 20 and 21 of the Calcutta Letters Patent of 1865]

Criminal Jurisdiction.

15 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of *these presents, and the criminal jurisdiction of the said last mentioned High Court over* such persons shall cease at such date Provided, nevertheless that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued

Ordinary original jurisdiction of the High Court

16 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

17 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

18 [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865]

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

High Court to review cases on points of law reserved by one or more Judges of the said High Courts

20 And We do further ordain that the said High Court of judicature, for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force

Appeals from Criminal Courts in the Provinces

21 And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut

Hearing of referred cases and revision of criminal trials

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court

High Court may direct the transfer of a case from one Court to another

23 [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865]

Exercise of jurisdiction elsewhere, than at the ordinary place of sitting of the High Court

Judges may be authorized to sit in any places by way of circuit or special commission

24 And We do further ordain that whenever it shall appear to the Lieutenant Governor of the North Western Provinces, subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Testamentary and Intestate Jurisdiction

Testamentary and intestate jurisdiction

25 And We do further ordain that the said High Court of Judicature for the North Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, and that the jurisdiction of the said last mentioned High Court in relation hereto shall cease from the date of the publication of these presents, Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26 27 [These clauses correspond with clauses 35 and 36 of the Calcutta Letters Patent of 1865]

Civil Procedure

Regulation of proceedings

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North Western Provinces from time to time to make rules and orders for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure being an Act passed by the Governor General in Council and being Act No VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively

Criminal Procedure.

Regulation of proceedings

29 And We do further ordain that the proceedings in all criminal cases which shall be brought befor the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made

in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of, Criminal Procedure, prescribed by an Act passed by the Governor General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

30 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North Western Provinces, made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 10th Clause of these presents, Provided, in either case, that the sum or matter at issue is of amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectively, are hereby varied and subject also to such further rules and orders, as we may, with the advice of our Privy Council, hereafter make in that behalf

Power to appeal

31, 32, 33, 34, 35 [These clauses are similar to clauses 40 41, 42, 43 and 44 of the Calcutta Letters Patent of 1865]

By Warrant under the Queen s Sign Manual.

(Sd) C ROMILLY

Letters Patent for the High Court of Patna.

(February 9, 1916.)

Recital of Act 24 and 25 Vict c 104

GEORGE THE FIFTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India To all to whom these Presents shall come, greeting WHEREAS by an Act of Parliament passed in the Twenty fourth and Twenty fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William,

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared,

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadr Diwani Adalat and Sadr Nizamat Adalat at Calcutta, in the said Presidency, should be abolished,

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice admiralty, testamentary intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed, thereby, and that, save as by such Letters Patent might be otherwise directed, and, subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of a Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint, and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies, and that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the

Governor-General or Governor of the Presidency in which such High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories:

Recital of establishment of High Courts at Fort William and Allahabad

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and did constitute that Court to be a Court of Record.

And whereas Her late Majesty Queen Victoria, by Lettrs Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty eighth day of December in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord one thousand eight hundred and sixty two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declare that the Court should continue to be a Court of Record.

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty ninth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty six, did *erect and establish a High Court of Judicature for the North-Western* Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record

Recital of Act 1 & 2 Geo 5, c 18

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India, including the Chief Justice, should be twenty,

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be establish ed under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court, and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits

Recital of Act 5 & 6 Geo 5, c 61

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915;

Recital of creation of Province of Bihar and Orissa

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor General of India on the Twenty second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council.

Establishment of High Court at Patna

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowldge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf, in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other Judges being Saiyid Shurf ud din, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson, and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor in Council may commission to receive it —

"I, *A B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915, and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby authorised and empowered to demand, seize and take the said seal from any prson or persons whomsoever, by what ways and means soever the same may have come to this, her or their possession.



5 And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court

Writs &c, to issue in name of the Crown, and under seal

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant Governor in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the Lieutenant-Governor in Council subject to the control of the Governor General in Council, may approve of: Provided always, and it is Our will and pleasure, that all and every the Officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Appointment of officers

Admission of Advocates, Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in admitting Advocates Vakils and Attorneys

8. And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at-law of the said High Courts and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

Powers of High Court in making rules for the qualification, etc of Advocates, Vakils and Attorneys

et. Pat. [Patna].

ls. 1-4.

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor General of India on the Twenty second day of March in the Year of Our Lord One thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council

Recital of creation of Province of Bihar and Orissa

1 Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowldge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record

Establishment of High Court at Patna

2 And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf, in accordance with section one hundred and one of the said recited Government of India Act 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other *Judges being Saiyid Shurf ud din Esquire, Edmund Pelly Chapman, Esquire*, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared

Constitution and first Judges of the High Court

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor in Council may commission to receive it —

Declaration to be made by Judges

"I, *A B*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.'

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, 'The Seal of the High Court at Patna.' And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government *of India Act, 1915, and We do further grant, ordain and appoint that* whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby authorised and empowered to demand, seize and take the said seal from any prson or persons whomsoever, by what ways and means soever the same may have come to this, her or their possession



5 And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Writs &c to issue in name of the Crown, and under seal

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the Lieutenant Governor in Council subject to the control of the Governor General in Council, may approve of: Provided always, and it is Our will and pleasure, that all and every the Officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Appointment of officers

Admission of Advocates, Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Patna to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in admitting Advocates Vakils and Attorneys

8 And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at law of the said High Courts and shall be empowered to remove or to suspend from practice on reasonable cause, the said Advocates, Vakils or Attorneys at-law and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor

Powers of High Court in making rules for the qualification etc of Advocates Vakils and Attorneys



Civil Jurisdiction of the High Court

Extraordinary original civil jurisdiction

9 And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Appeal to the High Court from Judges of the Court

10 And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section One hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being, but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court in such case shall be to Us Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

Appeal from other Civil Courts in the Province of Bihar and Orissa

11 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal, by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

Jurisdiction as to Infants and Lunatics

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents.

Law to be administered by the High Court.

By the High Court in the exercise of extraordinary original civil jurisdiction

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

14 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents

Ordinary original criminal jurisdiction of the High Court.

16 And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

17 And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

No appeal from High Court exercising original jurisdiction

Court may reserve points of law

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

High Court to review cases on points of law reserved by one or more Judges of the High Court

20 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature as Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India,

Appeals from other Criminal Court in the province of Bihar and Orissa

21 And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other officers in the Province of Bihar and Orissa who were, *immediately before the publication of these presents*, authorized to refer cases to the High Court of Judicature at Fort William in Bengal and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents subject to reference to or revision by the High Court of Judicature at Fort William in Bengal

Hearing of referred cases, and revision of criminal trials

22 And We do further ordain that the High Court of Judicature at Patna shall have power *to direct the transfer of any criminal case or* appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court

High Court may direct the transfer of a case from one Court to another

Criminal Law

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal reference or revision, charged with any offence for which provision is made by Act No XLV of 1860, called the "Indian Penal Code, or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Offenders to be punished under Indian Penal Code

Admiralty Jurisdiction

24 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable there in immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal

Civil

25 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction.

26 And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of pro-

Testamentary and intestate jurisdiction

bates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction

Matrimonial Jurisdiction

27 And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, with in the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction

Powers of single Judges and Division Courts

Single Judges and Division Courts

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided, then the opinion of the senior Judge shall prevail

Civil Procedure

Regulation of proceedings

29 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No V of 1908 passed by the Governor General in Council, and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary, intestate and matrimonial jurisdiction respectively

Criminal Procedure.

Regulation of proceedings

30. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being an Act No V of 1898 passed by the Governor General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council

Power to appeal in civil cases

31 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents, provided in either case, that the sum or matter at issue is of the amount of value of not less than 10 000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10 000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as afore said, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council, but subject always to such rules and orders as are now is force, or may from time to time be made respecting appeals to Our selves in Council from the Courts of the Province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Appeal from interlocutory judgments

32 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers him self aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

Appeal in criminal cases

33 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for their opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa.

Rules as to transmission of copies of evidence and other documents.

34 And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council,

a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And we do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court

Judges to visit Orissa by way of circuit

35 And We do further ordain that, unless the Governor General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant Governor in Council otherwise directs Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division

Special commissions and circuits

36. And We do further ordain that whenever it appears to the Lieutenant Governor in Council, subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdicion of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places *accordingly*

Proceedings of Judges on special commission or circuit

37 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers

Power to delegate duties

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi judicial and non judicial duties.

Cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal

Cessation of jurisdiction of the High Court of Judicature at Fort William over the Province of Bihar and Orissa

39 And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

(a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question, * and

(b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 16th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th or 35th clause of the Letters Patent bearing date at Westminster the Twenty eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty five relating to that Court and

(c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court

Provided secondly, that if any question arises as to whether any case is covered by the first proviso to this clause the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final

Calls for Records, etc, by the Government

High Court to comply with requisitions from Government for records etc

40 And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant Governor in Council for records, returns and statements, in such form and manner as he may deem proper

Powers of Indian Legislatures

Powers of Indian Legislatures prescribed

41 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor General in Legislative Council, and also of the Governor General in Council under section Seventy one of the Government of India Act, 1915, and also of the Governor General in cases of emergency under section Seventy two of that Act and may be in all respects amended and altered thereby

In Witness whereof we have caused these Our Letters to be made Patent. Witness Ourself at Westminster the Ninth day of February, in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign

By warrant under the King's Sign Manual

(Signed) SCHUSTER.

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* See *Ramgobind v Thakur Dayal* (1917) 2 Pat L J 633 43 I C 301

Letters Patent for the High Court of Lahore.

March 21, 1919.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act

And whereas the Provinces of the Punjab and Delhi are now subject to the Jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor General of India in Council, being Act No XXIII of 1865, and was continued by later enactments and no part of the said provinces is included within the limits of the local jurisdiction of any High Court

Establishment of High Court at Lahore

1 Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish for the Province of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2 And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Rattigan, Knight, and the six other Judges being William Chevis, Esquire, Henry Scott Smith, Esquire, Shadi Lal, Esquire, Rai Bahadur, Walter Aubinle Rossignol, Esquire, Leycester Hudson Leslie Jones, Esquire, and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

Declaration to be made by Judges

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore, previously to entering in the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor of the Punjab may commission to receive it —

> "I, *A. B.*, appointed Chief Justice [*or* a Judge] of the High Court of Judicature at Lahore do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.

4 And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a Seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Lahore." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the Office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act, 1915, and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.



Writs, etc, to issue in name of the Crown and under seal

5 And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of officers

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent, And it is our further will and pleasure, and we do hereby, for Us, Our heirs and successors give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant Governor of the Punjab, subject to the control of the Governor General in Council, may approve of, Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocates, Vakils and Attorneys.

Powers of High Court in admitting Advocates Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

8 And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys at-Law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co suitor

Powers of High Court in making rules for the qualifications, etc, of Advocates, Vakils and Attorneys

Civil Jurisdiction of the High Court

9 And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

10 And We do further ordain that an appeal shall lie to the High Court of Judicature at Lahore from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section one hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being, but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

Appeal to the High Court from Judges of the Court

11 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi

12. And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates, of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

Jurisdiction as to Infants and Lunatics

Law to be administered by the High Court

By the High Court in the exercise of extraordinary original civil jurisdiction

13 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein

By the High Court in the exercise of appellate jurisdiction

14 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Criminal Jurisdiction

Ordinary original criminal jurisdiction of the High Court

15 And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents

Jurisdiction as to persons

16 And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

Extraordinary original criminal jurisdiction

17 And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf

No appeal from High Court exercising original jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

Court may reserve points of law

High Court to review cases on points of law reserved by one or more Judges of the High Court

19 And We do further ordain that on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right

20. And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

Appeals from other criminal Courts in the Provinces of the Punjab and Delhi.

21 And We do further ordain that the High Court of Judicature at Lahore shall be a court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab

Hearing of referred cases and revision of criminal trials

22 And We do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

High Court may direct the transfer of a case from one Court to another

Criminal Law

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Offenders to be punished under Indian Penal Code

Testamentary and Intestate Jurisdiction

24 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Testamentary and Intestate jurisdiction

Let. Pat. [Lahore].

Cls. 25-29.

Matrimonial Jurisdiction

25 And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi, in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces which is lawfully possessed of that jurisdiction

Matrimonial jurisdiction

Powers of Single Judges and Division Courts

26 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court, thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915 and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but if the Judges be equally divided, then the opinion of the senior Judge shall prevail

Single Judges and Division Courts

Civil Procedure

27 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No V of 1908, passed by the Governor General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction respectively

Regulation of proceedings

Criminal Procedure

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act, No V of 1898, passed by the Governor-General in Council, or by such further or other law in relation to criminal procedure as may have been or may be made by competent legislative authority for India

Regulation of proceedings

Appeals to Privy Council

29 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or

Power to appeal in civil cases.

respecting property amounting to or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Appeal from interlocutory judgments

30 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

Appeal in criminal cases

31 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders, as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi

Rule as to transmission of copies of evidence and other documents

32. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Cls. 33-37. *Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court*

Special commissions and circuits

33 And We do further ordain that whenever it appears to the Lieutenant Governor of the Punjab, subject to the control of the Governor General in Council convenient that the jurisdiction and power by these Our Letters Patent or by or under the Government of India Act, 1915 vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly

Proceedings of Judges on special commission or circuit

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 3rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers

Power to delegate duties

35 The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar Prothonotary or Master or other official of the Court any judicial quasi judicial and non judicial duties

Calls for records etc by the Government

High Court to comply with requisitions from Government for records etc

36 And it is Our further will and pleasure that the High Court of Judicature at Lahore shall comply with such requisitions as may be made by the Governor General in Council or by the Lieutenant Governor of the Punjab for records, returns and statements, in such form and manner as he may deem proper

Powers of Indian Legislature

Powers of Indian Legislatures preserved

37 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council, and also of the Governor General in Council under section seventy one of the *Government of India Act, 1915*, and also of the Governor General in cases of emergency under section seventy two of that Act, and may be in all respects amended and altered thereby

In Witness thereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the 21st day of March in the Year of Our Lord one thousand nine hundred and nineteen and in the ninth Year of Our reign

By Warrant under the King's Sign Manual.

(Signed) SCHUSTER

Letters Patent for the High Court of Rangoon.

(*November* 11, 1192.)

GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting Whereas in the Government of India Act, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction, powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act.

And whereas that portion of the Province of Burma known as Lower Burma is now within the limits of the jurisdiction of the Chief Court of Lower Burma which was established by an Act of the Governor General of India in Legislative Council, being Act No VI of 1900, and whereas that portion of the said Province known as Upper Burma is with certain exceptions now within the limits of the jurisdiction of the Judicial Commissioner of Upper Burma appointed in pursuance of a Regulation of the Governor General of India in Council, being Regulation No V of 1892, and of the Court of the Judicial Commissioner of Upper Burma which was established by a Regulation of the Governor-General of India in Council, being Regulation No VIII of 1886, and was continued by a Regulation of the Governor General of India in Council, being Regulation No I of 1896:

And whereas no part of the said Province is included within the limits of the local jurisdiction of any High Court

Establishment of High Court at Rangoon

1 Now know ye that We, upon full consideration of the premises and of Our special Grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for those portions of the Province of Burma, at present within the limits of the jurisdiction of the said Chief Court of Lower Burma and of the said Judicial Commissioner and of the said Court of the Judicial Commissioner of Upper Burma, as aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Rangoon, and We do hereby constitute the said Court to be a Court of Record

Constitution and first Judges of the High Court

2 *And We do hereby appoint and ordain that the High Court of Judicature at* Rangoon shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section one hundred and one of the Government of India Act, ordinarily consist of a Chief Justice and not less than seven other Judges, the first Chief Justice being Sir Sydney Maddock Robinson, Knight, and the *other Judges being Leslie Harry Saunders, Esquire,* Companion of the Most Exalted Order of the Star of India, Maung Kin, Esquire, Charles Philip Radford Young, Esquire, Henry Sheldon Pratt, Esquire, Benjamin Herbert Heald, Esquire, John Guy Rutledge, Esquire, one of Our Counsel learned in the Law, and Hugh Ernest MacColl, Esquire, being respectively qualified as in the said Act is declared.

Cls. 3-6.

Declaration to be made by Judges

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Rangoon previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor of Burma in Council may Commission to receive it —

I, A B appointed Chief Justice [or a Judge] of the High Court of Judicature at Rangoon, ... will faithfully perform the duties of my office to the best of m...

4 And ...

at Rangoon ...



seal bearing a device and impression ... within an exergue or label surrounding the same, with this inscription, ' The seal of the High Court at Rangoon ' And ... ordain and appoint that the said seal shall ... in case of vacancy of the office of Chief Justice, ... e, the same shall be delivered over and kept in the custody of the pe... t as Chief Justice under the provisions of section one hundred and five of the Government of India Act And We do further grant ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be and is hereby authorized and empowered to demand seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his her or their possession

Writs etc to issue in name of the Crown and under seal

5 And We do hereby further grant ordain and appoint that all writs, summonses, precepts, rules orders and other mandatory process to be used issued or awarded by the High Court of Judicature at Rangoon shall run and be in the name and style of Us, or of Our Heirs and Successors, and shall be sealed with the seal of the said High Court

Appointment of officers

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Rangoon from time to time, as occasion may require and subject to any rules and restrictions which may be prescribed from time to time by the Governor of Burma in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent And it is Our further will and pleasure, and We do hereby, for Us, Our Heirs and Successors, give grant direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Governor of Burma in Council, subject to the control of the Secretary of State in Council, may approve Provided always, and it is Our will and pleasure that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence permissible by or under any rules made by the Secretary of State in Council, and to absent himself from the said limits during the term of such leave in so far as may be permitted by or under the said rules

Admission of Advocates and Pleaders.

7 And We do hereby authorize and empower the High Court of Judicature at Rangoon to approve, admit and enrol such and so many Advocates, Pleaders and Attorneys as to the said High Court may seem meet and such Advocates, Pleaders and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead, or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in admitting Advocates, Pleaders, and Attorneys

See *In the matter of certain First Grade Advocates* (x)

8. And We do hereby ordain that the High Court of Judicature at Rangoon shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Pleaders or Attorneys, and no person whatsoever but such Advocates, Pleaders or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor of the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co suitor

Power of High Court in making rules for the qualifications, etc, of Advocates Pleaders and Attorneys

Civil Jurisdiction of the High Court.

9. And We do hereby ordain that the High Court of Judicature at Rangoon shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the local legislature and until some local limits shall be so declared and prescribed, within the limits of the ordinary original civil jurisdiction of the Chief Court of Lower Burma immediately before the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction

Local limits of the ordinary original civil jurisdiction

10 And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court.

Original jurisdiction as to suits

11 And We do further ordain that the High Court of Judicature at Rangoon shall have power to remove, and to try and determine, as a Court of extraordinary original civil jurisdiction, any suit being or falling within the jurisdiction of any Court subject to

Extraordinary original civil jurisdiction

(x) (1923) 1 Rang 142 74 I C 913, ('24) A R 1

Cls. 11-14. its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Application for transfer.—Applications for transfer should be heard by a Judge sitting on the Original Side of the High Court (y)

Joinder of several causes of action

12 And We do further ordain that when the plaintiff has several causes of action against the defendant, such causes of action not being for land or other immoveable property, and the High Court of Judicature at Rangoon shall have original jurisdiction in respect of one such cause of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit

Appeal to the High Court from Judges of the Court

13 And We do further ordain that an appeal shall lie to the High Court of Judicature at Rangoon, from the Judgment (not being a judgment made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being, but that the right of appeal from other judgments of Judges of the said High Court of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

See notes to cl 15 of the *Letters Patent* for the Calcutta High Court on pp 1087 1090 above

Appeal from other Civil Courts

14. And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Civil Courts of the Province of Burma for which, immediately before the publication of these presents, the Chief Court of Lower Burma or the Court of the Judicial Commissioner of Upper Burma was a Court of Appeal, and from all other Civil Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction

(y) *Jupiter General Insurance Co Ltd v Abdul Aziz* (1923) 1 Rang 226, 76 I C 479 (23) A R 18

in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Court of the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

Jurisdiction as to Infants and Lunatics

15 And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Burma, as that which was vested in the Chief Court of Lower Burma, and the Court of the Judicial Commissioner of Upper Burma immediately before the publication of these presents

Provision with respect to the Insolvent Court

16 And We do further ordain that the Court for relief of insolvent debtors as Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon, and the said High Court, and any such Judge thereof, shall have and exercise within the Province of Burma, such power and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction

17 And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these Letters Patent had not issued

Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction

18 And We do further ordain that with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

Law and equity to be administered by the High Court in the exercise of extraordinary original civil jurisdiction

19 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Rangoon, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall, until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

Law and equity to be administered by the High Court in the exercise of appellate jurisdiction

20 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Rangoon, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

CRIMINAL JURISDICTION.

Ordinary original criminal jurisdiction of the High Court

21 And We do further ordain that the High Court of Judicature at Rangoon shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all persons beyond such limits over whom the Chief Court of Lower Burma has such criminal jurisdiction immediately before the publication of these presents

Jurisdiction as to persons

22. And We do further ordain that the High Court of Judicature at Rangoon, in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

Extraordinary original criminal jurisdiction

23 And We do further ordain that the High Court of Judicature at Rangoon shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Government Advocate, or by any magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original criminal jurisdiction

24. And We do further ordain that there shall be no appeal to the High Court of Judicature at Rangoon, from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

Court may reserve points of law

High Court to review on certificate of the Government Advocate

25. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the Government Advocate that in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court, should be further considered, the High Court of Judicature at Rangoon shall have full power and authority to review the case, or such part of it as, may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

Appeals from Criminal Courts

26 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of Appeal from the Criminal Courts for which immediately before the publication of these presents the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Criminal Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma by virtue of any law then in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India.

27 And We do further ordain that the High Court of Judicature at Rangoon shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers, who were, *immediately before the publication* of these presents authorised to refer cases to the Chief Court of Lower Burma or to the Judicial Commissioner of Upper Burma, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction, as were immediately before the publication of these presents, subject to reference to or revision by the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma.

Hearing of referred cases and revision of criminal trials

28 And We do further ordain that the High Court of Judicature at Rangoon shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

High Court may direct the transfer of a case from one Court to another

Criminal Law

29 And We do further ordain that all persons brought for trial before the High Court of Judicature at Rangoon either in exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, reference or revision, charged with any offence for which provision is made by the Indian Penal Code, being an Act passed by the Governor General in Council and being Act No XLV of 1860, or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts, and not otherwise

Offenders to be punished under Indian Penal Code

Admiralty Jurisdiction.

30 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such civil and maritime jurisdiction as might be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty immediately before the date of the publication of these present, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as might be exercised by the said High Court at the said date.

Civil

31 And We do further ordain that the High Court of Judicature at Rangoon shall have and exercise all such criminal jurisdiction as might immediately before the publication of these presents be exercised by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction.

32. And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority as that which was immediately before the publication of these presents law fully exercised within the Province of Burma by the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma in

Testamentary and intestate jurisdiction

Let. Pat. [Rangoon].

Cls. 32-36. relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction

Matrimonial jurisdiction

33. And We do further ordain that the High Court of Judicature at Rangoon shall have jurisdiction, within the Province of Burma, in matters matrimonial between Our subjects professing the Christian religion Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts

Single Judges and Division Courts

34. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Rangoon in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, and if such Division Court is composed of two or more Judges and the Judges are divided in union as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority but, if the Judges be equally divided, then the opinion of the senior Judge shall prevail

Civil Procedure.

Regulation of proceedings

35. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and martimonial jurisdiction, respectively Provided always, that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General of India in Legislative Council, and being Act No V of 1908 and the provisions of any law which has been or may be made, amending or altering the same by the local legislature or by competent legislative authority for India

Criminal Procedure.

Regulation of proceedings

36 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor General of India in Legislative Council, or by such further or other laws in relation to criminal procedure as have been or may be made by the local legislature or by competent legislative authority for India.

Appeals to Privy Council

37. And We do further ordain that any person or persons may appeal to Us, Our *Heirs and Successors, in Our or Their Privy Council, in any* matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment, decree or order, made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 13th clause of these presents

Power to appeal in civil cases

Provided in either case that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs and Successors, in Our or Their Privy Council; but subject always to such rules and orders as are now in force or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Burma, except so far as the said existing rules and orders, respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

38. And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said

Appeal from interlocutory judgment

himself aggrieved
said High Court n

to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

39 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Rangoon made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 24th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, provided the said High Court shall declare that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Burma

Appeal in criminal cases

40 And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Rangoon to Us, Our Heirs and Successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council a true and correct copy of all evidence, pro

Rules as to transmission of copies of evidence and other documents

Cls. 40-44. ceedings judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, conform to and execute, or cause to be executed, such judgments and orders as We, Our Heirs and Successors, in Our or Their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal order, or other order or rule of the said High Court, should or might have been executed

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

41 And We do further ordain that, unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judicature at Rangoon, as the Chief Justice may from time to time direct, shall sit at Mandalay, in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court provided that the Chief Justice may in his discretion, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon

Special commissions and circuits

42 And We do further ordain that whenever it appears convenient to the Governor of Burma in Council, that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the said High Court shall visit such place or places accordingly

Proceedings of Judges on special commission or circuit

43 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India.

Provisions regarding pending proceedings

44 And We do further ordain that all suits, appeals, revisions, applications, reviews, executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma, or before the Judicial Commissioner of Upper Burma or in the Court of the Judicial Commissioner of Upper Burma, in the exercise of any jurisdiction vested in them by any law, shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court, and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents

Delegation of Duties to Officers

Power to delegate duties

45 The High Court of Judicature at Rangoon may, from time to time, make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi judicial and non judicial duties

Calls for Records, etc , by the Government

High Court to comply with requisitions from Government for records etc

46 And it is Our further will and pleasure that the High Court of Judicature at Rangoon shall comply with such requisitions as may be made by the Governor General of India in Council or by the Governor of Burma in Council for records, returns and statements, in such form and manner as he may deem proper

Powers of Indian Legislatures

Powers of Indian Legislatures preserved

47 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature, and also of the Governor General in Council under section seventy one of the Government of India Act, and also of the Governor General under section seventy two of that Act, and may be in all respects amended and altered thereby.

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the eleventh day of November in the Year of our Lord one thousand nine hundred and twenty two and in the thirteenth Year of Our reign

By Warrant under the King s Sign Manual

(Signed) SCHUSTER.

APPENDIX III.

Rules made by the High Court of Calcutta, under s. 122.

O. 7, r. 3.— *After O 7, r 3, add the words*—

and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same are in terms of the local measures

O. 16, r. 2 (1) —*Add the following proviso to O 16, r (2) (i)* —

Provided that when a Government officer is summoned on behalf of Government, the Court shall not require his travelling and other expenses to be paid under this rule

O. 16, r 3 —*Add the following proviso to O 16, r 3* —

Provided that money shall not be tendered under this rule to Government officers whose pay exceeds Rs. 10 per mensem, or whose head quarters are situate more than 5 miles from the Court, when they are summoned to appear as witness in their official capacity in cases to which Government is a party

Schedule 1—Appendix A—Form No. 13.—In the form of 'Breach of agreement to purchase land,' No 13 of Appendix A to the First Schedule, *cancel* the word 'bighas' and *substitute* there for the words—acres / bighas

Schedule 1—Appendix G—Form No. 9.—In the form of 'Decree in Appeal,' No. 9 of Appendix G to the First Schedule *cancel* the words from 'Memorandum of Appeal' to 'the following reasons, namely' —

APPENDIX IV.

Rules made by the High Court of Bombay, under s. 122.

O. 3, r. 2, clause (a) —*O 3, r 2, cl (a) be amended to read as follows* —

Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties (a)

O. 5, r. 22 —*The following proviso be added to O 5, r 22* —

Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary

O. 13, r. 9 —*Between the first and second proviso to sub-rule* (1) *of rule* 9 *of Order XIII, the following proviso shall be inserted namely* —

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI, rule 1, may be returned after the appeal has been disposed of by the Court

O. 16, r. 1 (a) —*The following shall be added as rule* 1 *A to Order XVI* —

1 A (1) The Court may on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court

O. 16, r. 2 (1) —*The following shall be inserted as proviso to sub rule* (1) *of rule* 2 *of Order* 16 —

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

O. 16, r. 3 —*The following shall be inserted as proviso to rule* 3 *of Order* 16 —

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice

(a) See *Vardaji* v *Chandrappa* (1917) 41 Bom 40 36 I C 805

Rules—Bom.

App. IV. or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him

O. 21, r. 22—In rule 22 of Order XXI the words "two years" shall be substituted for the words "one year" wherever they occur

O. 21, r. 44A—*After r 44 of O 21, the following shall be inserted, namely* —

44A Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate

O. 21, r. 45—*The following words shall be added to sub rule* (1) *of rule* 45 *of Order XXI, after substituting a semi colon for the full stop* —

and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time.

O. 21, r. 54—*The following shall be added to sub rule* (1) *of rule* 54 *of Order XXI* —

Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged

O 21, r. 69 (2)—

In sub-rule (2) of rule 69 of Order XXI "thirty days" shall be substituted for "seven days"

O. 21, r. 72A—*After r 72 of O 21, the following shall be inserted, namely* —

72A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid

O. 21, r. 91A—*The following rule shall be added as rule* 91A *in Order XXI of the Code of Civil Procedure* —

Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under rules 89, 90 or 91, and in the case of an application under rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the local Government under section 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of rules 89, 90 and 91

O. 32, r. 3 (4)—

The words "to the minor and" in line 2 of sub rule (4) of rule 3 of Order XXXII shall be deleted

O. 33, r. 1—*The following sentence shall be added to the Explanation to rule 1 of Order XXXIII, Civil Procedure Code, namely* —

In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded.

O. 34, r. 2 (d) —*Substitute for clause (d) of rule 2 of Order XXXIV, the following* —

(d) that, if such payment is not made on or before the day to be fixed by the Court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3

O 34, r 4 (1) —

In sub rule (1) of rule 4 of Order XXXIV after the words as therein mentioned ' substitute the plaintiff shall be entitled to apply for a final decree for sale under rule 5

O. 34, r. 5 (2) —

In sub rule (2) of rule 5 of Order XXXIV, after the words proceeds of the sale, substitute (after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same

Provided that the Court may upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment

O 34, r 7 (d) —

For clause (d) of rule 7 of Order XXXIV, substitute (d) that if such payment is not made on or before the day to be fixed by the Court the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8

O 37, r 2 —*In sub rule (1) of rule 2 of Order XXXVII, after the words ' promissory notes the following words shall be inserted, namely* —

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only

(3) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under sub rule (1)

O 37, r 3 —*In rule 3 of Order XXXVII the following sub rule (3) shall be inserted* —

(3) The provisions of section 5 of the Indian Limitation Act 1908 shall apply to applications under sub rule (1)

O 41, r 3 A —*After rule 3 of Order XLI the following rule shall be inserted namely* —

3 A Where an appellant applies for delay to be excused notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13

In sub rule (2) of rule 3 of Order XLV after the words to show cause why the said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to refuse the certificate

O 43, r. 1 —

Clause (w) of rule 1 of Order XLIII shall be deleted.

O 45, r 3 (2) —

In sub-rule (2) of rule 3 of Order XLV, after the words to show cause why the said certificate should not be granted the following words shall be inserted, namely — unless it thinks fit to refuse the certificate.

Rules—Bom.

App. IV. **O. 45, r. 7-A.**—*After rule 7 of Order XLV the following rule shall be inserted, namely* —

7 A. No such security as is mentioned in rule 7 (1), clause (a), shall be required from the Secretary of State for India in Council or, where the local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity

O. 49, r. 4.—*The following rule made under s 128 (2) (i) to be added as r 4 in O 49* —

Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal.

Schedule I—Appendix B—Form No. 10.—*Form No 10 in Appendix B, Schedule I be amended to read as follows* —

' To accompany Returns of Summons of another Court (Order V, r 23)

(*Title.*)

Read proceeding from the forwarding for service on in Suit No of 19 *of that Court*

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with this proceeding

I hereby declare that the said summons on has been duly served.

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner '

Schedule I—Appendix D—Form No 4

In line 4 of Form No. 4 in Appendix D, for " realization ' substitute " the day hereinafter referred to '

For clause (2) of the said form, substitute ' (2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be entitled to apply to the Court for a final decree for sale.'

Delete Clause (3) of the said form.

Schedule I—Appendix D—Form No. 5

For clause (2) of Form No. 5 in Appendix D, substitute " (2) That if such payment is not made on or before the said day of 19 , the defendant shall be entitled to apply for a final decree for foreclosure or sale "

Schedule 1—Appendix D—Form No 10 A—*Add the following form as Form No 10A* —

" No 10 A.

Final Decree for sale.

(*Title*)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff, dated the day of 19 , and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at per cent per annum and subsequent costs, and that the balance, if any, be paid to the defendant

(2) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance "

APPENDIX V.

Rules made by the High Court of Allahabad under s. 122.

Order V.

27 *To O V, r 27, add the following as note 1 and note 2 —*

1 A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911

2 In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is *employed in order that arrangements may be made for the performance of the duties* of such person

Illustration If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district, and if to a sub registrar it shall inform the District Registrar to whom the sub registrar is subordinate

Add the following rules at the end of O 5 —

31 An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court.

32 Ordinarily every process except those that are to be served on Europeans shall be written in the Court vernacular But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation

Order VII.

Add the following rules at the end of O 7 —

19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added, file a proceeding of this nature

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh

21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the

notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23 Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party

24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so

26 Nothing in these rules shall apply to the notice prescribed by Order XXI, rule 22.

Order VIII.

Add the following rules at the end of O 8 —

11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

12 Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be to addresses for service filed under the preceding rule

Order XIII.

Add the following rules at the end of O. 13 —

12 Every document not written in the Court vernacular or in English which is produced (*a*) with a plaint or (*b*) at the first hearing or (*c*) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13 When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, &c, AA1, BB1, &c, and those of the second A2, B2, C2, &c, AA2, BB2, &c When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series

Order XVI.

Add the following to O 16, r 2 —

2 (4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters.

Add the following rules at the end of O 16 —

22 (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale —

(a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day,

(b) In the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct, and

(c) In the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs 200 a month, from three to five rupees a day

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense

Illustration

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons was issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed

23 In cases to which Government is a party, Government servants, not being police constables, whose salary exceeds Rs 10 per mensem, and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.

Order XVIII

Add the following rules at the end of O. 18 —

19 (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in

evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English and the issues shall be signed by the Judge and shall form part of the English proceedings

Order XIX.

Add the following rules at the end of O 19.—

4. Affidavits shall be entitled in the Court of at (naming such Court). If the affidavit be in support of or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case If there be no such case, it shall be entitled *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly, and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7 Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to Two or more persons may join in an affidavit. each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8 When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say"

9 Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe to be true," and shall state the name and address of, and sufficiently described for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11 Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

12. No verification of a petition and no affidavit purporting to have been made by a *pardah nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her

13 The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof the affidavit may be made

14 The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15 If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made

Order XX.

Add the following rule at the end of O 20 —

21. (1) Every decree and order as defined in section 2 other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as

of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

Order XXI.

22. In Order XXI *substitute* the words "two years" *for* "one year" both in rule 22 (1) *(a)* and in the second line of the proviso to rule 22.

Substitute the following *for* paragraph (2) in rule 25.—

25 (2) "2. Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

Substitute the following *for* rule 55.—

55 (1) Notice shall be sent to the sale officer executing a decree of all applications for ratable distribution of assets made under section 73 (1) in respect of the property of the same judgment debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—

(a) the amount decreed (which shall include the amount of any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub section (1), with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree (including any decree passed against the same judgment debtor), notice of which has been sent to the sale officer under sub-section (1), is otherwise made through the Court or certified to the Court or

(c) the decree (including any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub section (1), is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Add the following rules at the end of O. 21.—

104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105 Every attachment of moveable property under rule 43 of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106 When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the sub registrar within whose sub district such property is situated, showing that the sub registrar has searched his book nos I and II and their indices for the past twelve years and stating the encumbrances if any, which he has found on the property

107 Where an application is made for the sale of land or of any interest in land the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No 188711—238 10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question

On the day so fixed, or on any date to which the enquiry may have been adjourned the Court may take such evidence, by affidavit or otherwise, as it may deem necessary and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting

108 When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government

109 The certificate of the sub registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry

No fees are payable in respect of the report by the Collector

110 The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry

111 If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale

112 The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall wholly or in part be omitted therefrom.

113 When permission has been given to a decree holder to bid for property, the Court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons, in addition to the decree holder, entitled to share in the sale proceeds.

114 Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser

115 Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act

116 When an application is made for the attachment of live stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs or such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer ,may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

117 Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118 If the custody of live stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register—

(a) the number and description of the animals,

(b) the day and hour on and at which they were committed to his custody,

(c) the name of the attaching officer or his subordinate by whom they were committed to his custody, and shall give such attaching officer or subordinate a copy of the entry

119 For every animal committed to the custody of the pound keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continue, according to the scale prescribed under section 12 of Act No 1 of 1871

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act

120 The pound keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed

121 The charges herein authorized for the maintenance of live stock shall be paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer

122. Animals attached and committed as aforesaid shall not be released from custody by the pound keeper except on the written order of the Court, or of the attaching officer or of the officer appointed to conduct the sale, the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118

123 For the safe custody of moveable property other than live stock while under attachment the attaching officer shall subject to approval by the Court, made such arrangements as may be most convenient and economical

124 With the permission of the Court the attaching officer may place one or more persons in special charge of such property

125 The fee for the services of each such person shall be payable in the manner prescribed in rule 116 It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem The Court may at its discretion allow a higher fee, but if it do so, it shall state in writing its reasons for allowing an exceptional rate

126 When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge *Provided that, where the amount does not exceed Rs 5, it may be* paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with

127 When in consequence of an order of attachment being withdrawn or for some other reasons, the person has not been employed or has remained in charge or the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be

128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments

129 When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be A note that the same has been paid

into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book

130. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

131 Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment debtor simultaneously the notices required by Order XXI, rules 22, 66 and 107

132 For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24

Order XXVII.

Add the following rule at the end of O 27 —

9 In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears Such memorandum shall be, as nearly as may be, in the terms of the following form

TITLE OF THE SUIT, ETC

I A B, Government Pleader, appear on behalf of the Secretary of State for India in Council (*or* the Government of the United Provinces, *or* as the case may be) Respondent (*or*, &c), in the suit

or, on behalf of the Government [which under Order 27, rule 8 (1) of Act No V of 1908, has undertaken the defence of the suit], respondent (*or*, &c), in the suit

Order XXXII.

4 (3) In r 4 (3) *substitute* a comma for the full stop *and add the following words* —

' Unless a notice under rule 3 (4) of this order has been duly served on him and he has failed to reply to that notice within the time specified therein '

Order XLI.

Substitute the following for r 3 (1) —

Rejection or amendment of memorandum

3 (1) Where the memorandum of appeal is not drawn up in the manner herein before prescribed, or accompanied by the copies mentioned in rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there '

Add the following rule at the end of O 41 —

38 (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and *notices and processes shall issue from the* appellate Court to such addresses

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings.

Order XLII.

Substitute the following for r 1 :—

1 The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision :—

Procedure

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the Court of first instance.

Order XLIII.

Add the following rule at the end of O. 43 :—

3. In every appeal under rule 1, in every miscellaneous case, and *in every suit dismissed for default,* a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

Order XLVI.

Add the following rule at the end of O 46 :—

8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order.

Order XLVII.

Add the following rule at the end of O. 47 :—

10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order.

Order LII.—[*New.*]

1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

FORMS.

APPENDIX B.

No 7.

Form No 7—an order for transmission of summons for service in the jurisdiction of another Court (Order 5, rule 21) is hereby cancelled.

APPENDIX B.

No 10.

Form No. 10—a form to accompany return of summons of another Court (Order 5, rule 23), is cancelled.

APPENDIX B

No 20

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS

No OF SUIT

Name of parties
In the Court of the
Date fixed for hearing

1	2	3	4		5		6
			Distance of residence from Court		Cash paid for		
Number of witnesses to be summoned	Name and full address of each person to be summoned	Rank or occupation	Rail	Road	Travelling expenses	Diet expenses	Name and address of person to whom unexpended travelling expenses and diet money should be returned

APPENDIX E

No 43

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form —

In the Court of at

Suit No of 19

against

Plaintiff

C D of Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said C D has been arrested under a warrant and brought before the Court of , and whereas the said C D has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III of 1907, to be declared an insolvent, and the said Court has ordered that the said C. D shall be released from custody if the said C D furnish good and sufficient security in the sum of Rs. that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No III of 1907, to be declared as insolvent Therefore I, E F, inhabitant of have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said C D will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs.

Witness my hand at this day of 19

(Sd.) E. F,
Surety.

Witnesses

APPENDIX F

No 11

The security to be furnished under Order XXXVIII rule 9 shall be as nearly as may be by a bond in the following form —

In the Court of *at*

Suit No of 19

Plaintiff
Defendant

Amount of suit Rupees

WHEREAS in the suit above specified the plaintiff aforesaid has applied to the said Court that the said defendant may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit or that on his failure so to do certain property of the said defendant may be attached

And whereas on the failure of the said defendant to furnish such security or show cause why it should not be furnished the property aforesaid of the said defendant has been attached by order of the said Court

Therefore I inhabitant of have voluntarily become security and hereby bind myself my heirs and executors to as Judge of the said Court and his successors in Office that the said defendant shall produce and place at the disposal of the said Court when required the property herein below specified namely *(here give description of property or refer to annexed schedule)* of the value of the same or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment and in default of his so doing I bind myself my heirs and executors, to pay to as Judge of the said Court and his successors in office on his order such sum to the extent of rupees *(here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment)* as the said Court may adjudge against the said defendant

Witness my hand at this day of 19

(Signed)
Surety

Witnesses (Signed)

No 12

The security to be furnished under Order XXXIX rule 2 ( ) shall be as far as may be by a bond in the following form —

In the Court of at

Suit No of 19

Plaintiff
Defendant

WHEREAS in the suit above specified instituted by the said plaintiff to restrain the said defendant from *(here state the breach of contract or other injury)* the said Court has on the application of the said plaintiff granted an injunction to restrain the said defendant from the repetition *(or the continuance)* of the said breach of contract *(or wrongful act complained of)* and required security from the said defendant against such repetition *(or continuance)*

Therefore I inhabitant of have voluntarily become security and do hereby bind myself my heirs and executors to as Judge of the said Court and his successors in office that the said defendant shall abstain from the repetition *(or continuance)* of the breach of contract aforesaid

or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself, my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees , as the Court shall adjudge against the said defendant.

Witness my hand at this day of 19 .

Witnesses.

Surety.

APPENDIX H.

No 4

Notice to show cause. (General Form)

IN THE COURT OF

AT DISTRICT

CIVIL SUIT NO. OF 19 .

Miscellaneous No of 19 .

resident of

versus

resident of

To

WHEREAS the abovenamed

has made application to this Court that

you are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o clock in the forenoon to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be appointed guardian for the suit

Given under my hand and the seal of the Court this day of 19

Judge

APPENDIX H

No 5

(List of documents produced by $\frac{\text{plaintiff}}{\text{defendant}}$ Order 13, rule 1)

IN THE COURT OF AT DISTRICT

SUIT NO OF 19

Plaintiff

versus

Defendant

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant)

This list was filed by this day of 19

1	2	3			4
Serial number	Description and date, if any of the document	What became of the document			Remarks
		If brought on the record the exhibit mark put on the document	If rejected, date of return to party, and signature of party or pleader to whom the document was returned	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24 Chapter III the date of enclosure in the envelope	

Signature of party or pleader producing the list

APPENDIX H.
No 11

Notice to minor defendant and guardian.

IN THE COURT OF AT DISTRICT

SUIT NO OF 19

resident of
plaintiff.

versus

resident of
defendant.

To

Minor defendant.
Natural guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1) , are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint you or some other person to act as guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court this day of 19

Judge.

APPENDIX H

No. 16.

The security to be furnished under Order XXV rule 1, shall be as nearly as may be, by bond in the following form —

In the Court of at

Suit No. of 19 .

Plaintiff
Defendant.

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immoveable property within British India independent of the property in the suit

Therefore, I, inhabitant of , have vountarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and to his successors in office that the said plaintiff , his heirs and executors, shall whenever called on by the said Court pay all costs that may have been or may be incurred by the said defendant , in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order

Witness my hand at this day of 19

(Signed)

Witnesses *Surety*

APPENDIX H

No. 17

ADDRESS FOR SERVICE.

Under Order VII, rules 19 to 26, Order VIII, rules 11 and 12, Order XLI, rule 38 Order XLVI, rule 8, Order XLVII, rule 10, Order LII, rule 1

IN THE COURT OF THE OF

ORIGINAL $\frac{\text{Suit}}{\text{or Case}}$ No. OF 192 .

Plaintiff,

versus

Defendant.

This address shall be within the local limits of the district Court within which the suit is filed or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province —

Name parentage, and caste.	Residence.	Pargana or tahsil	Post office.	District.

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff. Defendant. Appellant. Respondent.

Or

I file the above address according to the instructions given by my client, (name)———————— (and capacity)————————.

Signature of pleader.

N B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

APPENDIX H.

No. 18.

NOTICE OF CHANGE OF ADDRESS FOR SERVICE.

Under Order VII, rules 19 to 26, Order VIII, rules 11 and 12, Order XLI, rule 38, Order XLVI, rule 8, Order XLVII, rule 10, Order LII, rule 1

IN THE COURT OF THE OF

ORIGINAL—Suit or Case—No OF 192

.. Plaintiff.

versus

. Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other provinces —

Name, parentage and caste.	Residence.	Pargana or tahsil	Post office.	District

Dated

Any summons, notice or process in the case may, henceforward be issued to me at the above address until I file notice of change If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff. / Defendant. / Appellant. / Respondent.

Or

I file the above address according to the instructions given by my client, (name) ——— ——— (and capacity) ———

Signature of pleader.

N.B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

Order XVI.

Insert as rule 4 A —

Special provision for public servants summoned as witnesses in suits to which the Government is a party

4 A (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance

Order XX

1 — *Make the following amendments to O 20, r 1 —*

(1) Re number rule 1 as sub rule (1)

(2) Add the following as sub rule (2) —

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court

3 — *For O 20, r 3 substitute the following rule —*

The judgment shall bear the date on which it is pronounced and shall be signed

such revision as may be deemed necessary be signed by the judge

12.— *Add the following to O 20 r 12 —*

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry, and in every case the Court of first instance shall, on the application of the decree holder inquire and pass the final decree

Order XXI.

17 — *In O 21 r 17 add as r 17 (5) —*

5 Registers in accordance with Forms Nos 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein.

[NOTE.—*For the new Forms Nos 19, 20 and 21, see below Appendix H*]

25 (2)—(1) *Amend O 21, r 25 (2), as follows* —

Insert the words 'or cause him to be examined by any other Court' *after* the words "examine him"

(2) *Add the following proviso to r 25 (2)* —

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

39 *Delete* the present sub rules 4 and 5 of rule 39 of Order XXI and *substitute* the following —

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment debtor for his journey from the Court house to the civil prison and from the civil prison, on his release to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison

(5) Sums disbursed under this rule by the decree holder for the subsistence and cost of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit

40 *Add the following as a proviso to O 21, r 40 (5)* —

Provided that, in order to give the judgment debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied

Add the following as sub rule (6) to O 21, r 40 —

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub rule *(2)* unless and until the decree holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment debtor and the escort for the journey to and from the prison

Sub rule (5) of rule 39 shall apply to such payments

For O 21, r 43, substitute the following rules viz —

43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof,

provided that when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live stock agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff / Defendant. / Appellant. / Respondent

Or

I file the above address according to the instructions given by my client, (name) —————————— (and capacity)——————.

Signature of pleader.

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

APPENDIX H

No. 18.

NOTICE OF CHANGE OF ADDRESS FOR SERVICE.

Under Order VII, rules 19 to 26, Order VIII, rules 11 and 12, Order XLI, rule 38, Order XLVI, rule 8, Order XLVII, rule 10, Order LII, rule 1

IN THE COURT OF THE OF

ORIGINAL Suit / or Case No OF 192

.. Plaintiff.

versus

.. Defendant.

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other provinces —

Name, parentage, and caste.	Residence.	Pargana or tahsil.	Post office.	District

Dated

Any summons, notice or process in the case may, henceforward be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party { Plaintiff
Defendant.
Appellant.
Respondent.

Or

I file the above address according to the instructions given by my client, (name) ——— ——— (and capacity) ———————

Signature of pleader

N.B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

APPENDIX VI.

Rules made by the High Court of Madras under s. 122.

Order III.

4 *Insert the following words at the commencement of sub rule (3), of rule 4 of Order III in the First Schedule*

No Government or other Pleader appearing on behalf of the Secretary of State for India in Council and

Add the following as sub rule (4) to O 3, r 4 —

(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit.

Order IV.

2 *In O 4, r 2, number the present rule 2 (1), and add as rule 2 (2)—*

Registers in accordance with Forms Nos 14, 15, 16, 17 and 18 in Appendix here prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein

[NOTE.—*For the New Forms Nos* 14, 15, 16, 17 *and* 18, *see below Appendix* H.]

Order V.

Substitute the following for rr 25 and 26 in O. 5 —

Service where defendant resides out of British India and has no Agent.

25. Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Provided that, if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

Service in foreign territory through Political Agent or Court or by special arrangement.

26. Where—

(*a*) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

Substituted by Act XVIII of 1914.

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant, and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner herein before directed, such endorsement shall be deemed to be evidence of service

Make the following amendments and additions to O 5 —

27. *In rule* 27 *after the words* "send it" *insert the words* "by registered post prepaid for acknowledgment"

28 *In rule* 28 *after the words* "shall send" *insert the words* "by registered post prepaid for acknowledgment."

29A *Insert as rule* 29 *A*—

Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons

Order IX.

13 —*Make the following amendments to O 9, r 13* —

(1) Re number rule 13 as rule 13 (1)

(2) Add the following as sub rule (2) to rule 13 —

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub rule (1)"

Order XIII.

7 —*Add the following proviso to rule* 7 (2) —

'Provided that no document shall be returned which by force of the decree has become wholly void or useless,

9 —*Add the following as sub rule* (3) —

Every application under the first proviso to sub rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application, including any costs "incidental to the preparation of the certified copy to be substituted for the original ' and may further direct that any party against whom any order for costs is made shall have such costs, if paid, ' included as costs in the cause

Order XVI.

Insert as rule 4 A —

4 A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

Special provision for public servants summoned as witnesses in suits to which the Government is a party

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance

Order XX

1 — *Make the following amendments to O 20, r 1* —

(1) Re number rule 1 as sub rule (1)

(2) Add the following as sub rule (2) —

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court

3.—*For O 20, r 3, substitute the following rule* —

The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the presiding judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary be signed by the judge

12.—*Add the following to O 20, r 12* —

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry, and in every case the Court of first instance shall, on the application of the decree holder, inquire and pass the final decree

Order XXI.

17 —*In O 21, r 17, add as r 17 (5)* —

5 Registers in accordance with Forms Nos 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein

[NOTE.—*For the new Forms Nos 19, 20 and 21, see below Appendix H*]

25 (2)—(1) *Amend O. 21, r. 25 (2), as follows* —

Insert the words "or cause him to be examined by any other Court" *after* the words "examine him"

(2) *Add the following proviso to r. 25 (2)* —

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

39. *Delete* the present sub rules 4 and 5 of rule 39 of Order XXI and *substitute* the following —

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment debtor for his journey from the Court house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison

(5) Sums disbursed under this rule by the decree holder for the subsistence and cost of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit.

40 *Add the following as a proviso to O 21, r. 40 (5)* —

Provided that, in order to give the judgment debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied

Add the following as sub rule (6) *to O 21, r 40* —

(6) No judgment debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub rule (2) unless and until the decree holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment debtor and the escort for the journey to and from the prison.

Sub rule (5) of rule 39 shall apply to such payments

For O 21, r 43, substitute the following rules, viz —

43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof,

provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the

judgment-debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the form No 15 A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment

Insert the following rules —

43-A (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court house and delivered to the proper officer of the Court

43-B (1) Whenever attached property kept in the village or place where it is attached is live stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the persons declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

[NOTE.—*An additional form, being form No 15 A, has been inserted in Appendix E*]

53. *Add the following as sub rule 1 (c) to O 21, r 53* —

(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

5 *Add the following as a proviso to O 22, r. 5* —

Provided that an appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question

11-A.—*In O 22, after r 11, add the following as r 11 A* —

11 A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal

Order XXVI-A.

1 The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court

2. The report of the Commissioner shall be evidence in the suit and shall form part of the record

3. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

Order XXVII.

5 —*For O 27, r 5, substitute the following rule* —

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion

Order XXIX.

1 A —*Insert as Rule 1 A of Order 29* —

In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two nonths time between the day of summons and the date for appearance

Order XXXII.

3 —*For O 32, r 3, substitute the following rule* —

3 (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub rule (5)

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representative of a deceased plaintiff or defendant. The application shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No. 11 set forth in appendix H hereto

4.—*For O 32, r 4, substitute the following rule.*—

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit·

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in form No. 11-A set forth in appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part to the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

7 – *Add the following in O. 32, r. 7*:—

Rule—(1-A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability

and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise, as in the following Form which shall be numbered as Form No 24 in Appendix D to this Schedule

14A —*In O. 32 after r 14, add the following as rule 14 A* —

14 A The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in case under appeal to the King in Council, shall be deemed to be a quasi judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal

17 —*Add as rule 17 of Order 32* —

In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance

Order XLI.

1—(1) *Add the following sentence to sub r (1) of r 1* —

The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal

Add the following as a proviso to O 41, r 1 (1) —

Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court

(2) *Add the following sentence to sub r (2) of r 1* —

The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act

(3) When an appeal is presented after the period of limitation prescribed therefore it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice had been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act of 1908 have been heard

9.—*Substitute the following for r. 9 (2)* :—

Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein.

[NOTE.—*For the new forms Nos 22, 23, 24 and 25, see Appendix H below.*]

18.—*In O. 41, r. 18, after the words* "cost of serving the notice" *insert the words* "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

31.—*Substitute the following for r. 31* :—

31. The judgment of the Appellate Court shall be in writing and shall state—

(a) the points for determination,

(b) the decision thereon,

(c) the reasons for the decision, and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge.

Order XLI-A (*new*)

Appeals to the High Court from original decrees of Subordinate Courts.

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in rule 22 of order XLI the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross Objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub rule above, he shall not be allowed to translate or print any part of the record.

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4 (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5 The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address

6 All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a m and 5 p m at the address for service of the party to be served

7 Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service

8 If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately

9 A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

10 (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers

11 When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court, shall be Rs 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs 30 At the request of any party, the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections.

12 (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar

13 If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22 (3) of Order XLI, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rule 12 (1)

14 Rule 31 of Order XLI shall not apply to the High Court If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary

Order XLI-B *(new).*

1 The rules of Order XLI A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court

Provided that it shall not be necessary to file copies of the judgment and decree appealed from

2. Notice of the appeal shall be given in manner prescribed by Order XLI-A, Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order

Order XLII. *(new).*

Appeals from appellate decrees

1 The rules of Order XLI and Order XLI A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order

2. (1) The memorandum of appeal shall be printed or type written and shall be accompanied by the following papers —

A copy thereof, one certified copy and one plain printed or type written copy of the decrees of Court of first instance and of the Appellate Court, and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy

(2) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented

(3) If the appellant fails to comply with this rule, the appeal may be dismissed

Order XLIII.

2.—*Substitute the following for r. 2.*—

2. The rules of Order XLI and of Order XLI A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law.

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court.

3.—*Add the following as r. 3 of O. 43.*—

3. A memorandum of appeal of an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith.

Appendix B to Schedule I.

Form No. 1.—*Insert the following note in red ink in form No. 1, namely.*—

Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out.

Form No. 13-A.—*Insert the following as form No. 13 A after form No. 13 in Appendix B of Schedule I.*—

No. 13 A.

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party.

(ORDER XVI, r. 4 A.)

(CAUSE TITLE.)

This is to certify that (name) (designation) being a Government servant was summoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this court from the day of to the day of 19 (inclusive) and that a sum of Rupees has been paid into Court by the plaintiff/defendant towards his travelling and subsistence allowance for days according to article 1133 of the Civil Service Regulations and that the said amount has been/will be remitted to the Government treasury at to be credited to Government under the head 'XXIX—Miscellaneous Fees and Fines.'

Dated the day of 19

Presiding Judge or Chief Ministerial Officer.

( )

Appendix D to Schedule I.

Form No. 10-A.—*Insert in Appendix D the following as Form No. 10-A.*—

FORM No 10 A.

FINAL DECREE FOR SALE [ORDER 34, RULE 5 (2), OR ORDER 34, RULE 8 (4)].

(Title)

Upon reading the preliminary decree passed in the above suit and the application of the $\frac{\text{plaintiff}}{\text{defendant}}$ dated and upon hearing Mr.

for plaintiff and Mr.

for defendant and it appearing that the payment directed by the said decree has not been made.

It is hereby decreed as follows —

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to $\frac{\text{plaintiff}}{\text{defendant}}$ in the aforesaid preliminary decree together with subsequent interest and subsequent cost and that the balance, if any, be paid to the $\frac{\text{defendant}}{\text{plaintiff}}$ or other person entitled to receive it, (2) that if the net proceeds of the sale is insufficient to pay such amount and such subsequent interests and costs in full the $\frac{\text{plaintiff}}{\text{defendant}}$ be at liberty to apply for a personal decree for the amount of the balance, and (3) that the $\frac{\text{defendant}}{\text{plaintiff}}$ do also pay $\frac{\text{plaintiff}}{\text{defendant}}$ Rs. for the costs of this application.

(Here enter description of mortgaged property in English or in the language of the Court)

NOTE —(1) In the case of a decree under Order 34, rule 5 (2), score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist

Form No. 10-B.—*Insert in Appendix D the following as Form No 10 B* —

FORM No 10 B

FINAL DECREE FOR REDEMPTION [ORDER 34, RULE 3 (1), ORDER 34, RULE 5 (1) AND ORDER 34, RULE 8 (1)]

(Title)

Upon reading the preliminary decree in the above suit on and the application of the $\frac{\text{defendant}}{\text{plaintiff}}$ I A No , dated and after hearing Mr pleader for the and Mr. pleader for the and it appearing that the payment directed by the aforesaid decree has been made.—

It is hereby decreed as follows —

That the $\frac{\text{plaintiff}}{\text{defendant}}$ do deliver up to the $\frac{\text{defendant}}{\text{plaintiff}}$ or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the $\frac{\text{defendant}}{\text{plaintiff}}$ free from the mortgage and from all incumbrances created by the $\frac{\text{plaintiff}}{\text{defendant}}$ or any person claiming under him (or by those under whom he claims) and do also put the $\frac{\text{defendant}}{\text{plaintiff}}$ in possession of the property.

SCHEDULE

Description of the mortgaged property

The costs of the $\frac{\text{defendant}}{\text{plaintiff}}$ in this proceedings —

Particulars	Amount

NOTE —(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines, in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines.

(2) The words "or by those under whom he claims" will be inserted only if the mortgagee derives title from an original mortgagee

Form No. 24.—*Add the following as Form No 24 in Appendix D* —

FORM No 24

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC]

(*Title*)

This suit coming on this day for final disposal in the presence of, etc, and C D the defendant, a minor by E F, his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing dated the day of and made between A B, the plaintiff of the one part, and the said C D by the said guardian *ad litem* of the other part, (or, on terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto It is ordered as follows —

(*Set out the terms of the compromise*)

Appendix E to Schedule I.

Form No. 15.—*For the word* "Dated" *substitute the words* "given under my hand and the seal of the Court, this day of "

Form No. 15-A.—*Add the following as Form No 15 A in Appendix E* —

FORM No 15 A

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES

(Order XXI, rule 43)

In the Court of ______________ at ____________

Civil Suit No of

A B of ______________

against

C D. of ______________

Know all men by these presents that we, I J of ______________ etc, and K L of ______________ etc, and M N of ______________ etc, are jointly and

severally bound to the Judge of the Court of ______________ in Rupees ______________ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this ______ day of ______________ 19______

AND WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the ______________ day of ______________ 19______________, in execution of a decree in favour of ______________ in suit No ______________ of ______________ 19 ______________ on the file of ______________ and the said property has been left in the charge of the said I J

Now the condition of this obligation is that, if the above bounden I J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force.

I J.
K.L.
M N

Signed and delivered by the above bounden ______________ in the presence of ______________

Form No. 17.—*Add* the following as a 'Note' to Form No. 29—(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure, 1908 —

"*Note*—The title deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title deeds, or mortgages not disclosed in the encumbrance certificate."

Appendix F to Schedule I.

Form No. 9.—*For Form No. 9 of Appendix F, substitute*—

FORM No. 9.

APPOINTMENT OF A RECEIVER.

(O. XL, r 1)

(*Title.*)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of 191 in favour of

It is hereby order that AB be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000

And it is further ordered that the parties/defendant to the above suit and all persons claiming under them to deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver And it is further ordered that the receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipts or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said and shall be entitled to retain in his hands the sum of Rs for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit He shall once in every months file his accounts and vouchers in Court, the first account to be filed on the day of and to be passed on the day of He shall be entitled to commission at the rate of Rs per cent on the net amounts collected by him or to the sum of Rs per month (or as the case may be) as his remuneration (or he shall act without any remuneration)

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the State in addition to his own office establishment the following further establishment —

(Here enter specification of property)

Given under my hand and the seal of the Court, this day of 19

Appendix G to Schedule I.

Form No. 6.—*Insert the following note in red ink in Form No 6, namely* —

"Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance"

Form No. 6-A.—*In Appendix G, insert the following as Form No 6 A* —

FORM No 6 A (Order XLI A, rule 2)

NOTICE TO RESPONDENT

(*Cause title*)

Appeal from the of the Court of dated the day of

To

Respondents

Take notice that an appeal from the above decree (*order*) has been presented by the abovenamed appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you

If no appearance is entered on your behalf by yourself your pleader or some one by law authorized to act for you in this appeal it will be heard and decided in your absence

The address for service of the appellant is that of his pleader Mr A B of (*insert address*) *Madras*

(*If the appellant appears in person insert his address for service*)

Given under my hand and the seal of the Court this day of 19

Registrar

[Interlocutory application No of 19 has been made by appellant a execution has been stayed (*or other order made*) by order dated the day 19]

Form No. 6-B —*In Appendix G insert the following as Form No 6-B* —

FORM No 6 B (Order XLI A rule 3)

MEMORANDUM OF APPEARANCE

(*Cause title*)

Take notice that the Respondent intends t appear and defend the above appeal and that his address for service of all notices an process is (*insert address*)

The said respondent requires a l t f the papers which the appellant propo es t translate and print

Dated the day of 19

(Signed) C D

Pleader for Respondent

To the Registrar High Court of Judicature Madras

APPENDIX G

No 9

Omit from Form 9 in Appendix G to the First Schedule to the Code of Civil Pro ced ire the entire portion beginning with the words Memorandum of Appeal an ending with the words the following reasons namely

CODE OF CIVIL PROCEDURE 1908

APPENDIX G

No 12 A

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

O XLV, r 7 C C P

(In cases where the subject matter of the appeal is of sufficient value and the find ings of the courts are not concurrent)

Read petition presented under O XLV r 3 of the Code of Civil Procedure praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree/final order of this Court in suit No of 19

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject matter of the suit in the court of first instance is $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed from involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ and that the $\frac{\text{decree}}{\text{final order}}$ appealed from does not affirm the decision of the lower court

APPENDIX G

No 12 B

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

O XLV, r 7, C C P

(In cases where the subject matter is of sufficient value and the findings of the court are concurrent)

Read petition presented under O XLV, r 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this court in suit No of 192

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject matter of the suit in the court of first instance is $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed against involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs 10 000}}{\text{upwards of Rs 10 000}}$ and that the affirming $\frac{\text{decree}}{\text{final order}}$ appealed from involves the following substantial question (s) of law, viz —

(1)
(2)

APPENDIX G

No 12 C

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

O XLV, r 7 C C P

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O XLV, r 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this court in suit No of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit both in the court of first instance and in this court is $\frac{\text{below Rs 10 000 in value}}{\text{incapable of money valuation}}$ this court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz —

(1)
(2)

Appendix H to Schedule I.

Form No. 11.—*Substitute the following for Form No 11 of Appendix H* —

FORM No 11

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR

[Order XXXII, rule 3 (5)]

(*Title*)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor

Whereas an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as $\frac{\text{his}}{\text{her}}$ guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian *of the said minor for the purposes of the said*

Given under my hand and the seal of the Court this day of 19 .

Form No. 11-A.—*In Appendix H, insert the following Form as Form No 11 A* —

FORM No 11 A

NOTICE TO PROPOSED GUARDIAN OF A MINOR $\frac{\text{DEFENDANT}}{\text{RESPONDENT}}$

[Order XXXIII, r 4 (3)]

To

(Name, description and place of residence of proposed guardian)

Take notice that A $\frac{\text{plaintiff}}{\text{appellant}}$ in has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor $\frac{\text{defendant(s)}}{\text{respondent(s)}}$ and that the same will be heard on the day of 19

2. The affidavit of X has been filed in support in this application

3. If you are willing to act as guardian for the said $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ you are requested to sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in the manner indicated above, take further notice that the Court may proceed under Order XXXII, r. 4, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ aforesaid.

Dated the day of 19 .

(Signed)

(To be printed on the reverse)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ therein mentioned

Witnesses (Signed) Y Z.

1.

2.

Form No. 14.—*For Form No 14 of Appendix H, substitute* —

FORM No. 14.

REGISTER OF ORDINARY SUIT INSTITUTED.

Court—

Year—

Instructions

If the suit has been received by transfer, or instituted under Order XXXVII, Schedule I, C C P, a note should be made to that effect at the head of the page

2. If a suit is remanded under rule 23, Order XLI, or restored to file under rule 9 or rule 13 Order IX, Schedule I, C C P, note under item 2, the date of restoration to file

3 Under the head "*Particulars of claim*" enter particulars required by *clauses* (*g*) *and* (*h*) of rule 1, Order VII, Schedule I, C C P, and also the *value* of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos. VII and VIII and H C Circulars Nos 1054 of 1870 and 2253 of 1894. Entries under heads 3, 4 and 5 should be full, for embodiment in the decree, as required by rule 6, Order XX, Schedule I, C C P

4 Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12

5. The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register.

6 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C C P, and also of any withdrawal of the claim or a portion of the claim against any of the defendants.

7. Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1. *Ordinary Suit No* *of* 19

2 Date of { Presentation / Filing

3. PLAINTIFF—Name, description and place of abode

4. DEFENDANT—Name, description and place of abode.

5 PARTICULARS OF CLAIM—*Claim* for
Cause of action arose at

6 Date for *Defendant's first appearance*

Vakil for { Plaintiff. / Defendant

7 Date of JUDGMENT and result

8 Number of application (for review or re hearing) with result and date
Fresh Judgment, if any, with date.

9. First Appeal No *of* 19 Result with date
Second Appeal No *of* 19 Result with date

10 Note of any orders passed under rule 11, Order XX, rule 2, etc, Order XXI, Schedule I, C C P

11 *Execution* —

No	Date of application	Order and date	Against whom	For what and amount, if for money	Amount of costs		
					Rs	A	P

12 *Return of Execution*—

Amount paid into Court			Persons arrested	Minute of other return than payment or arrest and the date of every return *including entry of order in appeal with date*	
Rs	A	P			

Form No. 15.—*Add the following as Form No 15 in App II* —

FORM No 15

REGISTER OF SMALL CAUSE SUITS INSTITUTED

Court—

Year—

Instructions

If the suit has been received by transfer or remanded or restored to file, a note should be made to that effect at the head of the page

2 Under the head 5 *Particulars of claim* enter particulars required by *clause* (g) and (h) of Rule 1 Order VIII, Schedule I C C P, and also the *value* of the suit as required by clause (1) of that order Entries under heads 3, 4 and 5 should be full, for embodiment in decrees as required by Rule 6 Order XX, Schedule I, C C P

3 A note should be made of all parties brought on or struck off the record under Order I or XXII Schedule I C C P

4 Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1 *Small Cause Suit No* *of* 19

2 Date of { Presentation / Filing

3 Plaintiff—Name, description and place of abode

4 Defendant—Name, description and place of abode

5 Particulars of claim—*Claim for*

Cause of action arose at on

6 Date for *Defendant's first appearance*

Vakil for { Plaintiff / Defendant

7 Judgment, date and result

8 Number of application for review (or re hearing) with result and date
Fresh Judgment, if any, with date

9 Revision Case No of 19 with result and date.

10 Note proceedings, if any, taken under Rule 11, Order XX, Rule 2, etc, Order XXI, Schedule I, C C P.

11 *Execution* —

No	Date of application	Order and date	Against whom	For what, and amount if for money	Amount of costs		
					Rs	A	P

12 *Return of Execution*—

Amount paid into Court			Person arrested	Minute of other return than payment or arrest and date of every return
Rs	A	P		

Form No. 16.—*Add the following as Form No 16 in App II* —

FORM No 16

REGISTER OF SUITS DISPOSED OF

Court—
Year—

Instructions

1. Separate register must be kept for ordinary and small cause suits
2. If the presiding officer of the Court is invested with extended small cause powers, the remarks column should show whether the value of the suit is between Rs 50 and Rs 100 or between Rs 100 and Rs 200
3. The date to be entered in column 3 will always be the latest date In the case of suits restored to file, the date of original institution should be entered
4. When a suit is, after context, compromised or withdrawn, a note of the fact should be made in the column of remarks It should also be stated whether the decree is appealable, and if so, to what Court

Serial number	Number of the suit disposed of	Date of institution or of receipt of order of transfer	Date of disposal	Transferred to another Court	Disposed of: Without trial	Disposed of: Without contest: Compromised	Disposed of: Without contest: Decreed on confession	Disposed of: Without contest: Ex parte: Decreed	Disposed of: Without contest: Ex parte: Dismissed	Disposed of: With contest: Decreed on reference to arbitration: In whole or part for plaintiff	Disposed of: With contest: Decreed on reference to arbitration: For defendant	Disposed of: With contest: Decreed on oath: For plaintiff	Disposed of: With contest: Decreed on oath: For defendant	Disposed of: With contest: Decreed after trial: In whole or part for plaintiff	Disposed of: With contest: Decreed after trial: For defendant	Actual number of days intervening between institution and disposal: Uncontested (columns 7 to 10)	Actual number of days intervening between institution and disposal: Contested (columns 11 to 16)	Amount decreed	Remarks
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	25	30	Corresponding columns of Statement No IX Part I (a)

Form No 17 —*Add the following as Form No 17 in App II* —

FORM No 17

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED

(ON THE SIDE)

Court—

Year—

Instructions

1 In this *register* must be entered all cases ordered by H C Circular No 5[illegible]7 of 1888 to be shown as miscellaneous applications for purposes of Judicial *Statement* No IX Part 2 as well as cases of contempt of Court (*vide* H C Circular No [illegible]928 of 189[illegible])

2 In the matter of references under the Land Acquisition Act enter in column 3 the number and date of letter of *reference* in column 4 the designation of the officer making the reference in column 5 the name of the claimant and in column 6 whether the reference is under section 18 29 or 30 of the Act

3 In the matter of references under *section* 16 of Madras Regulation III of 1802 enter in column 3 the number and date of letter of reference *in* column 4 the designation of the officer making the reference and the name of the deceased in column 5 the name *of* the claimant if any in column 6 the words Section 16, Madras Regulation III of 1802 and in the last column the number and date of reference if any made to Government and its result

Number of miscellaneous cases	Date of presentation	Number of connected case if any	Name of petitioner if any and of his vakil	Name of defendant and of his vakil	Purport of case and section of law	Final order with date	Number of appeal with result and date
1	2	3	4	5	6	7	8

Form No. 18.—*Add the following as Form No 18 in App H* —

FORM No 18

Register of Miscellaneous Cases disposed of.

Court—

Year—

Instructions

1 This register will show all miscellaneous cases of every kind whether instituted on the application of parties or of the Court's own motion including cases of contempt of Court (H C Circulars Nos 557 of 1888 and 2928 of 1892)

2 The date to be entered in column 3 will always be the latest date In the case of petitions restored to file, the date of original institutions should be entered and the date of restoration noted in the column of remarks

Serial No	Number of the miscellaneous case disposed of	Date of institution or of receipt of the order of transfer	Date of disposal	Transferred or registered as suit	Disposed of												Actual number of days intervening between institution and disposal		Remarks
					Without trial	Without contest				With contest									
						Compromised	Ordered on confession	Ex parte		Order on reference to arbitration		On oath		After trial		Party committed for contempt of Court	Uncontested (columns 7 to 10)	Contested (columns 11 to 16)	
								Ordered	Dismissed	In whole or in part for petitioner	For respondent	In whole or in part for petitioner	For respondent	In whole or in part for petitioner	For respondent				
1	2	1	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	Remarks	23	25	Corresponding columns to Statement No IX Part 2 (a)

Form No. 19.—*Add the following as Form No 19 in App II :—*

FORM No 19 .

REGISTER OF EXECUTION PETITIONS RECEIVED.
(ON THE SIDE)

Court—

Year—

Instructions.

Applications for transmission of decree for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register but must be entered in the Register of Miscellaneous Cases Received (Form No. 17)

Number of Execution Petition	Date of presentation	Number of connected suit and of last previous application	Name of decree-holder and of his pleader	Name of judgment-debtor and of his pleader	Items of decree or order to be executed with date of any proceedings from which time runs for this application	Mode of assistance, and section of Code, or law prescribing it	Order with reasons for closing of proceedings under this application and date	Number of appeal with result and date
1	2	3	4	5	6	7	8	9

Form No. 20.—*Add the following as Form No. 20 in App. II .—*

FORM No. 20.

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR EXECUTION UNDER SECTION 38 AND 39, C. C. P.

Court—

Year—

Date of receipt	Serial number	Name of the decreeing Court	Number of suit on the file of that Court	Number of connected execution or miscellaneous applications, if any, presented in this Court	Lower Court to which sent for execution	Nature and date of communication to the decreeing Court (vide section 41, C.C.P.)	Amount of postage, if any, realised	Remarks
1	2	3	4	5	6	7	8	9
							Rs. a. p	

Form No. 21—*Add the following as Form No 21 in App II* —

FORM No 21

REGISTER OF EXECUTION PETITIONS DISPOSED OF

Court—

Year—

Instructions

1 The date to be entered in column 4 will always be the latest date In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks

2 Note in the remarks column the number of judgment debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No XI.

Serial Number	Number of the execution petition disposed of	Number of connected case	*Date of institution or of receipt of the order of transfer*	Date when proceedings were finally closed	Withdrawn rejected or not prosecuted	Transferred	Application on which proceedings were finally closed: Satisfaction obtained — In full	In part	Execution wholly infructuous	Amount: Involved in execution applications disposed of	Realized	How the decree was executed: Judgment debtor — Imprisoned	Arrested but released
1	2	3	4	5	6	7	8	9	10	11	12	13	14
					6	7	8	9	10	15	16	17	18
										Rs	Rs		

Moveable property: Sold	Attached but released (R 1 55 or 60 Order XXI)	Immoveable property: Sold	Attached but released (R 1 55 or 60 Order XXI)	Otherwise dealt with (R 1 72 or 83 Order XXI or Schedule I or Schedule III)	Possession given of: Movables (Rule 31 Order XXI)	Immoveables (Rules 35 and 36 order XXI)	Specific performance enforced	Partition effected (Section 54 C P)	Execution otherwise effected	Actual number of days intervening between institution and disposal	REMARKS (If the petition is only for part satisfaction of the decree note the fact)
15	16	17	18	19	20	21	22	23	24	25	
19	20	21	22	23	24	25	26	27	28	13	Corresponding columns to Statement No. XI Part I

Form No. 22—*Add the following as Form No 22 in App II* —

FORM No 22

REGISTER OF APPEALS RECEIVED

Court—

Year—

Instructions

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No 24) in which appeals from other orders should be entered—*vide* H. C Circular No 3400 dated 22nd December 1893 and section 2 (2) and Rule 5, Order XXXVI, Schedule I, C C P

2 Under item 5 Particulars of suit and decree appealed from enter also *nature and value of appeal, with special reference to the information required by annual* statement No X, Parts 3 and 4 and H C Circulars Nos 1054 of 1870 and 2253 of 1894 In cases of appeals against *orders* having the force of decrees substitute the word '*Order* for *Decree* and add after date the words '*passed under* *C C P on M P No* *of* 19

3 If the appeal has been received by transfer, a note should be made to that effect at the head of the page

4 If an appeal is remanded under Rule 23, Order XLI, Schedule I, C C P, note under head 2 the date of restoration to file

5 A note should be made of all parties brought on or struck off the record under Order I or XXII Schedule I C C P

1 *Appeal No* *of* 19

2 Date of { Presentation / Filing

3 APPELLANT—Name, description and place of abode

4. RESPONDENT—Name, description and place of abode

5 PARTICULARS OF SUIT AND DECREE APPEALED AGAINST *Decree of the Court of* *dated* 19 *in Original Suit No* *of* 19

Particulars of relief	Value of relief		
	Claimed	*Decreed*	*Appealed against*
	Rs A P	Rs A P	Rs A P

6. Hearing if any under Rule 11, Order XLI, Schedule I, C C P, and result with date.

7 *Date for respondent's first appearance*

Vakil for { Appellant / Respondent

8 JUDGMENT result and date

9 Objections under Rule 22, Order XLI, Schedule I C C P, *if any, filed by whom* and value

10 Number of Application for *review* (re-hearing) with result and date *Fresh Judgment, if any, with date*

11 Second Appeal No of 19 Result with date

Form No. 23.—*Add the following as Form No. 23 in App. II.*—

FORM No. 23.

REGISTER OF APPEALS DISPOSED OF.

Court— *Year*—

Instructions

1 There must be three separate registers of appeals disposed of, *viz*, (1) for money or moveables, (2) under the Madras Estates Land Act, 1908, and (3) for title and other appeals

2 The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institutions should be entered

Serial number	Number of the appeal disposed of	Date of institution or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Disposed of: Dismissed under Rule 11, Order XLI	Disposed of: Dismissed for default or otherwise not prosecuted	Disposed of: Without contest: Decree confirmed	Disposed of: Without contest: Decree modified	Disposed of: Without contest: Decree reversed	Disposed of: Without contest: Remanded	Disposed of: With contest: On oath, or by arbitration or compromise	Disposed of: With contest: After trial: Decree confirmed	Disposed of: With contest: After trial: Decree modified	Disposed of: With contest: After trial: Decree reversed	Disposed of: With contest: After trial: Remanded	Actual number of days intervening between institution and decree: Uncontested (columns 6 to 11)	Actual number of days intervening between institution and decree: Contested (columns 12 to 16)	Objection under rule 22, Order XLI	REMARKS (If appeals are decided on oath, or by arbitration or compromise, note whether the decree appealed against was confirmed, modified or reversed)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	*
				6	10	11	12	13	14	15	16	17	18	19	20	24	26	31	Corresponding columns of Statement No X, Part I (a)

Form No. 24.—*Add the following as Form No. 24 in App II* —

FORM No 24.

REGISTER OF MISCELLANEOUS APPEALS RECEIVED

Court—

Year—

Instructions

Appeals from orders which have the force of decrees *should not be shown* in this register Appeals from other appealable orders only should find place in this register

2 If necessary, give value of appeal under head

3 A note should be made of all parties brought on or struck off the record under Order for XXII, Schedule I, C C P

1 *Miscellaneous Appeal No* *of* 19

2 Date of {

3 APPELLANT—Name description and place of abode

4 RESPONDENT—Name, description and place of abode

5. PARTICULARS OF ORDER APPEALED AGAINST—*Order of the* *Court of* *dated* 19 passed *on M P No* *of* 19 , *in Original Suit No* of 19

Appeal under of

6 Hearing, if any, under Rule 11, Order XLI, Schedule I, C C P, and result with date

7 *Date for Respondent's first appearance*

Vakil for { Appellant
Respondent.

8. JUDGMENT—Result and date

9 Objections under Rule 22, Order XLI, Schedule I, C C.P, if any, filed by whom.

10 Number of applications for review (or re hearing) with result and date

Fresh Judgment, if any, with date.

Form No. 25.—*Add the following as Form No 25 in App II* —

FORM No 25

REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Court— *Year*—

Instructions

The date to be entered in column 2 will always be the latest date In the case of appeals restored to file, the date of original institution should be entered

Serial number	Number of the miscellaneous appeal disposed of	Date of institution or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Disposed of: Dismissed under Rule 11 Order XLI	Disposed of: Dismissed for default or otherwise not prosecuted	Disposed of: Without contest: Order confirmed	Disposed of: Without contest: Order modified	Disposed of: Without contest: Order reversed	Disposed of: Without contest: Remanded	Disposed of: With contest: On oath or by arbitration or compromise	Disposed of: With contest: After trial: Order confirmed	Disposed of: With contest: After trial: Order modified	Disposed of: With contest: After trial: Order reversed	Disposed of: With contest: After trial: Remanded	Actual number of days intervening between institution and disposal: Uncontested (columns 8 to 11)	Actual number of days intervening between institution and disposal: Contested (columns 12 to 16)	Objections under Rule 22, Order XLI	Remarks
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	2[illegible]	20	Corresponding columns to statement No A Part 2 (a)

APPENDIX VII.

Rules made by the Chief Court of the Punjab and the High Court of Lahore under s. 122.

Order II.

8.—*After rule 7 of Order II, insert* —

8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court Fees Act.

Order V.

10. *To rule 10, Order V, the following proviso shall be added* —

Provided that in any case of the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order.

Order VII.

2.—In the second paragraph of rule 2 of Order VII after the words "and the defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate" after the words "the amount" *insert* "or value".

Order IX.

9 (1).—*To rule 9 (1) the following proviso shall be added* —

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.

Order XVI.

2. *Add the following as an Exception to rule 2 (1)* —

Exception.—When applying for a summons for any of its own Officers, Government will be exempt from the operation of clause (1).

3. *For Rule 3, substitute* —

3. (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

Exception (1) —In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court consider it necessary, be paid to them

Exception (2) —A Government servant, whose salary does not exceed Rs 10 per mensem, may receive his expenses from the Court

4 After the word ' summoned, ' where it occurs in rule 4 (1) insert —
or, when such person is a Government servant, to be paid into Court

Order XVII.

1 (3) —*To rule 1 add the following as sub rule (3)* —

(3) Where sufficient cause is not shown for the grant of an adjournment under sub rule (1) the Court shall proceed with the suit forthwith

Order XXI.

29 A —*After rule 29 of Order XXI, the following rule shall be inserted* —

29A When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided

75 In r 75 after the word stored shall be added the words ' or can be sold to greater advantage in an unripe state, such as green wheat or gram

Order XXX.

1 —*To rule 1 of Order XXX the following explanation shall be added* —

Explanation — ' This rule applies to a joint Hindu family trading partnership '

Order XXXII.

1 —*To rule 1 the following paragraph shall be added* —

Such person may be ordered to pay any costs in the suit as if he were the plaintiff

3 —*Omit* the words to the minor and in the last paragraph of Rule 3 and *add* the following as a proviso

Provided that the Court may if it sees fit issue notice to the minor also

Order XLI.

35 —*Add the following as a proviso to rule 35 (4)* —

Provided also in the case of the High Court that in the absence of a Judge who passed a decree or one or more of the Judges who passed a decree either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court

Order XLII.

2 —*Add the following as rule 2* —

2 In addition to the copies specified in Order XLI, rule 1, the Memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance

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Appendix B.

FORM NO 11.

Order V, rule 18, Schedule 1, App. B, Form No. 11.—For the 3rd and 4th parts of (3) in the form read.—

(3) The said——————————————and his house in which he ordinarily resides being personally known to me / pointed out to me by

I went to said house in——————————————and there on the day of——————19 , at——————————o'clock in the fore/after——noon I did not find the said

I enquired from { (a)—————— / (b)—————— } neighbours.

I was told that——————————————had gone to ——————and would not be back till——————————

———————

Signature of Process Server.

APPENDIX VIII.

Rules made by the High Court of Patna under s. 122.

Order III.

4 *Notwithstanding anything contained in Order III, rule 4 (3) of the First* Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf, or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person.

Order XII.

Substitute the following for rule 6 in Order XII —

6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just

Order XIII.

Add the following as sub rule (A) in rule 9, Order XIII —

9 (1A). Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided

Order XVI.

2 (1)—*Add the following proviso to O 16, r 2 (1)* —

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity

(3) —*Add the following proviso to rule 3* —

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of fact, which have come to his knowledge, or of matters with which he has had to deal, in his public capacity, then

(i) if the officer's salary does not exceed Rs 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury

(ii) if the officer's salary exceed Rs 10 a month and the Court is situated not more than 5 miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred—

(iii) if the officer's salary exceed Rs. 10 a month and the Court is situated more than 5 miles from his headquarters no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government.

Order XLI.

Add the following as rule 14 (A) in Order XLI.—

14 (A) The appellate Court may, in its discretion, dispense with the service of notice herein before required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal.

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